APPENDIX

APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-11092
Non-Argument Calendar

D.C. Docket Nos.
0:16-cv-61718-JIC; 0:14-cr-60270-JIC-1

DENNIS DE JESUS,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(January 27, 2021)

Before MARTIN, NEWSOM, and BRANCH, Circuit Judges.

PER CURIAM:

Dennis De Jesus pleaded guilty in 2015 to engaging in illicit sexual conduct in a foreign place in violation of 18 U.S.C. § 2423(c), enticement of a minor to engage in illicit sexual activity in violation of 18 U.S.C. § 2422(b), and possession of child pornography in violation of 18 U.S.C. § 2252(a)(4)(B). In 2016, while serving his sentence in federal prison, De Jesus moved to challenge his convictions under 28 U.S.C. § 2255. The district court denied De Jesus's § 2255 motion. De Jesus then timely filed a Rule 59(e) motion to alter or amend the judgment denying his § 2255 motion. The district court rejected De Jesus's Rule 59(e) motion on two alternative grounds. First, it held that it lacked jurisdiction because the motion was effectively a second or successive § 2255 motion and therefore barred by 28 U.S.C. § 2244. Second, it held that if it had jurisdiction, it would deny the motion on the merits because the motion "raise[d] no new arguments or issues" but rather "rehashe[d] arguments that the [c]ourt previously rejected."

De Jesus now appeals the district court's dismissal or denial of his Rule 59(e) motion. De Jesus argues as to jurisdiction that the district court had jurisdiction because a Rule 59(e) motion isn't a second or successive motion under *Banister v. Davis*, 140 S. Ct. 1698 (2020). He argues as to the alternative merits holding that it cannot be the basis for affirmance because it was dictum and legal error.

We review the district court's jurisdiction de novo. *Zakrzewski v. McDonough*, 490 F.3d 1264, 1267 (11th Cir. 2007). In *Banister*, which was decided after the district court rejected De Jesus's Rule 59(e) motion, the Supreme Court held that Rule 59(e) motions are *not* second or successive petitions, but instead a part

of a prisoner's first habeas proceeding. 140 S. Ct. at 1708, 1711. Therefore, we agree with De Jesus that the district court had jurisdiction to consider his Rule 59(e) motion.

We next review the district court's alternative holding denying De Jesus's Rule 59(e) motion on the merits. As an initial matter, we note that we have previously held in a similar context that where a district court denies requested relief on two alternative grounds—one jurisdictional and one on the merits—we can consider the merits after concluding that the court has jurisdiction. *Rutherford v. McDonough*, 466 F.3d 970, 976 (11th Cir. 2006). We rejected the alternative proposition that "a district court which erroneously concludes that it lacks jurisdiction does lack jurisdiction." *Id.*

We review a Rule 59 denial for abuse of discretion. *Arthur v. King*, 500 F.3d 1335, 1343 (11th Cir. 2007). A district court abuses its discretion if it applies an incorrect legal standard, follows improper procedures, or makes findings of fact that are clearly erroneous. *Winthrop-Redin v. United States*, 767 F.3d 1210, 1215 (11th Cir. 2014). We "may affirm for any reason supported by the record, even if not relied upon by the district court." *United States v. Chitwood*, 676 F.3d 971, 975 (11th Cir. 2012) (quotation marks omitted).

A Rule 59(e) motion can be granted based only on "newly-discovered evidence or manifest errors of law or fact" and cannot be used to "raise argument[s] or present evidence that could have been raised prior to the entry of judgment." *Arthur*, 500 F.3d at 1343 (quotation marks omitted). The Rule gives a district court the chance "to rectify its own mistakes in the

period immediately following" its decision, to "reconsider[ ] matters properly encompassed in a decision on the merits," and "to clarify their reasoning or address arguments . . . passed over or misunderstood before." *Banister*, 140 S. Ct. at 1703, 1708 (quotation marks omitted).

Here, the district court did not abuse its discretion in denying De Jesus's Rule 59(e) motion because the motion didn't present evidence of manifest errors of law or fact or otherwise satisfy the Rule 59(e) standard. De Jesus moved to alter or amend the denial on the grounds that (1) his conduct was legal in Colombia, so he lacked a culpable mens rea, and (2) the district court erred in construing his underlying motion as one predicated on ineffective assistance of counsel where it was really a constitutional vagueness challenge to the statute under which he was convicted.

De Jesus's Rule 59(e) argument that he lacked a culpable mens rea didn't establish a manifest legal error. The Due Process Clause prohibits the exercise of extraterritorial jurisdiction over a defendant when it would be "arbitrary or fundamentally unfair" and requires "at least some minimal contact between a State and the regulated subject." *United States v. Baston*, 818 F.3d 651, 669 (11th Cir. 2016) (quotation marks omitted). We have upheld the legality of the extraterritorial application of statutes concerning child pornography without apparent regard to whether the conduct was legal where it took place. *See*, *e.g.*, *United States v. Frank*, 599 F.3d 1221, 1230–33 (11th Cir. 2010).

De Jesus's Rule 59(e) argument that the district court misconstrued his motion also didn't establish reversible error. Assuming that it should have been construed as a constitutional vagueness challenge, we have held that 18 U.S.C. § 2422(b), prohibiting enticement of a minor, isn't unconstitutionally overbroad or vague. *United States v. Panfil*, 338 F.3d 1299, 1301 (11th Cir. 2003). We have also held that 18 U.S.C. § 2252A(a)(5)(B), prohibiting possession of child pornography, isn't unconstitutionally overbroad or vague. *United States v. Woods*, 684 F.3d 1045, 1057–60 (11th Cir. 2012). We don't think De Jesus's request for reconsideration based on similar arguments established manifest error.

Accordingly, the district court did not abuse its discretion in denying De Jesus's Rule 59(e) motion.[1]

AFFIRMED.

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[1] De Jesus has separately requested that we vacate an earlier order, dated January 10, 2019, denying him a certificate of appealability. Because that single-judge order is not binding on a future merits panel, and the district court should not interpret it as a ruling on the merits of De Jesus's § 2255 motion, there is no need to vacate it.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Eleventh Circuit

No. 18-11092

District Court Docket Nos.
0:16-cv-61718-JIC; 0:14-cr-60270-JIC-1

DENNIS DE JESUS,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

JUDGMENT

It is hereby ordered, adjudged, and decreed that the opinion issued on this date in this appeal is entered as the judgment of this Court.

Entered: January 27, 2021
For the Court: DAVID J. SMITH, Clerk of Court
By: Jeff R. Patch

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-61718-CIV-COHN/WHITE
(14-60270-CR-COHN)

DENNIS DE JESUS,

Movant,

v.

UNITED STATES of AMERICA,

Respondent.
_____/

ORDER DENYING MOTION TO ALTER AND AMEND

THIS CAUSE is before the Court upon Movant Dennis De Jesus's Motion to Alter and Amend ("Motion") [DE 16] the Court's Order ("Habeas Order") [DE 14] Denying Movant's petition for habeas relief ("Petition") [DE 1]. The Court has reviewed the Motion, the Habeas Order, the Petition, and the record in this case, and is otherwise fully advised in the premises. For the reasons stated below, the Motion is denied.

BACKGROUND

On April 21, 2015, Movant De Jesus pled guilty to Counts 1 and 3 of the Superseding Indictment

(engaging in illicit sexual conduct in a foreign place), Counts 5 and 6 (enticement of a minor to engage in illicit sexual activity), and Count 7 (possession of child pornography). [Cr. DE 26; 37.][1] Those charges stemmed from a June 2013 trip to the nation of Colombia, during which Movant engaged in—and videotaped—sexual activity with underage prostitutes. [Cr. DE 38 ¶¶ 3–7.] At the time of his October 2014 arrest in Florida, Movant was planning an additional sex tourism excursion to Colombia. [*Id.* ¶¶ 9–11.] Law enforcement authorities recovered Movant's instant messaging chats with one of the (still underage) victims from his June 2013 trip. In those chats, Movant sought to arrange another sexual encounter with her and one of her friends. [*Id.*] In a June 30, 2015 sentencing hearing, this Court sentenced Movant to 180 months' imprisonment on Counts 1 and 3 and 120 months on Counts 5, 6, and 7, with all terms to run concurrently. [Cr. DE 46.]

On July 19, 2016, Movant filed his Petition. On January 5, 2018, the Court entered the Habeas Order, denying the Petition and closing this matter. [DE 14.] Movant has now filed his Motion seeking to "alter or amend" the Habeas Order pursuant to Federal Rule of Civil Procedure 59(e). [DE 16.] He also seeks permission to supplement the existing factual record. [*Id.* at 1.] He claims that this is necessary, because the Court's analysis in the Habeas Order demonstrates to him that the Court did not fully appreciate how commercial sex with "post-adolescent"

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[1] "Cr. DE" refers to docket entries in the underlying criminal proceeding, Case No. 14-60270-CR-COHN.

victims is, in his view, an accepted feature of Colombian society. [*Id.*]

DISCUSSION

Rule 59(e) provides that "[a] motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment." Initially, the Court concludes that it lacks subject-matter jurisdiction and will therefore deny the Motion. *See Cadet v. Bulger*, 377 F.3d 1173, 1179 (11th Cir. 2004) (federal courts must "inquire into subject-matter jurisdiction *sua sponte* whenever it may be lacking" (internal quotation marks omitted)). The Supreme Court has held that where, as here, a Rule 60(b) motion is used to attack the resolution of a habeas petition on the merits, that motion constitutes a second or successive petition as defined in the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2244. *See Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005). And given AEDPA's limitation on successive petitions, for a district court to even accept a Rule 60(b) motion "the court of appeals must [first] determine that it presents a claim not previously raised that is sufficient to meet § 2244(b)(2)'s new-rule or actual-innocence provisions." *Williams v. Chatman*, 510 F.3d 1290, 1294 (11th Cir. 2007). (citing *Gonzalez*, 545 U.S. at 530 (internal quotation marks omitted)).

While *Chatman* specifically addresses Rule 60(b) motions, several courts in this circuit have found that its holding also governs Rule 59(e) motions. *See, e.g.*, *Williams v. United States*, No. 15-CV-00233-KD-B, 2017 WL 3613042, at *2–3 (S.D. Ala. Aug. 22, 2017). *See also Aird v. United States*, 339 F. Supp. 2d 1305, 1310–11 (S.D. Ala. 2004) (concluding that "Rule 59(e)

petitions [are] jurisdictionally barred under AEDPA for the same reason that analogous filings under Rule 60(b) are precluded" and collecting cases). The Court agrees with this legal conclusion. Therefore, since the Eleventh Circuit has not determined that the Motion presents a new claim sufficient to meet AEDPA's new-rule or actual innocence requirement, the Court holds that it lacks subject-matter jurisdiction to consider the Motion.

Moreover, even if the Court did have jurisdiction, it would still deny the Motion. Petitioner raises no new arguments or issues. Instead, he simply rehashes arguments that the Court previously rejected in the Habeas Order. *Cf. Huggins v. Pastrana*, No. 09-CV-22635-LENARD/WHITE, 2010 WL 4384211, at *2 (S.D. Fla. Sept. 22, 2010) ("Rule 59(e) cannot be used to relitigate matters that already have been considered, or to proffer new arguments or evidence that the petitioner could have brought up earlier.").

CONCLUSION

In consideration of the foregoing, it is thereupon **ORDERED AND ADJUDGED** that the Motion [DE 16] is **DENIED**.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 2nd day of March, 2018.

s/James I. Cohn
JAMES I. COHN
United States District Judge

Copies provided to:
Counsel of record via CM/ECF
Pro Se parties at addresses on file

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-61718-CIV-COHN-WHITE
(14-60270-CR-COHN)

DENNIS DE JESUS,

Movant,

v.

UNITED STATES of AMERICA,

Respondent.
_____/

ORDER ADOPTING REPORT OF MAGISTRATE JUDGE

THIS CAUSE is before the Court upon the Report and Recommendations ("Report") [DE 10] submitted by United States Magistrate Judge Patrick A. White, regarding Movant Dennis De Jesus's *pro se* Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2255 ("Petition") [DE 1]. The Court has conducted a *de novo* review of the Petition, the Report, Movant's Objections to the Report ("Objections") [DE 13], and the record in this case, and is otherwise advised in the premises.

BACKGROUND

On April 21, 2015, Movant De Jesus pled guilty to Counts 1 and 3 of the Superseding Indictment (engaging in illicit sexual conduct in a foreign place), Counts 5 and 6 (enticement of a minor to engage in illicit sexual activity), and Count 7 (possession of child pornography). [Cr. DE 26; 37.][1] Those charges stemmed from a June 2013 trip to the nation of Colombia, during which Movant engaged in—and videotaped—sexual activity with underage prostitutes. [Cr. DE 38 ¶¶ 3–7.] At the time of his October 2014 arrest in Florida, Movant was planning an additional sex tourism excursion to Colombia. [*Id.* ¶¶ 9–11.] Law enforcement authorities recovered Movant's instant messaging chats with one of the (still underage) victims from his June 2013 trip. In those chats, Movant sought to arrange another sexual encounter with her and one of her friends. [*Id.*] In a June 30, 2015 sentencing hearing, this Court sentenced Movant to 180 months' imprisonment on Counts 1 and 3 and 120 months on Counts 5, 6, and 7, with all terms to run concurrently. [Cr. DE 46.]

Movant filed his Petition on July 19, 2016, citing three grounds for relief. [DE 1.] First, he asserts ineffective assistance for his counsel's failure to challenge the constitutionality of the statutes of conviction ("Claim 1").[2] [*Id.* at 5.] Second, he asserts

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[1] "Cr. DE" refers to docket entries in the underlying criminal proceeding, Case No. 14-60270-CR-COHN.

[2] Movant styles Claim 1 as a direct constitutional challenge to the statutes of conviction. [DE 1 at 5.] But, since Movant pled guilty to violating those statutes [Cr. DE 37], such a challenge is disallowed. *See United States v. Brown*, 752 F.3d 1344, 1347 (11th Cir. 2014) ("[A] guilty plea, since it admits all the elements

ineffective assistance for his counsel's failure to raise an affirmative defense pertaining to an alleged conflict between American and Colombian law ("Claim 2"). [*Id.* at 6.] Finally, he asserts ineffective assistance for his counsel's failure to inform him of the consequences of his guilty plea and appellate waiver ("Claim 3"). [*Id.* at 8.]

Judge White's Report recommends against habeas relief on any of Movant's three Claims. Regarding Claim 1, Judge White found that the relevant criminal statutes are plainly constitutional, and that defense counsel did not render ineffective assistance by failing to raise a meritless defense. [DE 10 at 20.] As for Claim 2, Judge White concluded that there is no valid affirmative defense of which defense counsel failed to advise Movant. [*Id.* at 20–22.] Finally, regarding Claim 3, Judge White reviewed the record from Movant's criminal proceeding and identified the portion of the plea colloquy in which Movant clearly represented that he understood the consequences of his guilty plea and appellate waiver. [*Id.* at 22–23.]

Movant has submitted Objections to the Report. [DE 13.] In those Objections, he argues that he could not have violated the relevant criminal statutes because (1) his victims were legal adults under Colombian law; and (2) he had not been aware while engaging in the offense conduct that U.S. law governed his activities in Colombia, meaning he

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of a formal criminal charge, waives all non-jurisdictional defects in the proceedings against a defendant."). The Court will, therefore, construe Claim 1 as arguing counsel's ineffectiveness in failing to proffer the constitutional defense in the criminal proceeding.

lacked the necessary *mens rea*, and also that his attorney failed to properly inform him of the consequences of his guilty plea and appellate waiver [*Id.* at 2–4.] For the reasons stated below, this Court will adopt the Report in full, overrule the Objections, and deny the Petition.

DISCUSSION

Claim 1 addresses the alleged constitutional infirmity of the statutes of conviction. [DE 1 at 5.] Those statutes are 18 U.S.C. § 2423(c) (engaging in illicit sexual conduct in a foreign place), 18 U.S.C. § 2422(b) (enticement of a minor to engage in sexual activity), and 18 U.S.C. § 2252(a)(4)(B) (possession of child pornography). [Cr. DE 37.] Movant does not specify which of these statutes he challenges, so the Court will address each in turn.

Several appellate courts have upheld Congress's power to criminalize sexual activity with minors in a foreign jurisdiction.[3] *See United States v. Clark*, 435 F.3d 1100, 1114–17 (9th Cir. 2006) (section 2423(c) valid under the Foreign Commerce Clause, U.S. Const. Art. I, § 8, cl. 3); *United States v. Bollinger*, 798 F.3d 201, 214–19 (4th Cir. 2015) (same); *United States v. Pendleton*, 658 F.3d 299, 308–11 (3d Cir. 2011) (same). And while the Eleventh Circuit has not directly spoken to the issue, it has, relying upon the Foreign

[3] Section 2423(c) criminalizes both commercial and non-commercial sex with minors. At least one appellate court has questioned Congress's authority to regulate non-commercial sexual activity, *see United States v. Al-Maliki*, 787 F.3d 784, 792–94 (6th Cir. 2015), but that issue is irrelevant here, where Movant's offense conduct involved paid encounters with prostitutes.

Commerce Clause, rejected a constitutional challenge to a statute proscribing extraterritorial sex-trafficking. *See United States v. Baston*, 818 F.3d 651, 667–69 (11th Cir. 2016).

Regarding the child pornography statute, multiple appellate courts have rejected sundry constitutional challenges. *See, e.g.*, *United States v. Paull*, 551 F.3d 516, 525–26 (6th Cir. 2009) (child pornography statute not unconstitutionally vague); *United States v. Robinson*, 137 F.3d 652, 655–56 (1st Cir. 1998) (child pornography statute a valid exercise of Congress's commerce power). And the Eleventh Circuit has routinely affirmed convictions for possession of child pornography. *See, e.g.*, *United States v. Holmes*, 814 F.3d 1246 (11th Cir. 2016); *United States v. Baker*, 680 F. App'x 861 (11th Cir. 2017); *United States v. Brooks*, 647 F. App'x 988 (11th Cir. 2016). Finally, the Eleventh Circuit has expressly upheld the enticement statute. *See United States v. Panfil*, 338 F.3d 1299, 1300–01 (11th Cir. 2003).

In order to prove ineffective assistance of counsel, Movant "must establish that no competent counsel would have taken the action that his counsel did take." *Gordon v. United States*, 518 F.3d 1291, 1301 (11th Cir. 2008). And "it matters not whether the challenged actions of counsel were the product of a deliberate strategy or mere oversight." *Id.* Under that standard, Claim 1 clearly fails, as it is hardly the case that no competent counsel would have refrained from offering meritless defenses.

In Claim 2, Movant maintains that his counsel was ineffective in failing to argue that the charges against him violated principles of international law, since the

offense conduct for which he was charged was legal in Colombia.[4] [DE 1 at 6.] But that argument is directly contrary to controlling precedent, which holds that the United States government may, under the "nationality principle," exercise extraterritorial criminal jurisdiction over American citizens. *See United States v. Frank*, 599 F.3d 1221, 1233 (11th Cir. 2010). In fact, the *Frank* defendant, like Movant, had been convicted of various child sex offenses, including violations of § 2423(c). *Id.* at 1226. Counsel was not ineffective in failing to proffer this additional meritless defense.

Finally, in Claim 3, Movant argues that his counsel failed to properly inform him that his guilty plea would preclude a later direct appellate challenge to his conviction. [DE 1 at 8.] But that assertion is belied by the record. At his change of plea hearing, the Court asked Movant in excruciating detail whether he had read, understood, discussed with his attorney, and voluntarily executed his plea agreement, with particular reference to the appellate waiver provision of that agreement. [Cr. DE 51 at 11–14.] Movant answered each question in the affirmative. [*Id.*]

Movant's objections do nothing to rehabilitate his Petition. First, he argues that because his victims were "emancipated minors" in Colombia, they fall "outside the scope of the relevant criminal statutes." [DE 13 at 4.] But those statutes proscribe sexual activities with individuals below eighteen years of age.

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[4] It is not clear to the Court that Movant's conduct was in fact legal in Colombia. Movant asserts that his victims were "emancipated minors," and hence legal adults under Colombian law. [DE 13 at 4.] But he submits no evidence demonstrating as much.

See 18 U.S.C. §§ 2423(f)(1), 2422(b), 2256(1). That someone younger than eighteen may be considered a legal adult in her home country is of no consequence. Next, Movant offers a classic mistake of law argument, claiming that he "did not realize he was breaking a United States law as a result of his conduct wholly within a foreign country . . . [and,] had [he] known this, then he would not have engaged in the illegal conduct." [DE 13 at 4.] But basic hornbook law dictates that "ignorance of the law or a mistake of law is no defense to criminal prosecution." *Cheek v. United States*, 498 U.S. 192, 199 (1991).

In short, Movant's Petition rests on the faulty premise that his attorney's failure to proffer a series of utterly meritless defenses somehow constitutes ineffective assistance. Movant is, accordingly, entitled to no relief.

In consideration of the foregoing, it is thereupon **ORDERED AND ADJUDGED** as follows:

1. The Report [DE 10] is **ADOPTED** in its entirety.
2. The Petition [DE 1] is **DENIED**.
3. Movant's Objections [DE 13] are **OVERRULED**.
4. A certificate of appealability is **DENIED**. The Court notes that pursuant to Fed. R. App. P. 22(b)(1), Movant may now seek a certificate of appealability from the United States Court of Appeals for the Eleventh Circuit.
5. The Clerk of Court is instructed to **CLOSE** this case and **DENY as moot** any pending motions.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 5th day of January, 2018.

s/James I. Cohn
JAMES I. COHN
United States District Judge

Copies provided to:
United States Magistrate Judge Patrick A. White
Counsel of record via CM/ECF
Pro Se parties at addresses on file

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-CV-61718-COHN
(14-CR-60270-COHN)
MAGISTRATE JUDGE P.A. WHITE

DENNIS DE JESUS,

Movant,

vs.

REPORT OF MAGISTRATE JUDGE

UNITED STATES OF AMERICA,

Respondent.
_____/

I. Introduction

This matter is before the Court on the movant's *pro se* motion to vacate, filed pursuant to 28 U.S.C. §2255, attacking the constitutionality of his conviction and sentence, entered following a guilty plea in **case no. 14-60270-CR-Cohn**.

This cause has been referred to the undersigned for consideration and report pursuant to 28 U.S.C. §636(b)(1)(B), (C); S.D.Fla. Local Rule 1(f) governing Magistrate Judges; S.D. Fla. Admin. Order 2003-19; and Rules 8 and 10 Governing Section 2255 Cases in the United States District Courts.

Before the Court for review are the movant's §2255 motion (Cv-DE#1), the government's response (Cv-DE#7) to this court's order to show cause, together with the Presentence Investigation Report ("PSI"), and Statement of Reasons ("SOR"), along with all pertinent portions of the underlying criminal file, including the plea agreement and factual proffer (Cv DE# 37, 28), as well as, the change of plea (Cv-DE#7-1) and sentencing (Cv-DE#7-2) transcripts.

II. Claims

Construing the §2255 motion liberally as afforded *pro se* litigants pursuant to *Haines v. Kerner*, 404 U.S. 519 (1972), the movant raises the following grounds for relief:

1. Ineffective assistance of counsel for failing to file a motion to dismiss the indictment on the grounds that the statutes on which the charges were based were unconstitutional.
2. Ineffective assistance of counsel for failing to advise Petitioner about an affirmative defense.
3. Ineffective assistance of counsel for failing to advise Petitioner of the consequences of the appellate waiver.

III. Factual Background and Procedural History

A. Facts of the Offense

The stipulated factual proffer reveals as follows.

The United States of America and Dennis De Jesus ("defendant"), hereby agree that, had this case proceeded to trial, the United States would have proven beyond a reasonable doubt the

following facts, which occurred in the Southern District of Florida and elsewhere:

1. U.S. Immigration and Customs Enforcement's (ICE/Homeland Security Investigations (HSI)) Attaché Office in Colombia and the Colombian Attorney General's Technical Investigative Corps Transnational Criminal Investigative Unit (CTI TCIU) conducted an undercover operation into a sex trafficking ring that was suspected of exploiting minors. The Colombian operation was carried out simultaneously in Cartagena, Medellin, and Armenia, all Colombian cities.

2. The investigation led them to U.S. citizen targets who regularly travel to Colombia to engage in sexual contact with Colombian minors. In September 2014, HSI Bogota received information that Dennis De Jesus intended to travel to Colombia in October 2014 to engage in sexual activity with minors. HSI Bogota learned that De Jesus had previously traveled to Medellin, Colombia to engage in illicit sexual conduct.

3. A confidential informant (CI), who worked with HSI Bogota, opened an undercover account on the social media network internet site Facebook.com. De Jesus became a Facebook friend of the CI. During the investigation, De Jesus chatted with the CI using Facebook's instant messaging service about traveling to Colombia to engage in illicit sexual activity with child prostitutes in Colombia. De Jesus also told the CI that he produced at least one video

depicting child pornography. Additionally, De Jesus told the Cl that he still possessed that video.

4. October 11, 2014, law enforcement officers executed a search warrant at De Jesus's home in North Lauderdale, FL. During the search, agents recovered a computer in De Jesus's bedroom and eighteen costumes and masks. HSI forensic analyst recovered videos of the defendant and the minor victims. In said videos, the victims are scantily clad in costumes and masks similar to those recovered in the defendant's home. At least one of the videos recovered shows victims C.G. and A.H. engaging in sexual acts. This video was located in a folder in the defendant's computer under: users/dennis/music/video dennis trips/ June 2013/new folder/.

5. The defendant's travel records show that he traveled from Fort Lauderdale, Florida to Medellin on 6/15/2013 and returned on 6/23/2013. During his trip in June 2013, the Defendant met with C.G. and A.H., and engaged in illicit sexual conduct with them. Additionally, a video recording was made of C.G. and A.H. engaging in sexual activity. Both girls were paid by Defendant.

6. C.G.'S birth certificate had been obtained and confirms that she was born in September, 1998. Thus, during De Jesus's trip in June 2013, C.G. was 14 years of age. A.H. was born in January, 1997. Thus, during De Jesus's trip to Colombia in June, 2013, A.H. was 16 years of age.

8. The Defendant is a U.S. citizen, born in Puerto Rico. From the defendant's cell phone, agents recovered his Whatsapp chats with C.G., M.V., and the CI. During the chats with C.G., the defendant stated that he intended on traveling to Colombia in October to attend a ranch party and to have a private party with C.G. and one of her friends. De Jesus makes references to the prior trip he took during which he and C.G. met. The defendant sent C.G. via Whatsapp, pictures of costumes and other presents he intended on taking her as partial payment for the sexual services she was going to provide.

10. De Jesus was advised of his *Miranda* warnings and signed a statement of rights form whereby he agreed to speak with agents without a lawyer present. During the post *Miranda* interview, De Jesus told the agents that he has traveled to Colombia since 2007 and he stores his travel pictures in his laptop computer. De Jesus also stated that he was planning to travel to Colombia on October 24, 2014. De Jesus admitted that he intended on taking the eighteen (18) costumes found in his home to Colombia.

11. HSI agents interviewed C.G. and A.H., who confirmed that they have engaged in illicit commercial sex acts with De Jesus during a prior trip to Colombia. Additionally, agents interviewed M.V., who confirmed that she communicated with De Jesus and agreed to attend a party attended by De Jesus for the purpose of engaging in sexual activity.

> 12. The images described above in paragraphs 4 were produced using materials that had been mailed, shipped, or transported across state lines or in foreign commerce and the defendant knew that the children in said images were under the age of 18.

(Cr DE# 38).

B. Indictment, Pre-trial Proceedings, Conviction, Sentencing, and Direct Appeal

On April 21, 2015, the petitioner pled guilty pursuant to a written negotiated plea agreement to Counts 1 and 3, engaging in illicit sexual conduct in a foreign place in violation of 18 U.S.C. §2423(c)); Counts 5 and 6, coercion and enticement of a minor to engage in illicit sexual activity in violation of 18 U.S.C. §2422(b)); and Count 7, possession of child pornography in violation of 18 U.S.C. §2252(a)(4)(B) of the superseding indictment. (Cr DE# 37, Plea Agreement). The government agreed to recommend that the court dismiss counts 2 and 4 of the superseding indictment. (*Id.*:3–4).

Movant further understood that the sentence would be imposed by the court after considering the advisory, federal sentencing guidelines. (*Id.*:2). Movant acknowledged that the court could depart from the advisory guideline range computed, and while required to consider that range, it was not bound to impose a sentence within the advisory range, but was permitted to tailor the sentence in light of other statutory concerns. (*Id.*).

He understood that as to counts 1 and 3, the court could impose a statutory maximum of thirty years. As to counts 5 and 6, the court was required to impose a

minimum term of ten years' imprisonment and could impose a statutory maximum term of life. As to count 7, the court could impose a statutory maximum term of ten years' imprisonment. (*Id.*:3). The parties agreed that they would jointly recommend a fifteen-year term of imprisonment. (*Id.*:4).

The movant acknowledged that any estimate of the probable sentence to be imposed, whether from his attorney, the government, or the probation office, was merely a predication, not a promise, and was not binding on the government, the probation office, or the court. (*Id.*:4–5). Movant also understood and acknowledged that he could not withdraw his plea based upon the court's failure to accept a sentencing recommendation made by the parties. (*Id.*:2). The government also agreed to recommend up to a 3-level reduction to movant's base offense level based on his timely acceptance of responsibility. (*Id.*:4).

The movant also acknowledged that upon release from prison, he would have to register as a sex offender. (*Id.*:5–6).

Petitioner waived his right to appeal unless his sentence exceeded the statutory maximum, his sentence was the result of an upward departure and/or upward variance from the advisory guideline range, and/or the government appealed. (*Id.*:6).

On April 21, 2015, a thorough change of plea proceeding, pursuant to Fed.R.Cr.P. 11, was conducted by the District Court. (Cv-DE#7-1, Change of Plea Hearing Transcript). After movant was given the oath, the movant provided background information, including his age and educational background. (*Id.*:3–4). He explained that he was not

treated for mental illness during the prior year and he had not consumed alcohol or drugs during the prior 24 hour period. (*Id.*:4). He had no mental or physical conditions which would prevent him from understanding the court. (*Id.*). Defense counsel stated that Petitioner was competent to enter a guilty plea. (*Id.*:4–5).

Next, movant confirmed he had reviewed the charges and the case in general with his attorney. (*Id.*:5). He further stated that he was satisfied with the representation and advice provided by his lawyer. (*Id.*). Movant confirmed that he understood each charge as well as the potential sentences. (*Id.*:5–7).

Regarding the sentence to be imposed, the movant understood that the court is required to consider, as one of the factors when imposing sentence, the advisory, federal sentencing guidelines. (*Id.*:10–11). Movant acknowledged that the PSI, containing the advisory guidelines, would not be prepared until after the Court had accepted the movant's plea. (*Id.*). Movant understood that his plea could result in deportation if he was not a United States citizen. (*Id.*:11).

Turning to the plea agreement, the movant stated that he reviewed the agreement with his lawyer before he signed and that he understood it fully. (*Id.*). He was not threatened or promised things not included in the agreement in order to convince him to sign. (*Id.*:11–12). The movant acknowledged that he was giving up his right to appeal the sentence in this case, that he had discussed this waiver with his attorney, and was satisfied with his decision to go forward with the waiver (*Id.*:12–14). The court found that the

movant voluntarily and knowingly waived his right to appeal. (*Id.*:14).

Regarding the rights he was waiving by entering into a guilty plea, movant acknowledged, in pertinent part, that he was giving up his right to a jury trial, his right to challenge the government's evidence and confront its witnesses at trial, to call defense witnesses to testify on his own behalf, present his own evidence, and testify on his own behalf at trial. (*Id.*:14–15).

The movant acknowledged that he read and discussed the factual proffer with his attorney prior to signing. (*Id.*:15–16). He answered in the affirmative when asked whether the factual basis in support of the guilty plea was true. (*Id.*).

When asked how he wished to plead, movant responded, "Guilty." (*Id.*:16). As a result of the foregoing, the court found the movant was fully competent and capable of entering into an informed plea, that his plea is knowing and voluntary, and supported by an independent basis in fact, containing each of the essential elements of the offense. (*Id.*). Next, the court accepted the plea and adjudicated the movant guilty. (*Id.*:16–17).

Prior to sentencing, a PSI applying the 2014 Guidelines Manual was prepared which revealed as follows: As to counts 1 and 5, engaging in illicit sexual conduct in a foreign place, the base offense level was set at 28 pursuant to U.S.S.G. §2G1.3(a)(3). (PSI ¶27). Because the offense involved the use of a computer or an interactive computer service to (A) persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct; or (B) entice, encourage, offer, or solicit a person to engage in

prohibited sexual conduct with the minor, the offense level was increased by two levels, §2G1.3(b)(3). (PSI ¶28). Because the offense involved the commission of a sex act or sexual contact, the offense level was increased by two levels, §2G1.3(b)(4)(A). (PSI ¶29).

As to count 3, engaging in illicit sexual conduct in a foreign place, the base offense level was set at 24 pursuant to §2G1.3(a)(4). (PSI ¶34). Because the offense involved the commission of a sex act or sexual contact, the offense level was increased by two levels, §2G1.3(b)(4)(A). (PSI ¶35).

As to count 6, coercion and enticement of a minor to engage in sexual activity, the base offense level was set at 28 pursuant to §2G1.3(a)(3). (PSI ¶40). Because the offense involved the use of a computer or an interactive computer service to (A) persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct; or (B) entice, encourage, offer, or solicit a person to engage in prohibited sexual conduct with the minor, the offense level was increased by two levels, §2G1.3(b)(3). (PSI ¶41).

As to count 7, possession of a visual depiction that involves the use of a minor engaging in sexually explicit conduct, the base offense level was set at 18 pursuant to §2G2.2(a)(1). (PSI ¶46). Because the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor, the offense level was increased by five levels, §2G2.2(b)(5). (PSI ¶47). Because the offense involved the use of a computer or an interactive computer service for the possession, transmission, receipt, or distribution of the material or for accessing with intent to view the

material, the offense level was increased by two levels, §2G2.2(b)(6). (PSI ¶48). Because the offense involved at least 150 images, but fewer than 300 images, the offense level was increased by 3 levels, §2G2.2(b)(7)(B). (PSI ¶49).

The combined adjusted offense level was set at 36. (PSI ¶56). Three levels were then deducted based on movant's timely acceptance of responsibility, resulting in a total adjusted base offense level 33. (PSI ¶¶58–60).

The probation officer next determined that movant had zero criminal history points, resulting in a criminal history category I. (PSI ¶63).

Statutorily, as to each of counts one and three, the term of imprisonment was 0 to 30 years, 18 U.S.C. §2423(c); as to each of counts five and six, the term of imprisonment was 10 years to life, § 2422(b); and as to count seven, the term of imprisonment was 0 to 10 years, 18 U.S.C. § 2252(b)(2). (PSI ¶100). Based upon a total offense level of 33 and a criminal history category of I, the guideline imprisonment range was 135 to 168 months. (PSI ¶101).

The court held a sentencing hearing on June 30, 2015. (Cr DE# 7-2, Sentencing Hearing Transcript). After considering the statements of all parties, the PSI, the advisory guidelines range as well as the factors set forth in 18 U.S.C. §3553(a), the court accepted the joint recommendation of the parties and imposed a fifteen-year sentence. The sentence consisted of 180 months' as to counts 1 and 3 and 120 months' as to counts 5, 6, and 7, to run concurrently. (*Id.*:12–13).

The initial judgment was filed on June 30, 2015. (Cr DE# 46). On **August 28, 2015**, the court filed an amended judgment, which included restitution in the amount of $1,000. (Cr DE# 49). No direct appeal was prosecuted.

Thus, the judgment became final on **Monday**, **September 14, 2015**, fourteen days after the entry of the judgment, when time expired for filing a notice of appeal.[1] Thus, the movant had one year from the time his conviction became final, or no later than **Wednesday**, **September 14, 2016**[2] within which to timely file this federal habeas petition. *See Griffith v. Kentucky*, 479 U.S. 314, 321, n.6 (1986); *see also*, *See Downs v. McNeil*, 520 F.3d 1311, 1318 (11th Cir. 2008) (*citing Ferreira v. Sec'y, Dep't of Corr's*, 494 F.3d 1286, 1289 n.1 (11th Cir. 2007) (this Court has suggested that the limitations period should be calculated

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[1] Where, as here, a defendant does not pursue a direct appeal, his conviction becomes final when the time for filing a direct appeal expires. *Adams v. United States*, 173 F.3d 1339, 1342 n.2 (11th Cir. 1999). On December 1, 2009, the time for filing a direct appeal was increased from 10 to 14 days days after the judgment or order being appealed is entered. Fed.R.App.P. 4(b)(1)(A)(i). The judgment is "entered" when it is entered on the docket by the Clerk of Court. Fed.R.App.P. 4(b)(6). Moreover, now every day, including intermediate Saturdays, Sundays, and legal holidays are included in the computation. *See* Fed.R.App.P. 26(a)(1).

[2] *See Downs v. McNeil*, 520 F.3d 1311, 1318 (11th Cir. 2008) (*citing Ferreira v. Sec'y, Dep't of Corr's*, 494 F.3d 1286, 1289 n.1 (11th Cir. 2007) (this Court has suggested that the limitations period should be calculated according to the "anniversary method," under which the limitations period expires on the anniversary of the date it began to run); *accord United States v. Hurst*, 322 F.3d 1256, 1260–61 (10th Cir. 2003); *United States v. Marcello*, 212 F.3d 1005, 1008–09 (7th Cir. 2000)); *see also*, 28 U.S.C. §2255.

according to the "anniversary method," under which the limitations period expires on the anniversary of the date it began to run); *accord United States v. Hurst*, 322 F.3d 1256, 1260–61 (10th Cir. 2003); *United States v. Marcello*, 212 F.3d 1005, 1008–09 (7th Cir. 2000)). Applying the anniversary method to this case means petitioner's limitations period expired on **Wednesday**, **September 14, 2016**.

Movant filed the instant petition under 28 U.S.C. §2255 on **July 13, 2016**, the date he signed the petition.[3] (DE#1:14).

IV. Threshold Issues: Timeliness

As narrated previously, the movant's judgment of conviction became final on **Monday**, **September 14, 2015**. Movant timely filed the instant §2255 motion on **July 13, 2016**.

V. Standard of Review

Because collateral review is not a substitute for direct appeal, the grounds for collateral attack on final judgments pursuant to §2255 are extremely limited. A prisoner is entitled to relief under §2255 if the court

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[3] Under the prison mailbox rule, a *pro se* prisoner's court filing is deemed filed on the date it is delivered to prison authorities for mailing. *Williams v. McNeil*, 557 F.3d 1287, 1290 n.2 (11th Cir. 2009); *see* Fed.R.App. 4(c)(1) ("If an inmate confined in an institution files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing."). Unless there is evidence to the contrary, like prison logs or other records, a prisoner's motion is deemed delivered to prison authorities on the day he signed it. *See Washington v. United States*, 243 F.3d 1299, 1301 (11th Cir. 2001); *Adams v. United States*, 173 F.3d 1339 (11th Cir. 1999) (prisoner's pleading is deemed filed when executed and delivered to prison authorities for mailing).

imposed a sentence that (1) violated the Constitution or laws of the United States, (2) exceeded its jurisdiction, (3) exceeded the maximum authorized by law, or (4) is otherwise subject to collateral attack. *See* 28 U.S.C. § 2255(a); *McKay v. United States*, 657 F.3d 1190, 1194 n.8 (11th Cir. 2011). "Relief under 28 U.S.C. §2255 'is reserved for transgressions of constitutional rights and for that narrow compass of other injury that could not have been raised in direct appeal and would, if condoned, result in a complete miscarriage of justice.'" *Lynn v. United States*, 365 F.3d 1225, 1232 (11th Cir. 2004) (citations omitted). It is also well-established that a §2255 motion may not be a substitute for a direct appeal. *Id.* at 1232 (*citing United States v. Frady*, 456 U.S. 152, 165, 102 S.Ct. 1584, 1593, 71 L.Ed.2d 816 (1982)). The "fundamental miscarriage of justice" exception recognized in *Murray v. Carrier*, 477 U.S. 478, 496 (1986), provides that it must be shown that the alleged constitutional violation "has probably resulted in the conviction of one who is actually innocent . . ."

The Eleventh Circuit promulgated a two-part inquiry that a district court must consider before determining whether a movant's claim is cognizable. First, a district court must find that "a defendant assert[ed] all available claims on direct appeal." *Frady*, 456 U.S. at 152; *McCoy v. United States*, 266 F.3d 1245, 1258 (11th Cir. 2001); *Mills v. United States*, 36 F.3d 1052, 1055 (11th Cir. 1994). Second, a district court must consider whether the type of relief the movant seeks is appropriate under Section 2255. This is because "[r]elief under 28 U.S.C. §2255 is reserved for transgressions of constitutional rights and for that narrow compass of other injury that could

not have been raised in direct appeal and would, if condoned, result in a complete miscarriage of justice." *Lynn*, 365 F.3d at 1232–33 (*quoting Richards v. United States*, 837 F.2d 965, 966 (11th Cir. 1988) (internal quotations omitted)).

If a court finds a claim under Section 2255 to be valid, the court "shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate." 28 U.S.C. §2255. To obtain this relief on collateral review, a petitioner must "clear a significantly higher hurdle than would exist on direct appeal." *Frady*, 456 U.S. at 166, 102 S.Ct. at 1584 (rejecting the plain error standard as not sufficiently deferential to a final judgment). Under Section 2255, unless "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief," the court shall "grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto." However, "if the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing." *Schriro v. Landrigan*, 550 U.S. 465, 474, 127 S.Ct. 1933, 167 L.Ed.2d 836 (2007). *See also Aron v. United States*, 291 F.3d 708, 715 (11th Cir. 2002) (explaining that no evidentiary hearing is needed when a petitioner's claims are "affirmatively contradicted by the record" or "patently frivolous"). As indicated by the discussion below, the motion and the files and records of the case conclusively show that movant is entitled to no relief, therefore, no evidentiary hearing is warranted.

A. Guilty Plea Principles

It is well settled that before a trial judge can accept a guilty plea, the defendant must be advised of the various constitutional rights that he is waiving by entering such a plea. *Boykin v. Alabama*, 395 U.S. 238, 243 (1969). Since a guilty plea is a waiver of substantial constitutional rights, it must be a voluntary, knowing, and intelligent act done with sufficient awareness of the relevant circumstances and likely consequences surrounding the plea. *Brady v. United States*, 397 U.S. 742, 748 (1970). *See also United States v. Ruiz*, 536 U.S. 622, 629 (2002); *Hill v. Lockhart*, 474 U.S. 52, 56 (1985); *Henderson v. Morgan*, 426 U.S. 637, 645 n.13 (1976). To be voluntary and knowing, (1) the guilty plea must be free from coercion; (2) the defendant must understand the nature of the charges; and (3) the defendant must know and understand the consequences of his guilty plea. *United States v. Moriarty*, 429 F.3d 1012, 1019 (11th Cir. 2005) (table); *United States v. Mosley*, 173 F.3d 1318, 1322 (11th Cir. 1999).

After a criminal defendant has pleaded guilty, he may not raise claims relating to the alleged deprivation of constitutional rights occurring prior to the entry of the guilty plea, but may only raise jurisdictional issues, *United States v. Patti*, 337 F.3d 1317, 1320 (11th Cir. 2003), *cert. den'd*, 540 U.S. 1149 (2004), attack the voluntary and knowing character of the guilty plea, *Tollett v. Henderson*, 411 U.S. 258, 267 (1973); *Wilson v. United States*, 962 F.2d 996, 997 (11th Cir. 1992), or challenge the constitutional effectiveness of the assistance he received from his attorney in deciding to plead guilty, *United States v. Fairchild*, 803 F.2d 1121, 1123 (11th Cir. 1986). To

determine that a guilty plea is knowing and voluntary, a district court must comply with Rule 11 and address its three core concerns: "ensuring that a defendant (1) enters his guilty plea free from coercion, (2) understands the nature of the charges, and (3) understands the consequences of his plea." *Id.*; *see also*, *United States v. Frye*, 402 F.3d 1123, 1127 (11th Cir. 2005) (*per curiam*); *United States v. Moriarty*, 429 F.3d 1012 (11th Cir. 2005).[4]

In other words, a voluntary and intelligent plea of guilty made by an accused person must therefore stand unless induced by misrepresentations made to the accused person by the court, prosecutor, or his own counsel. *Brady v. United States*, 397 U.S. 742, 748 (1970). If a guilty plea is induced through threats, misrepresentations, or improper promises, the defendant cannot be said to have been fully apprised of the consequences of the guilty plea and may then challenge the guilty plea under the Due Process Clause. *See Santobello v. New York*, 404 U.S. 257 (1971).

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[4] In *Moriarty*, the Eleventh Circuit specifically held as follows:

> [t]o ensure compliance with the third core concern, Rule 11(b)(1) provides a list of rights and other relevant matters about which the court is required to inform the defendant prior to accepting a guilty plea, including: the right to plead not guilty (or persist in such a plea) and to be represented by counsel; the possibility of forfeiture; the court's authority to order restitution and its obligation to apply the Guidelines; and the Government's right, in a prosecution for perjury, to use against the defendant any statement that he gives under oath.

Id.

B. Ineffective Assistance of Counsel Principles

Because the movant suggests in the motion that counsel rendered ineffective assistance, this Court's analysis begins with the familiar rule that the Sixth Amendment affords a criminal defendant the right to "the Assistance of Counsel for his defense." U.S. CONST. amend. VI. To prevail on a claim of ineffective assistance of counsel, a habeas petitioner must demonstrate both (1) that counsel's performance was deficient, and (2) a reasonable probability that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984); *Harrington v. Richter*, 562 U.S. 86, 104, 131 S.Ct. 770, 788 (2011). *See also Premo v. Moore*, 562 U.S. 115, 121–22, 131 S.Ct. 733, 739–740 (2011); *Padilla v. Kentucky*, 559 U.S. 356, 367, 130 S.Ct. 1473, 1482, 176 L.Ed.2d 284 (2010). If the movant cannot meet one of *Strickland*'s prongs, the court does not need to address the other prong. *Strickland*, 466 U.S. at 697, 104 S.Ct. 2069 (explaining a court need not address both prongs of *Strickland* if the defendant makes an insufficient showing on one of the prongs). *See also Butcher v. United States*, 368 F.3d 1290, 1293 (11th Cir. 2004); *Brown v. United States*, 720 F.3d 1316 (11th Cir. 2013).

To show counsel's performance was unreasonable, a defendant must establish that "no competent counsel would have taken the action that his counsel did take." *Gordon v. United States*, 518 F.3d 1291, 1301 (11th Cir. 2008) (citations omitted); *Chandler v. United States*, 218 F.3d 1305, 1315 (11th Cir. 2000). With regard to the prejudice requirement, the movant must establish that, but for counsel's deficient performance, the outcome of the proceeding would have been

different. *Strickland*, 466 U.S. at 694. For the court to focus merely on "outcome determination," however, is insufficient; "[t]o set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him." *Lockhart v. Fretwell*, 506 U.S. 364, 369–70, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993); *Allen v. Sec'y, Fla. Dep't of Corr's*, 611 F.3d 740, 754 (11th Cir. 2010). A defendant therefore must establish "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Lockhart*, 506 U.S. at 369 (*quoting Strickland*, 466 U.S. at 687).

In the context of a guilty plea, the first prong of Strickland requires petitioner to show that the plea was not voluntary because he/she received advice from counsel that was not within the range of competence demanded of attorneys in criminal cases, while the second prong requires petitioner to show a reasonable probability that, but for counsel's errors, he/she would have entered a different plea. *Hill*, 474 U.S. at 56–59. If the petitioner cannot meet one of *Strickland*'s prongs, the court does not need to address the other prong. *Dingle v. Sec'y for Dep't of Corr's*, 480 F.3d 1092, 1100 (11th Cir.), *cert. den'd*, 552 U.S. 990 (2007); *Holladay v. Haley*, 209 F.3d 1243, 1248 (11th Cir.), *reh'g and reh'g en banc den'd by*, *Holladay v. Haley*, 232 F.3d 217 (11th Cir.), *cert. den'd*, 531 U.S. 1017 (2000).

However, a defendant's sworn answers during a plea colloquy must mean something. Consequently, a defendant's sworn representations, as well as representation of defense counsel and the prosecutor, and any findings by the judge in accepting the plea,

"constitute a formidable barrier in any subsequent collateral proceedings." *Blackledge v. Allison*, 431 U.S. 63, 73–74 (1977); *United States v. Medlock*, 12 F.3d 185, 187 (11th Cir.), *cert. den'd*, 513 U.S. 864 (1994); *United States v. Niles*, 565 Fed.Appx. 828 (11th Cir. May 12, 2014) (unpublished).

A criminal defendant is bound by his/her sworn assertions and cannot rely on representations of counsel which are contrary to the advice given by the judge. *See Scheele v. State*, 953 So.2d 782, 785 (Fla. 4 DCA 2007) ("A plea conference is not a meaningless charade to be manipulated willy-nilly after the fact; it is a formal ceremony, under oath, memorializing a crossroads in the case. What is said and done at a plea conference carries consequences."); *Iacono v. State*, 930 So.2d 829 (Fla. 4 DCA 2006) (holding that defendant is bound by his sworn answers during the plea colloquy and may not later assert that he committed perjury during the colloquy because his attorney told him to lie); *United States v. Rogers*, 848 F.2d 166, 168 (11th Cir. 1988) (**"**[W]hen a defendant makes statements under oath at a plea colloquy, he bears a heavy burden to show his statements were false.**"**).

Moreover, in the case of alleged sentencing errors, the movant must demonstrate that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been less harsh due to a reduction in the defendant's offense level. *Glover v. United States*, 531 U.S. 198, 203–04, 121 S.Ct. 696, 148 L.Ed.2d 604 (2001). A significant increase in sentence is not required to establish prejudice, as "any amount of actual jail time has Sixth Amendment significance." *Id.* at 203.

Furthermore, a §2255 movant must provide factual support for his contentions regarding counsel's performance. *Smith v. White*, 815 F.2d 1401, 1406–07 (11th Cir.1987). Bare, conclusory allegations of ineffective assistance are insufficient to satisfy the *Strickland* test. *See Boyd v. Comm'r, Ala. Dep't of Corr's*, 697 F.3d 1320, 1333–34 (11th Cir. 2012); *Garcia v. United States*, 456 Fed.Appx. 804, 807 (11th Cir. 2012) (*citing Yeck v. Goodwin*, 985 F.2d 538, 542 (11th Cir. 1993)); *Wilson v. United States*, 962 F.2d 996, 998 (11th Cir. 1992); *Tejada v. Dugger*, 941 F.2d 1551, 1559 (11th Cir. 1991), *cert. den'd Tejada v. Singletary*, 502 U.S. 1105 (1992); *Stano v. Dugger*, 901 F.2d 898, 899 (11th Cir. 1990) (*citing Blackledge v. Allison*, 431 U.S. 63, 74, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977)); *United States v. Ross*, 147 Fed.Appx. 936, 939 (11th Cir. 2005).

Finally, the Eleventh Circuit has recognized that given the principles and presumptions set forth above, "the cases in which habeas petitioners can properly prevail ... are few and far between." *Chandler*, 218 F.3d at 1313. This is because the test is not what the best lawyers would have done or even what most good lawyers would have done, but rather whether some reasonable lawyer could have acted in the circumstances as defense counsel acted. *Dingle*, 480 F.3d at 1099; *Williamson v. Moore*, 221 F.3d 1177, 1180 (11th Cir. 2000). "Even if counsel's decision appears to have been unwise in retrospect, the decision will be held to have been ineffective assistance only if it was 'so patently unreasonable that no competent attorney would have chosen it.'" *Dingle*, 480 F.3d at 1099 (*quoting Adams v. Wainwright*, 709 F.2d 1443, 1445 (11th Cir. 1983)). The Sixth Circuit

has framed the question as not whether counsel was inadequate, but rather counsel's performance was so manifestly ineffective that "defeat was snatched from the hands of probable victory." *United States v. Morrow*, 977 F.2d 222, 229 (6th Cir. 1992).

VI. Discussion

Under **claim 1**, Petitioner alleges ineffective assistance of counsel for failing to file a motion to dismiss the indictment on the grounds that the statutes on which the charges were based were unconstitutional. (Cv DE# 1, p. 4).

Petitioner pled guilty to three different statutes, Title 18, United States Code §§2423(c), 2422(b), and 2252(a)(4)(B). Petitioner fails to assert which statute he believes is unconstitutionally vague. Regardless, his claim is devoid of merit. The Eleventh Circuit has established that enticement of a minor, 18 U.S.C. §2423(c), is not vague or constitutionally infirm. *See United States v. Ruggiero*, 791 F.3d 1281 (11h Cir. 2015). Similarly, in *United States v. Panfil*, 338 F.3d 1299 (11th Cir. 2003), in a published opinion, the Eleventh Circuit held that the statute criminalizing enticement of a minor, 18 U.S.C. §2422(b), was not vague or over broad. Lastly, the Eleventh Circuit also found that statues criminalizing receipt and possession of child pornography, including 18 U.S.C. §2252(a)(4)(B), were not unconstitutionally vague. *See United States v. Woods*, 730 F. Supp. 2d 1354 (11th Cir 2010). Counsel cannot be ineffective in failing to raise a meritless claim. *See Strickland*. Petitioner is not entitled to relief under claim 1.

Under **claim 2**, the Petitioner alleges ineffective assistance of counsel for failing to advise Petitioner about an affirmative defense. (Cv DE# 1, p. 5).

Petitioner appears to be claiming that the court's exercise of extra-territorial jurisdiction violates precepts of international law. However, regardless of the status of the foreign country's law or their customs and culture, Petitioner's assertions are foreclosed by binding precedent. In *United States v. Frank*, 486 F.Supp. 599 F.3d 1221, 1233 (11th Cir. 2010), the Eleventh Circuit explained that:

> Jurisdiction exists under the "nationality" principle, which allows a country "to exercise criminal jurisdiction over one of its nationals." *Plummer*, 221 F.3d at 1307 (*citing Rivard v. United States*, 375 F.2d 882, 885–86 (5th Cir.1967)). Because Frank is a United States citizen, the United States properly exercised jurisdiction over him. *See id.*; *United States v. Reeh*, 780 F.2d 1541, 1543 n. 2 (11th Cir.1986) (*citing United States v. Mitchell*, 553 F.2d 996, 1001 (5th Cir. 1977)) ("[A] state may punish the wrongful conduct of its citizens no matter where it takes place.").

Additionally, petitioner's claim that child sex trafficking and underage prostitution is legal in Colombia is entirely false. See Colombian Penal Code, Article 213A, added by law 1329 of 2009 (criminalizing commercial sex acts with minors under the age of eighteen).

In *Frank*, a United States citizen was indicted and convicted for traveling to Cambodia for the purpose of engaging in commercial sex with minors. Frank

argued, as the Petitioner does here, that §2423(c) violates international law because it fails to recognize that the age of consent in Cambodia is 15, and that the statute fails to recognize the law of Cambodia. In the order denying Frank's motion to dismiss, the District Court found that section 2423 does not regulate the conduct of Cambodian nationals. *See United States v. Frank*, 486 F. Supp. 2d 1353, 1359 (S.D. Fla. 2007). Furthermore, the Court noted that Cambodia had ratified the Optional Protocol to the United Nations Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography ("the Optional Protocol") in May of 2002. *Id.* at 1360. The Optional Protocol mandates that state parties shall enact laws to prohibit sex tourism, child prostitution, and other forms of child exploitation. *Id.* at 1356. The Preamble to the Optional Protocol states that countries involved are "[deeply concerned at the widespread and continuing practice of sex tourism, to which children are especially vulnerable, as it directly promotes the sale of children, child prostitution, and child pornography." *Id.* "One of the statutes that Congress enacted to implement the Optional Protocol was Section 2423(c), part of the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Act of 2003 (the "Protect Act")." *Id.* at 1357.

Like the defendant in *Frank*, the Petitioner is a United States citizen and governed by the laws of the United States. Contrary to his claims that commercial sex acts with minors was not a violation of Colombian law or custom, Colombia signed and ratified the Optional Protocol approximately a decade before the United States. Furthermore, binding precedent has clearly established that Congress specifically passed

the Protect Act to criminalize illicit sexual acts taking place entirely outside the United States. Congress realized the potential effects of domestic harm that come with foreign sex trafficking of minors. Congress purposefully passed this statute in order to stop United States citizens from traveling abroad in order to engage in commercial sex acts with minors. Petitioner's counsel was not ineffective in failing to raise a claim which lacked merit. *See Chandler v. United States*, 218 F.3d 1305, 1315 (11th Cir. 2000). He is not entitled to relief under claim 2.

Under **claim 3**, the Petitioner alleges ineffective assistance of counsel for failing to advise Petitioner of the consequences of the appellate waiver. (Cv DE# 1, p. 4).

This claim is refuted by the record. During the change of plea hearing, the court stated as follows:

> Do you understand that in exchange for certain promises made by the government, that you are agreeing to waive, that means to give up, your right to appeal any sentence imposed, including any restitution order, or to appeal the manner in which the sentence was imposed unless the sentence exceeds the maximum permitted by statute or is the result of an upward departure and/or an upward variance from the advisory guideline range that the Court established at sentencing?

(Cv DE# 7-1, Change of Plea Hearing Transcript:13). Movant responded, under oath, "I understand." (*Id.*). The Court further asked the petition if he had "fully discussed the appellate waiver with" defense counsel. (*Id.*). The petitioner again acknowledged that he had

and further confirmed that he did not have any questions regarding the legal effect of the appellate waiver provision. (*Id.*). After this colloquy, the Court found that the petitioner, "Dennis de Jesus knowingly, intelligently, and voluntarily waived his right to appeal the sentence in accord with the language contained in Paragraph 14 of the plea agreement." (*Id.*:14). The Court accepted the petitioner's guilty to plea finding that he was "fully competent and capable of entering an informed plea, that the defendant is aware of the nature of the charges and the consequences of his plea, and that his plea of guilty is a knowing and voluntary plea which is supported by an independent basis in fact containing each of the essential elements of the offenses charged in Counts 1, 3, 5, 6, and 7." (*Id.*:16–17). Petitioner cannot now claim that he did not understand the appellate waiver, in light of the foregoing excerpt of the change of plea hearing.

Petitioner is also not entitled to relief on any of the grounds raised as it is apparent from the review of the record above that movant's guilty plea was entered freely, voluntarily, and knowingly with the advice received from competent counsel and not involuntarily and/or unknowingly entered, as appears to now be suggested. *See Boykin v. Alabama*, 395 U.S. 238, 243 (1969); *Brady v. United States*, 397 U.S. 742, 748 (1970).[5] *See also Hill v. Lockhart*, *supra*; *Strickland v.*

[5] It is well settled that before a trial judge can accept a guilty plea, the defendant must be advised of the various constitutional rights that he is waiving by entering such a plea. *Boykin v. Alabama*, 395 U.S. 238, 243 (1969). Since a guilty plea is a waiver of substantial constitutional rights, it must be a voluntary, knowing, and intelligent act done with sufficient

Washington, *supra*. 466 U.S. 668 (1984). Moreover, even if the movant was misinformed by counsel prior to the change of plea proceeding as to the strength of the government's case, given the stipulated factual proffer, coupled with the apparent thorough Rule 11 proceeding conducted by the court, there is nothing of record to suggest that the plea was anything other than knowing and voluntarily entered. Consequently, the movant cannot demonstrate that he suffered either deficient performance or prejudice under *Strickland* arising from any purported misadvice by counsel regarding the facts of his case.

As set forth by the government at the change of plea hearing, there was sufficient evidence to prove beyond a reasonable doubt that movant was guilty of the offenses charged. The movant stated on the record and under oath that the facts put forth by the government were true and correct. (CV DE# 7-1, Change of Plea Hearing Transcript, p. 15–16). Thus, counsel's performance cannot be considered deficient for advising movant to plead guilty when the evidence clearly supported his conviction. *See Cox v. McNeil*, 638 F.3d 1356, 1362 (11th Cir. 2011) ("Because a petitioner's failure to show either deficient performance or prejudice is fatal to a *Strickland* claim, a court need not address both *Strickland* prongs if the

---

awareness of the relevant circumstances and likely consequences surrounding the plea. *Brady v. United States*, 397 U.S. 742, 748 (1970). A voluntary and intelligent plea of guilty made by an accused person who has been advised by competent counsel may not be collaterally attacked. *Mabry v. Johnson*, 467 U.S. 504, 508 (1984).

petitioner fails to satisfy either one of them") (internal quotation marks omitted).

Given the facts narrated above, the movant cannot demonstrate that he was lied to or otherwise misadvised by counsel regarding the facts relating to his offense of conviction. His representations herein to the contrary are disingenuous and border on the perjurious. A defendant's **sworn answers** during a plea colloquy must mean something. Consequently, a defendant's sworn representations, as well as representation of his/her lawyer and the prosecutor, and any findings by the judge in accepting the plea, "constitute a formidable barrier in any subsequent collateral proceedings." *Blackledge v. Allison*, 431 U.S. 63, 73–74 (1977); *United States v. Medlock*, 12 F.3d 185, 187 (11th Cir.), *cert. den'd*, 513 U.S. 864 (1994); *United States v. Niles*, 565 Fed.Appx. 828 (11th Cir. May 12, 2014) (unpublished).[6]

A criminal defendant is bound by his/her sworn assertions and cannot rely on representations of counsel which are contrary to the advice given by the judge. *See Scheele v. State*, 953 So.2d 782, 785 (Fla. 4 DCA 2007) ("A plea conference is not a meaningless charade to be manipulated willy-nilly after the fact; it is a formal ceremony, under oath, memorializing a crossroads in the case. What is said and done at a plea conference carries consequences."); *Iacono v. State*, 930 So.2d 829 (Fla. 4 DCA 2006) (holding that defendant is bound by his sworn answers during the

[6] "Unpublished opinion are not considered binding precedent, but they may be cited as persuasive authority." 11th Cir. R. 36-2. The Court notes this same rule applies to other Fed. Appx. cases cited herein.

plea colloquy and may not later assert that he committed perjury during the colloquy because his attorney told him to lie); *United States v. Rogers*, 848 F.2d 166, 168 (11th Cir. 1988) (**"**[W]hen a defendant makes statements under oath at a plea colloquy, he bears a heavy burden to show his statements were false.**"**). The movant is not entitled to relief under claims 1–3.

Finally, it is noted that this court has considered all of the movant's claims for relief.[7] *See Dupree v. Warden*, 715 F.3d 1295 (11th Cir. 2013) (*citing Clisby v. Jones*, 960 F.2d 925 (11th Cir. 1992)). For all of his claims, petitioner has failed to demonstrate that he is entitled to the relief requested. In other words, he has failed to satisfy *Strickland*'s deficient performance and/or prejudice prong. Thus, to the extent a precise argument, subsumed within any of the foregoing grounds for relief, was not specifically addressed herein, the claim was considered and found to be

---

[7] To the extent the movant has raised new facts and provided new evidence to the undersigned, for the first time, in his traverse, something which is precluded under federal case law, it has been reviewed, but not considered herein. If the movant again attempts to raise new arguments or grounds for relief or otherwise provides additional evidence "for the first time in an objection to a report and recommendation, the district court may [and should] exercise its discretion and decline to consider the argument" or new facts. *Daniel v. Chase Bank USA, N.A.*, 650 F.Supp.2d 1275, 1278 (N.D. Ga. 2009) (*citing Williams v. McNeil*, 557 F.3d 1287 (11th Cir. 2009); *see also*, *Starks v. United States*, 2010 WL 4192875 at *3 (S.D. Fla. 2010); *United States v. Cadieux*, 324 F.Supp.2d 168 (D.Me. 2004). **"**Parties must take before the magistrate, 'not only their best shot but all of the shots.'**"** *Borden v. Sec'y of Health & Human Servs.*, 836 F.2d 4, 6 (1st Cir. 1987) (*quoting Singh v. Superintending Sch. Comm.*, 593 F.Supp. 1315, 1318 (D.Me. 1984)).

devoid of merit, warranting no specific discussion herein.

VII. Evidentiary Hearing

Movant is also not entitled to an evidentiary hearing on the claims raised in this proceeding. Movant has the burden of establishing the need for an evidentiary hearing, and he would only be entitled to a hearing if his allegations, if proved, would establish his right to collateral relief. *See Schriro v. Landrigan*, 550 U.S. 465, 473–75, 127 S.Ct. 1933, 1939–40, 127 S.Ct. 1933 (2007) (holding that if record refutes the factual allegations in the petition or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing). *See also Townsend v. Sain*, 372 U.S. 293, 307 (1963); *Holmes v. United States*, 876 F.2d 1545, 1553 (11th Cir. 1989), *citing*, *Guerra v. United States*, 588 F.2d 519, 520–21 (5th Cir. 1979) (holding that §2255 does not require that the district court hold an evidentiary hearing every time a section 2255 petitioner simply asserts a claim of ineffective assistance of counsel, and stating: "A hearing is not required on patently frivolous claims or those which are based upon unsupported generalizations. Nor is a hearing required where the petitioner's allegations are affirmatively contradicted by the record.").

VIII. Certificate of Appealability

As amended effective December 1, 2009, §2255 Rule 11(a) provides that "[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant," and if a certificate is issued "the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. §2253(c)(2)." A timely notice of appeal must

still be filed, even if the court issues a certificate of appealability. Rules Governing §2255 Proceedings, Rule 11(b), 28 U.S.C. foll. §2255.

After review of the record, Movant is not entitled to a certificate of appealability. "A certificate of appealablilty may issue ... only if the applicant has made a substantial showing of the denial of a constitutional right." *Id.* 28 U.S.C. §2253(c)(2). To merit a certificate of appealability, Movant must show that reasonable jurists would find debatable both (1) the merits of the underlying claims and (2) the procedural issues he seeks to raise. *Slack v. McDaniel*, 529 U.S. 473, 478, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000). *See also Eagle v. Linahan*, 279 F.3d 926, 935 (11th Cir. 2001). Because the § 2255 motion is clearly time-barred, Movant cannot satisfy the *Slack* test. *Slack*, 529 U.S. at 484.

As now provided by Rules Governing §2255 Proceedings, Rule 11(a), 28 U.S.C. foll. §2255: "Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue." If there is an objection to this recommendation by either party, that party may bring this argument to the attention of the Chief Judge in the objections permitted to this report and recommendation.

IX. Recommendations

Based on the foregoing, it is recommended that the motion to vacate be DENIED; that no certificate of appealability issue; and, that this case be closed.

Objections to this report may be filed with the District Judge within fourteen days of receipt of a copy of the report.

SIGNED this 6th day of September, 2017.

s/P.A. White
UNITED STATES
MAGISTRATE JUDGE

cc: Dennis De Jesus, *Pro Se*
Reg. No. 06924-104
Coleman Low
Federal Correctional Institution
Inmate Mail/Parcels
Post Office Box 1031
Coleman, FL 33521

Francis Ines Viamontes
United States Attorney's Office
Criminal Div. / Major Crimes
500 E. Broward Boulevard
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Fort Lauderdale, FL 33394
954-660-5688
Fax: 954-356-7336
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APPENDIX F

Date Filed: 04/30/2021

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-11092-HH

DENNIS DE JESUS,

Petitioner - Appellant,

versus

UNITED STATES OF AMERICA,

Respondent - Appellee.

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: MARTIN, NEWSOM, and BRANCH, Circuit Judges.

PER CURIAM:

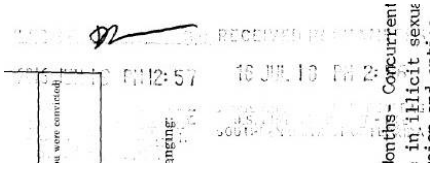
The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Panel Rehearing is also denied. (FRAP 40)

ORD-46

APPENDIX G

MOTION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT SENTENCE BY A PERSON IN FEDERAL CUSTODY

United States District Court	District Southern Dist. FLA Ft. Lauderdale Division
Name (under which you were convicted): Dennis DeJesus	Docket or Case No.:
Place of Confinement: Federal Correctional Complex Coleman Low	Prisoner No.: 06924-104
UNITED STATES OF AMERICA v.	Movant (include name under which you were convicted) Dennis De Jesus



MOTION

1. (a) Name and location of court that entered the judgment of conviction you are challenging:

United States District Court
Southern District of Florida
Fort Lauderdale Division

(b) Criminal docket or case number (if you know): 113C 0:14CR60270 COHN-1

2. (a) Date of the judgment of conviction (if you know):

(b) Date of sentencing: 6/30/2015

3. Length of sentence: Count 1 & 3 - 180 months, Count 5, 6, 7 - 120 Months - Concurrently

4. Nature of crime (all counts): Count 1 & 3: 18 U.S.C. 2423(c) - Engage in illicit sexual conduct in a foreign place; Count 5 - 18 U.S.C. 2422(b) - Coercion and enticement of a minor to engage in sexual activity; Count 6 - 18. U.S.C. 2422(b) - Coercion and enticement of a minor to engage in sexual activity; Count 7 - 18 U.S.C. 2252(a)(4)(B) - Possession of a visual depiction that involves the use of a minor engaging in sexually explicit conduct.

5. (a) What was your plea? (Check one)

(1) Not guilty ☐ (2) Guilty ☒
(3) Nolo contendere (no contest) ☐

(b) If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, what did you plead guilty to and what did you plead not guilty to?

6. If you went to trial, what kind of trial did you have? (Check one) Jury ☐ Judge only ☐

7. Did you testify at a pretrial hearing, trial, or post-trial hearing? Yes ☐ No ☒

8. Did you appeal from the judgment of conviction?
Yes ☐ No ☒

9. If you did appeal, answer the following:

(a) Name of court:

(b) Docket or case number (if you know):

(c) Result:

(d) Date of result (if you know):

(e) Citation to the case (if you know):

(f) Grounds raised:

(g) Did you file a petition for certiorari in the United States Supreme Court?

Yes ☐ No ☒

If "Yes," answer the following:

(1) Docket or case number (if you know):

(2) Result:

(3) Date of result (if you know):

(4) Citation to the case (if you know):

(5) Grounds raised:

10. Other than the direct appeals listed above, have you previously filed any other motions, petitions, or applications concerning this judgment of conviction in any court?

Yes ☐ No ☒

11. If your answer to Question 10 was "Yes," give the following information:

(a) (1) Name of court:

(2) Docket or case number (if you know):

(3) Date of filing (if you know):

(4) Nature of the proceeding:

(5) Grounds raised:

(6) Did you receive a hearing where evidence was given on your motion, petition, or application? Yes ☐ No ☐

(7) Result:

(8) Date of result (if you know):

(b) lf you filed any second motion, petition, or application, give the same information:

(1) Name of court:

(2) Docket or case number (if you know):

(3) Date of filing (if you know):

(4) Nature of the proceeding:

(5) Grounds raised:

(6) Did you receive a hearing where evidence was given on your motion, petition, or application? Yes ☐ No ☐

(7) Result:

(8) Date of result (if you know):

(c) Did you appeal to a federal appellate court having jurisdiction over the action taken on your motion, petition, or application?

(1) First petition: Yes ☐ No ☐

(2) Second petition: Yes ☐ No ☐

(d) If you did not appeal from the action on any motion, petition, or application, explain briefly why you did not:

12. For this motion, state every ground on which you claim that you are being held in violation of the

Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

GROUND ONE: The statutes of convictions are unconstitutionally vague since they encompass legal within the jurisdiction where they occurred.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): The offense conduct involved activities in a foreign country. Activities, which were not illegal within the foreign countries. A criminal statute that encompasses conduct that by the law and tradition of the venue's is not criminal is inherently vague. The statute does not provide fair warning and does not treat similarly-situated persons the same.

(b) **Direct Appeal of Ground One**:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☒

(2) If you did not raise this issue in your direct appeal, explain why:

Counsel told me that I had waived my right to appeal.

(c) **Post-Conviction Proceedings**: N/A

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☐

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

GROUND TWO: "Plea negotiation stage counsel was ineffective for failing to advise Mr. DeJesus about an "affirmative defense."

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): The sexual offense activities involve foriegn citizens emancipated in the foriegn country; but a minor person who is if they are in the United States. The conflict between the governing law establishes a defense fro the crime. That is a mistake of law defense, Mr. DeJesus anyone for that matter could be confused by "the" choice of law doctrine.

(b) **Direct Appeal of Ground Two**:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐

(2) If you did not raise this issue in your direct appeal, explain why:

(c) **Post-Conviction Proceedings**:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☐

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

GROUND THREE: Trial counsel failed to advise Mr. DeJesus of the consequences of failing to appeal.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): Mr. DeJesus, despite his plea agreement, was unhappy not only with the sentence but also with the conviction. He did not believe the law was fair since it

punished conduct that was acceptable in the country where it occurred; and because he did not know that activities legal in the country where they happened could be prosecuted as a crime in the United States. He wanted to fight the injustice Counsel failed to tell him that if he wanted to fight, he needed an appeal. Otherwise the procedural-default doctrine and the non-retro-activity principle would make it impossible for him to challenge his sentence and nearly impossible to challenge his conviction. If counsel had advised him on the consequences of failing to appeal he would have appealed. The court should follow circuit precedent and restore Mr. DeJesus's appeals right.

(b) **Direct Appeal of Ground Three**:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☒

(2) If you did not raise this issue in your direct appeal, explain why:

Not ripe for review at the time of direct appeal.

(c) **Post-Conviction Proceedings**:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☒

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

GROUND FOUR:

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

(b) **Direct Appeal of Ground Four**:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐

(2) If you did not raise this issue in your direct appeal, explain why:

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☐

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

13. Is there any ground in this motion that you have not previously presented in some federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them: None of the grounds were presented. I did not knwo about the issues counsel told me I had nothing to appeal.

14. Do you have any motion, petition, or appeal now pending (filed and not decided yet) in any court for the judgment you are challenging?

Yes ☐ No ☒

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised.

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At preliminary hearing:

(b) At arraignment and plea:

Chantel Doakes, AFPD
One East Broward, Suite 100
Fort Lauderdale, FL 33301-1842

(c) At trial:

(d) At sentencing:

Chantel Doakes, AFPD
ONe East Broward Boulevard,
Suite 100
Fort Lauderdale, FL 33301-1842

(e) On appeal:

(f) In any post-conviction proceeding:

(g) On appeal from any ruling against you in a post-conviction proceeding:

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?

Yes ☒ No ☐

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging?

Yes ☐ No ☒

(a) If so, give name and location of court that imposed the other sentence you will serve in the future:

(b) Give the date the other sentence was imposed:

(c) Give the length of the other sentence:

(d) Have you filed, or do you plan to file, any motion, petition, or application that challenges

the judgment or sentence to be served in the future?

Yes ☐ No ☐

18. TIMELINESS OF MOTION: If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2255 does not bar your motion.*

The motion is timely under 28 U.S.C. § 2255(f)(1) since the conviction did not become final untile July 1, 2015.

---

* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2255, paragraph 6, provides in part that:

> A one-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—
>
> (1) the date on which the judgment of conviction became final;
>
> (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making such a motion by such governmental action;
>
> (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Therefore, movant asks that the Court grant the following relief:

or any other relief to which movant may be entitled.

_____
Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Motion under 28 U.S.C. § 2255 was placed in the prison mailing system on (month, date, year).

Executed (signed) on 7/13/16 (date).

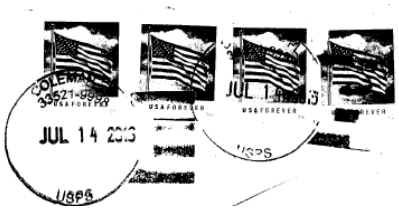
s/Dennis De Jesus
Signature of Movant

I declare (or certify, verify, or state) under penalty of perjury that I have been notified that I must include in this motion all the grounds for relief from the conviction or sentence that I challenge, and that I must state the facts that support each ground. I also understand that if I fail to set forth all the grounds in this motion, I may be barred from presenting additional grounds at a later date.

Executed (signed) on 7/13/16 (date)

Signature of Movant s/Dennis De Jesus

If the person signing is not movant, state relationship to movant and explain why movant is not signing this motion.



Dennis DeJesus
Fed. No. 06924-104, Unit B-3
Federal Correctional Complex
Coleman-Low
P.O. Box 1031
Coleman, Floria 33521

United States District Court
ATTN: Clerk of Court
299 East Broward Blvd, Room 205-F
Ft. Lauderdale, Florida 33301-1092

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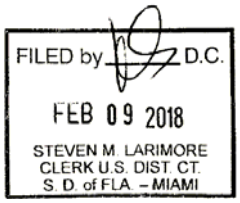
APPENDIX H

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Dennis De Jesus,

Movant,

v.



United States of America,

Case No.: 16-cv-61718-JIC
14-cv-60270-JIC

Respondent. /

DENNIS DE JESUS'S MOTION UNDER RULE 59(e) TO ALTER AND AMEND THIS COURT'S JANUARY 8, 2018 ORDER

On January 8, 2018, this court denied Mr. De Jesus's § 2255 motion. Mr. De Jesus requests this court alter its judgment to permit development of the record. This court's summary ruling and Mr. De Jesus's indigency prevented full explication of the Colombian practice of Prepago. This culturally accepted and law-enforcement supported practice of Prepago.

Prepago is a practice where post-adolescent girls (women) engage in escort services that include sexual relations. The morality of the practice aside, the conduct is legal within Colombian society; so much so that non-payment is reported to local police for debt collection or criminal prosecution.

This raises two significant consequences in the context of Mr. De Jesus's criminal and habeas actions. First, Mr. De Jesus's willfulness is in question, because his conduct, readily disclosed on Facebook, does not have the badges of deception normally associated with criminal behavior, rather his conduct is representative of someone who engages in a lawful habit (smoking, viewing adult pornography, gambling, eating french fries on an Atkins diet) that he is somewhat embarassed about. This distinction is important for determining culpable mens rea. Mr. De Jesus requires an opportunity to develop a more expansive record to permit both this court and the appeals court to conduct a meaningful review.

He requests 120 days to submit items within the ambit of judicial notice or the equivalent of Brandeis brief. Thereby, completing the record forth both his his voluntariness challenge, and his challenge to the constitutionality of the statute.

The second ground for altering the judgment is this court's decision to liberally construe Claim 1 as an ineffectiveness claim (Doc. 14 at 3). This court's analysis has two flaws. Initially, the facial unconstitutionality of a statute has subject-matter jurisdiction implications, thus is not subject to any procedural impediment. The claim may be raised for the first time in a § 2255 and review is de novo. See 28 U.S.C. § 2255(a). Therefore, regardless of counsel's effectiveness, the claim may be raised anew in a § 2255 motion.

Also, that courts other than the Supreme Court have spoken on the validity of the statute is relevant but not decisive as to whether the statute is

constitutionally valid. See, e.g., **United States v. Santos**, 553 U.S. 507 (2008), **United States v. Johnson**, 135 S.Ct. 2551 (2015). Consequently, it is irrelevant whether counsel's error was a "deliberate strategy or oversight." (Doc. 14 at 5).

Governing authority permits this court to reframe (liberally construe) a pro se pleading to prevent dismissal or to comport the substantive claim to a procedural framework that permits adjudication of the merits. **Castro v. United States**, 540 U.S. 375 (2002); **United States v. Tannebaum**, 148 F.3d 1262 (11th Cir. 1998); **United States v. Jordan**, 915 F.2d 622 (11th Cir. 1990). That authority does not authorize reframing a question to an inferior framework.

Succinctly, Mr. De Jesus argues that the statute criminalizes conduct that the authoritative sovereigns consider legal, therefore the statute is unconstitutionally vague since it does not put an ordinary citizen on notice of the prohibited conduct and allows for arbitrary law enforcement.

This court should alter its judgment to address directly the constitutionality of the statute without the glaze of an ineffectiveness assistance argument.

Respectfully submitted on this 3rd day of February, 2018 by:

s/Dennis De Jesus
Dennis De Jesus
Reg. No.: 06924-104
FCI Coleman Low
P.O. Box 1031
Coleman, Florida 33521-1031

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have mailed, via U.S. Mail, this motion to the following addresses:

United States District Court
Southern District of Florida
Office of the Clerk
400 N. Miami Ave.
Room 8N09
Miami, FL 33128-7716

United States
Attorney's Office
500 E. Broward Blvd.
Floor 7
Fort Lauderdale, FL
33394

on this 3rd day of February, 2018.

s/Dennis De Jesus
Dennis De Jesus

VERIFICATION

Under the penalty of perjury pursuant to 28 U.S.C. § 1746, I declare that the factual allegations contained in this motion are true and correct to the best of my knowledge.

s/Dennis De Jesus
Dennis De Jesus

Dennis De Jesus 06924-104
Federal Correctional Complex
FCI Coleman Low
P.O. Box 1031
Coleman, FL 33521-1031

USMS
INSPECTED

United States District Court
Southern District of Florida
Office of the Clerk
400 N. Miami Ave., Room 8N09
Miami, FL
33128-7716

33128-771699

APPENDIX I

18-11092-HH

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

DENNIS DE JESUS,
Petitioner-Appellant,
v.
UNITED STATES OF AMERICA,
Respondent-Appellee.

On Appeal from the United States District Court for the Southern District of Florida, Fort Lauderdale Division, in Case No. 0:16-cv-61718-JIC

PETITIONER-APPELLANT'S SUPPLEMENTAL BRIEF

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Counsel for Petitioner-Appellant

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, Petitioner-Appellant Dennis De Jesus provides this Certificate of Interested Persons and Corporate Disclosure Statement. To the best of Mr. De Jesus' knowledge, the following persons and entities may have an interest in the outcome of this case:

A.H. (victim)

Amodeo, Frank L.

Anton, Jodi

C.G. (victim)

Cohn, Hon. James I.

Cornell, Robert B.

Day, Timothy

De Jesus, Dennis

Doakes, Chantel

Fajardo Orshan, Ariana

Ferrer, Wifredo A.

Greenberg, Benjamin G.

Hoffman, Andrea G.

Hunt, Hon. Patrick A.

Jones Day

Lea, Brian C.

M.C. (victim)

M.V. (victim)

Mulvihill, Thomas

Powell, Victoria C.

Rivero, Laura Thomas

Rubio, Lisa Tobin

Sinel, Genna L.

Smachetti, Emily M.

Snow, Hon. Lurana S.

Valle, Hon. Alicia O.

Viamontes, Francis Ines

White, Anita

White, Hon. Patrick A.

To the best of Mr. De Jesus' knowledge, no other persons, associations of persons, firms, partnerships, or corporations have an interest in the outcome of this case or appeal.

STATEMENT REGARDING ORAL ARGUMENT

Petitioner-Appellant Dennis De Jesus, through his court-appointed counsel, respectfully requests oral argument. This appeal involves an important and oft-recurring jurisdictional question that arises in the context of post-conviction proceedings with a complicated procedural history. Resolution of this appeal turns on the Supreme Court's recent decision in *Banister v. Davis*, 140 S. Ct. 1698 (June 1, 2020). Oral argument would be useful in resolving any questions regarding the implications of the Supreme Court's recent decision for this case and others like it, as well as any questions about this case's complex procedural history.

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STATEMENT OF JURISDICTION

This is an appeal from an order rejecting a motion, under Rule 59(e) of the Federal Rules of Civil Procedure, requesting that the District Court alter or amend its previous order denying Mr. De Jesus' motion pursuant to 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence. CVDE 17.[1] The District Court had jurisdiction under 18 U.S.C. § 3231 and 28 U.S.C. § 2255, because the case involves challenges to convictions and sentences imposed based on purported federal offenses. *See* 18 U.S.C. § 3231; 28 U.S.C. § 2255. In the alternative, the District Court had jurisdiction under 28 U.S.C. § 1331 and 28 U.S.C. § 2255, because the case involves post-conviction proceedings challenging criminal convictions and sentences based on "the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. *See* Gov't Br. at vi (basing District Court's jurisdiction in Section 1331). The District Court entered its order denying Mr. De Jesus' Section 2255 motion on January 8, 2018. CVDE 14:6. Mr. De Jesus timely filed his uncounseled Rule 59(e) motion on February 3, 2018.[2] CVDE 16.

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[1] Following the convention adopted by the Government, Mr. De Jesus (1) refers to docket entries in the underlying criminal case, Southern District of Florida Criminal Case No. 14-60270-CR-Cohn, as "CRDE," and (2) refers to docket entries in these Section 2255 proceedings, Southern District of Florida Civil Case No. 16-61718-CIV-Cohn, as "CVDE." *See* Gov't Br. at vi (Mar. 3, 2011).

[2] Under the prisoner mailbox rule, Mr. De Jesus' uncounseled filings are deemed filed on the date that he delivered them to prison authorities for mailing. *See, e.g.*, *Williams v. McNeil*, 557 F.3d 1287, 1290 n.2 (11th Cir. 2009). And because the record contains no evidence to the contrary, this Court "will assume" that each of Mr. De Jesus' filings were delivered to prison

The District Court entered an order rejecting Mr. De Jesus' Rule 59(e) motion on March 2, 2018. CVDE 17.

Mr. De Jesus timely filed his uncounseled notice of appeal on March 8, 2018. CVDE 18:1. *See* Fed. R. App. P. 4(a)(1)(B), (a)(4)(A)(iv), (c). This Court has jurisdiction under 28 U.S.C. § 1291. *See* 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Whether, as confirmed by the Supreme Court's recent decision in *Banister*, the District Court erred in "deny[ing]" (CVDE 17:3) Mr. De Jesus' timely motion under Rule 59(e), over which the District Court had jurisdiction and which asserted arguments of the sort for which Rule 59(e) was promulgated.

STATEMENT OF THE CASE

1. Course of Proceedings and Disposition in the Court Below

a. Plea and Sentence

Mr. De Jesus is currently incarcerated as a result of the 15-year federal prison sentence imposed following his 2015 guilty plea. CRDE 49:3; *see* 11th Cir. R. 28-1(i)(1). Specifically, Mr. De Jesus pleaded guilty to: two counts of violating 18 U.S.C. § 2423(c) (Counts 1 and 3); two counts of violating 18 U.S.C. § 2422(b) (Counts 5 and 6); and one count of violating 18 U.S.C. § 2252(a)(4)(B) (Count 7). CRDE 49:1–2. *See* 18 U.S.C. §§ 2252(a)(4)(B), 2422(b), 2423(c). The District Court

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authorities for mailing on the day they were signed by Mr. De Jesus. *See Washington v. United States*, 243 F.3d 1299, 1301 (11th Cir. 2001) (per curiam). This brief therefore refers to the date on which Mr. De Jesus signed his uncounseled filings when discussing the date they were filed.

sentenced Mr. De Jesus to 180 months imprisonment as to Counts 1 and 3 and 120 months imprisonment as to Counts 5, 6, and 7, with all terms of imprisonment to run concurrently. *Id.* at 3.

The charges against Mr. De Jesus, and the resulting sentences, were based on Mr. De Jesus' trip to Colombia and his plan to return for a second trip. CRDE 38:1–2. Specifically, in the factual proffer supporting the plea agreement, Mr. De Jesus, an American citizen, acknowledged that he traveled to Colombia in 2013 and engaged in sexual activity with a 16-year-old and a 14-year-old (Counts 1 and 3). *Id.* at 2–3. He planned to return to Colombia in 2014 and, in preparation for that second trip, he communicated with a 16-year-old and another person whose age was not confirmed (Counts 5 and 6). *Id.* at 3–4. He also kept a video of sexual conduct during his first trip (Count 7). *Id.* at 1–2.

Mr. De Jesus pleaded guilty under a plea agreement with the Government. CRDE 37. That agreement contained a waiver of Mr. De Jesus' right to appeal "any sentence imposed … or … the manner in which the sentence was imposed," but it did not contain a waiver of his right to challenge his convictions. *Id.* at 6–7. Despite that fact, trial counsel instructed Mr. De Jesus that he could not appeal his convictions (CVDE 1:4); Mr. De Jesus followed that instruction and the District Court's judgment therefore became final in September 2015.[3]

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[3] The District Court entered its amended judgment in the underlying criminal case on August 28, 2015. CRDE 49. Under Federal Rule of Appellate Procedure 4(b), a defendant has 14 days after entry of the challenged judgment to file a direct appeal,

b. Section 2255 Motion

On July 13, 2016, Mr. De Jesus timely filed an uncounseled motion under Section 2255. CVDE 1. Read liberally, as this Court's precedents require, Mr. De Jesus' Section 2255 motion asserted four arguments challenging his convictions. *See Mederos v. United States*, 218 F.3d 1252, 1254 (11th Cir. 2000) ("Pro se filings, including those [Section 2255 motions] submitted by Mederos in the present case, are entitled to liberal construction."). *First*, Mr. De Jesus argued that his convictions were invalid because the underlying conduct occurred or was to occur in a foreign country where the conduct was legal, both by law and custom. CVDE 1:4. *Second*, Mr. De Jesus contended that the statutes were unconstitutional, because one does not have the constitutionally required fair notice that he is prohibited from activities in a foreign country that are legal in that foreign country. *Id.* *Third*, Mr. De Jesus claimed that his trial counsel provided ineffective assistance in failing to advise him that he could challenge the charges against him on those bases. *Id.* at 5. *Fourth*, Mr. De Jesus argued that his trial counsel provided ineffective assistance by advising him that he had waived his right to appeal and by failing to inform him of the consequences of not appealing. *Id.* at 4, 7.

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and a judgement is "entered for purposes of this Rule 4(b) when it is entered on the criminal docket." Fed. R. App. P. 4(b)(1)(A)(i), (b)(6). Because Mr. De Jesus did not pursue a direct appeal, his convictions became final on September 11, 2015—14 days after the entry of judgment. *See Mederos v. United States*, 218 F.3d 1252, 1253 (11th Cir. 2000).

The magistrate judge entered a report recommending that Mr. De Jesus' Section 2255 motion be denied. CVDE 10. In that report, the magistrate judge framed all of Mr. De Jesus' arguments as challenges to the effectiveness of trial counsel. *Id.* at 2. The magistrate judge concluded that trial counsel did not provide ineffective assistance in failing to argue that the statutes of conviction exceeded Congress' authority because Congress has the power to criminalize acts occurring in a foreign nation, although he did not address whether that remained true when the acts are legal in that foreign nation. *Id.* at 20–21. The magistrate judge also concluded that the statutes of conviction were not unconstitutionally vague, and that Mr. De Jesus' trial counsel therefore did not provide ineffective assistance in failing to argue otherwise. *Id.* at 19–20. And the magistrate judge determined that Mr. De Jesus knowingly pleaded guilty with an understanding of the appellate waiver in his plea agreement, and that his trial counsel therefore did not provide ineffective assistance in failing to advise him of the consequences of that waiver. *Id.* at 22–23. Finally, the magistrate judge recommended that Mr. De Jesus not receive an evidentiary hearing, and that he be denied a certificate of appealability. *Id.* at 26–28.

Mr. De Jesus objected *pro se* to the magistrate judge's report and recommendation. CVDE 13. In doing so, he reiterated his challenges to his convictions, emphasizing that his conduct was legal in Colombia, where it occurred or was to occur, because the individuals involved were emancipated and considered adults under Colombian law, and that his conduct therefore could not be punished as a violation

of American law. *Id.* at 3–5. Mr. De Jesus also objected that the magistrate judge erred in rejecting his claims of ineffective assistance in light of his uncontroverted explanation that trial counsel failed to properly advise him of the just mentioned arguments and also failed to advise him concerning his appellate rights and the effect of his guilty plea on those rights. *Id.* at 1–4. At a minimum, Mr. De Jesus argued, he should be allowed to present his claims at a hearing, or at least through additional briefing. *Id.* at 2–5.

Without allowing Mr. De Jesus those opportunities to present his case, the District Court entered an order denying Mr. De Jesus' Section 2255 motion on January 8, 2018. CVDE 14. In that order, the District Court held that Mr. De Jesus' guilty plea barred him from directly challenging "the statutes of conviction." *Id.* at 2. The District Court therefore analyzed Mr. De Jesus' arguments under the rubric of ineffective assistance of counsel. *Id.* The Court held that trial counsel was not ineffective for failing to challenge the statutes of conviction because, under *United States v. Frank*, 599 F.3d 1221 (11th Cir. 2010), Congress may criminalize the conduct of American citizens in foreign nations. CVDE 14:5. And the Court rejected Mr. De Jesus' vagueness challenge, recharacterizing it as a "classic mistake of law argument." *Id.* at 6. And, finally, the District Court misconstrued Mr. De Jesus' ineffective assistance claim, concluding that the record showed that trial counsel properly advised Mr. De Jesus that the plea agreement "would preclude a later direct appellate challenge to his conviction." *Id.* at 5. The District Court declined to issue a certificate of appealability. *Id.* at 6.

c. Rule 59(e) Motion

On February 3, 2018, Mr. De Jesus timely filed an uncounseled Rule 59(e) motion to alter or amend the order denying his Section 2255 motion. CVDE 16. *See* Fed. R. Civ. P. 59(e) ("A motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment."). In that filing, Mr. De Jesus sought to clarify his challenges to his convictions, arguing that "the conduct [underlying his convictions] is legal within Colombian society," and "law-enforcement supported." CVDE 16:1, 3. Accordingly, Mr. De Jesus argued, he had been improperly convicted for conduct that the relevant statutes do not and cannot constitutionally reach. *Id.* And, Mr. De Jesus emphasized, the statutes of conviction were "unconstitutionally vague" because they criminalized conduct that was legal where it occurred and therefore did "not put an ordinary citizen on notice of the prohibited conduct." *Id.* at 3. Mr. De Jesus also argued that the District Court improperly reviewed his challenges to his convictions through the deferential lens applicable to ineffective assistance of counsel clams, both because he directly challenged the statutes under which he was convicted and because his arguments spoke to an issue of jurisdiction. *Id.* at 2. Finally, Mr. De Jesus argued that, before denying his Section 2255 motion, the District Court should have allowed him an evidentiary hearing, or at minimum an opportunity for briefing, to adequately present his arguments, because his "indigency" and the District Court's "summary ruling" prevented him from gathering and presenting evidence before the District Court denied his Section 2255 motion. *Id.* at 1–2.

On March 2, 2018, the District Court dismissed Mr. De Jesus' Rule 59(e) motion for lack of jurisdiction.[4] CVDE 17:3. Specifically, the District Court reasoned that, because Mr. De Jesus' Rule 59(e) motion challenged the denial of his Section 2255 motion, the Rule 59(e) motion should be recharacterized as a successive Section 2255 motion. *Id.* at 2–3 (citing *Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005)). Having thus recharacterized Mr. De Jesus' Rule 59(e) motion, the District Court held that it lacked jurisdiction due to the bar on successive Section 2255 motions set out in 28 U.S.C. § 2244. The Court added that, even if it had jurisdiction, it would "still deny" the Rule 59(e) motion because it "raises no new arguments or issues," but instead "rehashes arguments that the Court previously rejected" in denying Mr. De Jesus' Section 2255 motion. CVDE 17:3. The District Court made no other comments as to Mr. De Jesus' claims. *See id.*

d. Appellate Proceedings

Still proceeding *pro se*, Mr. De Jesus filed a timely notice of appeal on March 8, 2018. CVDE 18. This Court construed Mr. De Jesus' notice of appeal as a motion for a certificate of appealability and denied the

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[4] The District Court incorrectly referred to its dismissal of the Rule 59(e) motion for lack of jurisdiction as a "denial" of the motion. *See* CVDE 17:1, 3–4. When a court lacks jurisdiction over a motion, the "appropriate disposition" of the motion is dismissal for lack of jurisdiction, not denial. *See, e.g.*, *United States v. White*, 765 F.3d 1240, 1250 (10th Cir. 2014) (vacating the district court's "denial" of the prisoner's motion "for lack of jurisdiction" and remanding with instructions to "dismiss"). Indeed, this Court describes the District Court's disposition of Mr. De Jesus' Rule 59(e) motion as a dismissal. Order at 2 (Jan. 10, 2019) ("The district court dismissed the Rule 59(e) motion.").

motion.[5] Order at 2, 4 (Jan. 10, 2019). The Court, however, held that Mr. De Jesus did not need a certificate of appealability to challenge "the district court's ruling that it lacked subject matter jurisdiction to consider his Rule 59(e) motion," and that that issue would "proceed to briefing." *Id.* at 4.

After the close of briefing in this appeal, the Supreme Court of the United States released a decision holding (in the context of a petition under 28 U.S.C. § 2254) that a Rule 59(e) motion may not be recharacterized as a second or successive habeas petition. *See Banister v. Davis*, 140 S. Ct. 1698 (2020). This Court appointed counsel for Mr. De Jesus, ordering that "[a]ppointed counsel shall file supplemental briefing addressing the effect of the Supreme Court's decision in *Banister* … on this case" and "may also address any other issues relevant to the disposition of this appeal." Order at 1 (June 2, 2020).

2. Statement of the Facts

Because of the procedural posture of this case, the relevant facts are set out in the Course of Proceedings section, above.

STANDARD OF REVIEW

This Court reviews *de novo* questions of a district court's jurisdiction. *Zakrzewski v. McDonough*, 490 F.3d 1264, 1267 (11th Cir. 2007) (per curiam). The same standard applies to this Court's review of legal

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[5] In an abundance of caution, Mr. De Jesus has filed with this brief a separate motion requesting vacatur of this Court's order denying a certificate of appealability. To be clear, Mr. De Jesus is not currently seeking a certificate of appealability, but rather only vacatur of the order denying one.

issues, including questions concerning the scope of a federal rule. *Mega Life & Health Ins. Co. v. Pieniozek*, 585 F.3d 1399, 1403 (11th Cir. 2009).

SUMMARY OF THE ARGUMENT

The District Court committed reversible error in purporting to deny Mr. De Jesus' Rule 59(e) motion, over which it had jurisdiction.

I. The Supreme Court's decision in *Banister* makes clear that the District Court erred in recharacterizing Mr. De Jesus' timely Rule 59(e) motion as a second or successive habeas petition. The District Court therefore had jurisdiction to consider Mr. De Jesus' Rule 59(e) motion and committed reversible error in concluding otherwise.

II. The District Court's cursory remarks on the merits of Mr. De Jesus' Rule 59(e) motion cannot support affirmance for at least three independent reasons. *First*, the District Court's comments do not suffice as an alternative holding. *Second*, the District Court's comments on the substance of Mr. De Jesus' Rule 59(e) motion reflect an error of law concerning the scope of Rule 59(e). *Third*, the District Court's comments reflect a misunderstanding of Mr. De Jesus' arguments, which fall within the scope of Rule 59(e) even under the District Court's unduly cramped understanding of that provision.

ARGUMENT

The District Court committed reversible error in ruling that it lacked jurisdiction over Mr. De Jesus' timely Rule 59(e) motion. And the District Court's cursory remarks rejecting Mr. De Jesus' arguments as outside the scope of Rule 59(e) provide no alternative basis for affirmance—and indeed, reveal a

misunderstanding of the scope of Rule 59(e). This Court therefore should vacate and remand for the District Court to consider and adjudicate Mr. De Jesus' Rule 59(e) arguments.

I. THE DISTRICT COURT ERRED IN CONCLUDING IT LACKED JURISDICTION TO CONSIDER MR. DE JESUS' TIMELY RULE 59(E) MOTION.

The District Court concluded it lacked jurisdiction over Mr. De Jesus' timely Rule 59(e) motion because the motion "attack[ed] the resolution of [his] habeas petition on the merits" and therefore "constitutes a second or successive petition as defined in the Antiterrorism and Effective Death Penalty Act…, 28 U.S.C. § 2244." CVDE 17:2–3. The Supreme Court, however, rejected this recharacterization of Rule 59(e) motions in *Banister*, holding that timely Rule 59(e) motions are not second or successive habeas petitions. Accordingly, Mr. De Jesus' timely Rule 59(e) motion is not a successive Section 2255 motion, and the District Court had jurisdiction to consider it.

A. *Banister* Establishes That a Timely Rule 59(e) Motion is Not a Second or Successive Section 2255 Motion.

In *Banister*, the Supreme Court held that a timely motion under Rule 59(e) is not, and may not be recharacterized as, a successive habeas petition subject to the gatekeeping requirements established by AEDPA[6] and codified in 28 U.S.C. § 2244.[7] *See*

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[6] Antiterrorism and Effective Death Penalty Act of 1996, P.L. 104-132, § 105, 110 Stat. 1214.

[7] Section 2244 establishes that a court must "dismiss[ ]" a "claim presented in a second or successive habeas corpus application under section 2254," unless "the appropriate court of

Banister, 140 S. Ct. at 1702. The proper treatment of Rule 59(e) motions arose in *Banister* after the United States Court of Appeals for the Fifth Circuit dismissed a state prisoner's appeal from the denial of his habeas petition as untimely, reasoning that the prisoner's timely Rule 59(e) motion did not toll the time to appeal because it "was not really a Rule 59(e) motion at all," but rather was an impermissibly successive habeas petition.[8] *Id.* at 1704. The Supreme Court reversed, explaining that "[a] Rule 59(e) motion is … part and parcel of the first habeas proceeding" and that the Fifth Circuit therefore erred in recharacterizing the state prisoner's Rule 59(e) motion as a successive habeas petition under 28 U.S.C. § 2254. *Banister*, 140 S. Ct. at 1702, 1711.

The Supreme Court grounded its holding that Rule 59(e) motions may not be recharacterized as successive habeas petitions on the history and purposes of the two provisions, Rule 59(e) and Section 2244(b). As the Court explained, Rule 59(e) "derived from a court's common law power to alter or amend its own judgments during the term of court in which they were rendered, prior to any appeal." *Id.* at 1706. And, the Court elaborated, Rule 59(e) allows for an orderly litigation process by "suspend[ing] the finality of the original judgment for purposes of … appeal" so that a district court can "fix any mistakes … before a possible appeal," thereby "consolidat[ing] appellate

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appeals" enters an "order authorizing the district court to consider the application." 28 U.S.C. § 2244(b).

[8] *See* Fed. R. App. P. 4(a)(4)(A)(iv) (the time to appeal runs "from the entry of the order disposing of" a motion "to alter or amend the judgment under Rule 59").

proceedings." *Id.* at 1703, 1708 (quotation marks and citation omitted).

As for Section 2244(b), the Court explained that Congress enacted that provision against a backdrop of settled law establishing that Rule 59(e) applied in habeas proceedings. *Id.* at 1706. Specifically, the Court observed that it had held in *Browder v. Director, Dep't of Corr.*, 434 U.S. 257 (1978), that Rule 59(e) "'was thoroughly consistent' with habeas law and 'well suited to the special problems and character of habeas proceedings.'" *Banister*, 140 S. Ct. at 1706 (quoting *Browder*, 434 U.S. at 271). The Court canvassed pre-AEDPA decisions, observing that, with one exception, courts invariably entertained Rule 59(e) motions filed after resolution of a habeas petition, despite the then-existing limits on successive petitions. *Id.* at 1707. When Congress enacted AEDPA, the Court noted, it did nothing to change that legal backdrop, which is entirely consistent with AEDPA's purposes of "reducing delay, conserving judicial resources, and promoting finality." *Id.* at 1707–08.

It is hard to improve on the Supreme Court's summary of its core holding in *Banister*: "The upshot, after AEDPA as before, is that Rule 59(e) motions are not second or successive petitions, but instead a part of a prisoner's first habeas proceeding." *Id.* at 1708.

B. *Banister* Makes Clear That the District Court had Jurisdiction to Resolve Mr. De Jesus' Timely Rule 59(e) Motion.

Banister makes resolution of this appeal easy. It is undisputed that Mr. De Jesus' Rule 59(e) motion was timely filed. *See* Gov't Br. at 4. The District Court held that it lacked jurisdiction to decide that Rule 59(e)

motion because it really was a successive Section 2255 motion barred by Section 2244. CVDE 17:2–3. *Banister* makes clear that the District Court's holding was error, because Mr. De Jesus' "Rule 59(e) motion[ ] [is] not [a] second or successive petition[,] but instead a part of [Mr. De Jesus'] first habeas proceeding." 140 S. Ct. at 1706. Because Mr. De Jesus' Rule 59(e) motion is not a second or successive petition, the District Court had jurisdiction to adjudicate the motion under *Banister*. *See id.* at 1709–11.

Contrary to the District Court's (pre-*Banister*) conclusion, it makes no difference that Mr. De Jesus' Rule 59(e) motion "attack[ed] the resolution of [his] habeas petition on the merits." CVDE 17:2–3. In concluding otherwise, the District Court relied on *Gonzalez*, 545 U.S. 524, in which the Supreme Court stated that a motion under Rule 60(b) of the Federal Rules of Civil Procedure should be recharacterized as a successive habeas petition if it attacks resolution of an earlier habeas petition on the merits. *Id.* at 531–32. The Supreme Court in *Banister* made clear that was error: The Court specifically held that *Gonzalez* does not apply to motions under Rule 59(e) because Rule 59(e) motions are an efficiency-promoting part of the underlying proceedings, whereas Rule 60(b) motions amount to separate proceedings collaterally attacking the result of the earlier proceedings at the cost of finality and efficiency. *See Banister*, 140 S. Ct. at 1709–10. The Supreme Court therefore has already rejected the District Court's basis for holding that it lacked jurisdiction over Mr. De Jesus' Rule 59(e) motion. To again quote the Supreme Court, "Rule 60(b) differs from Rule 59(e) in just about every way that matters to the inquiry here." *Id.* at 1709.

It is likewise irrelevant that the Rule 59(e) motion in this case was filed in a Section 2255 proceeding challenging Mr. De Jesus' federal convictions. True, *Banister* involved a prisoner's challenge to his state conviction under Section 2254. *Id.* at 1702. But all aspects of the Court's decision in *Banister* remain applicable in the Section 2255 context. Rule 59(e) applies in Section 2255 proceedings, *see Burgess v. United States*, 874 F.3d 1292, 1296 (11th Cir. 2007) (holding that the Federal Rules of Civil Procedure generally apply in proceedings under Section 2255), and the history and purposes of Rule 59(e) obviously do not change according to the statutory basis for post-conviction relief. *See Banister*, 140 S. Ct. at 1702–03, 1706. And Section 2244(b) (with its history and purposes) also applies in Section 2255 proceedings, because Section 2255(h)[9] makes Section 2244's bar on successive petitions applicable to "successive motion[s]" under Section 2255. *See In re Baptiste*, 828 F.3d 1337, 1339 (11th Cir. 2016) (per curiam). The interplay of the two provisions remains the same, because Congress enacted Section 2255(h) as part of AEDPA, working against the same historical backdrop

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[9] Section 2255(h) provides that "[a] second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain:

> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
>
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable."

discussed in *Banister*, under which courts almost invariably adjudicated Rule 59(e) motions filed after resolution of habeas petitions. *See Banister*, 140 S. Ct. at 1707. Indeed, in discussing the relevant history, the Supreme Court cited post-conviction cases brought by federal prisoners without distinguishing them from Section 2254 cases, which confirms that *Banister*'s holding applies in the Section 2255 context. *See id.* (citing *Gajewski v. Stevens*, 346 F.2d 1000, 1001 (8th Cir. 1965)).

II. THE DISTRICT COURT'S REMARKS ON THE MERITS OF MR. DE JESUS' RULE 59(e) MOTION DO NOT PROVIDE AN ALTERNATIVE BASIS FOR AFFIRMANCE.

As the Government acknowledges, "[t]he only issue that this Court has authorized is whether the district court erred when it construed [Mr.] De Jesus's Rule 59(e) motion to 'alter or amend' the order denying his § 2255 motion as a second or successive § 2255 motion that it did not have subject matter jurisdiction to consider." Gov't Br. at 7; Order at 4 (Jan. 10, 2019). For that reason alone, this Court should not affirm on the basis of the District Court's cursory remarks on the substance of Mr. De Jesus' Rule 59(e) motion.

But, if the Court does consider the issue, those remarks provide no basis for affirmance. *First*, the District Court's comments do not amount to an alternative holding because the District Court impermissibly exercised "hypothetical jurisdiction," *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998), disposing of Mr. De Jesus' Rule 59(e) arguments in a mere three sentences *after* concluding it lacked jurisdiction—without meaningfully engaging

with the motion's merits. CVDE 17:3. *Second*, the District Court's purported denial of the Rule 59(e) motion rests on an error of law, because the District Court misunderstood the proper bases of Rule 59(e) relief in rejecting Mr. De Jesus' arguments. *Id.* *Third*, the District Court reversibly erred in its misunderstanding of those arguments, which fell within the scope of Rule 59(e) even on the District Court's cramped understanding of that provision.

A. The District Court's Comments on the Merits of the Rule 59(e) Motion Do Not Amount to an Alternative Holding.

After holding that it lacked jurisdiction to consider Mr. De Jesus' Rule 59(e) motion, the District Court offered that "it would still deny the Motion" if it "did have jurisdiction." CVDE 17:3. In cursory sentences, the District Court explained that it would do so because Mr. De Jesus reiterated his earlier arguments, which, the District Court concluded, is not a permissible use of Rule 59(e). *Id.*

Those statements do not qualify as an alternative holding capable of supporting affirmance. As other Circuits have held, once a court holds that it lacks jurisdiction, any statements it makes on the merits of the matter are *dicta*—not an alternative holding. *See Charter Twp. of Meskegon v. City of Muskegon*, 303 F.3d 755, 764 (6th Cir. 1986) (where district court erred in holding it lacked jurisdiction, remanding for hearing on the merits despite district court's earlier comments on the merits because "if a court does not have jurisdiction, *ipso facto*, it cannot address the merits of a case"); *In re Dep't of Energy Stripper Well Litig.*, 206 F.3d 1345, 1351 (10th Cir. 2000) ("[T]he

district court need only have announced that it lacked jurisdiction over the matter and dismissed the case. … As such, we must consider the remainder of the district court's decision dicta."); *Moreland v. Fed. Bureau of Prisons*, 431 F.3d 180, 185 (5th Cir. 2005) (where earlier panel held it lacked subject matter jurisdiction, holding statements addressing the merits were dicta, not an alternative holding). That conclusion is the natural result of a long-settled rule: When a court concludes it lacks jurisdiction, "the only function remaining to the court is that of announcing the fact and dismissing the cause." *Steel Co.*, 523 U.S. at 94 ("Without jurisdiction the court cannot proceed at all in any cause." (quoting *Ex parte McCardle*, 7 Wall. 506, 514 (1868))). A court therefore should not exercise what amounts to "hypothetical jurisdiction" by addressing the merits after concluding it lacks jurisdiction. *Id.* at 101. And as evidenced by the cursory merits discussion in the District Court's order, the rule makes good sense, because a court that has concluded it lacks jurisdiction is unlikely to pay the arguments on the merits the close attention they otherwise would receive.

Admittedly, this Court adopted a different approach in *Rutherford v. McDonough*, 466 F.3d 970, 976 (11th Cir. 2006), holding that a district court's treatment of the merits qualifies as an alternative holding even if the district court held it lacked jurisdiction.[10] But this case is unlike *Rutherford*, in which the district court

[10] Mr. De Jesus preserves his argument that *Rutherford* was wrongly decided because it conflicts with both Supreme Court precedent and decisions of those Circuits which have held that discussion of the merits does not qualify as an alternative holding if the court holds it lacks jurisdiction. *See supra* at 19–20.

meaningfully engaged with the merits over the course of five lengthy paragraphs despite its holding that it lacked jurisdiction to do so. *See Rutherford v. Crosby*, No. 06-cv-50, 2006 WL 228883, at *3–4 (N.D. Fla. Jan. 28, 2006). Whatever the merits of *Rutherford*'s decision that analysis of that sort can qualify as an alternative holding, it has no application here, where the District Court disposed of Mr. De Jesus' Rule 59(e) arguments in a mere three sentences, without treating the arguments' substance.[11] CVDE 17:3. This Court therefore should remand so that the District Court can consider and adjudicate Mr. De Jesus' Rule 59(e) arguments with the clear understanding that it has jurisdiction to do so.

B. The District Court Misunderstood the Proper Bases of Rule 59(e) Relief.

The District Court offered only one basis for its assertion that it would deny Mr. De Jesus' Rule 59(e) motion if it had jurisdiction: that the arguments fell outside the scope of Rule 59(e) because they had already been rejected in the order denying relief under Section 2255. CVDE 17:3. The purported denial therefore rests on an error of law, because the Supreme Court in *Banister* held that Rule 59(e) may

[11] The same is true of *M.H.D. v. Westminster Schools*, 172 F.3d 797 (11th Cir. 1999), on which *Rutherford* relied. The Eleventh Circuit's decision in *Westminster* recounts that the district court fully treated the merits of the summary judgment motion before erroneously "dismiss[ing]" a claim under Title IX for want of jurisdiction, instead of concluding it failed on the merits. *Id.* at 801–02. Nothing of the sort happened here, where the District Court concluded it lacked jurisdiction for reasons independent of the substantive merits of Mr. De Jesus' Rule 59(e) motion, before summarily stating it would have denied the motion in any event.

be used to invite a district court to "rectify its own mistakes" in rejecting already-asserted arguments by "reconsider[ing] matters properly encompassed in a decision on the merits." *Banister*, 140 S. Ct. at 1703 (quoting *White v. New Hampshire Dep't of Emp. Sec.*, 455 U.S. 445, 450–51 (1982)). As the Supreme Court put it in *Banister*, "Rule 59(e) motions … give habeas courts the chance to clarify their reasoning," which necessarily means a Rule 59(e) motion may properly reassert arguments to which that reasoning was directed. *Id.* Or, as one Circuit recently explained, a "motion to reconsider under Rule 59 is—well, there's no better name than a motion to *reconsider*." *Adams v. Bd. of Educ.*, — F.3d —, 2020 WL 4434529, at *2 (7th Cir. Aug. 3, 2020) (Easterbrook, J.). "A litigant is entitled to ask a court to change decisions that influenced the judgment" and "repeating old arguments is a standard practice [under Rule 59(e)], part of what the Supreme Court recently called a unitary process to produce one complete and correct adjudication." *Id.* (citing *Banister*, 140 S. Ct. 1698). So the District Court faulted Mr. De Jesus for using a Rule 59(e) motion for one of the purposes for which the rule is intended: to ask the District Court to reconsider arguments it previously rejected.

The same conclusion emerges when the issue is viewed from the other direction. *Banister* is again instructive, because it explains that a court adjudicating a Rule 59(e) motion generally "will not address new arguments or evidence." 140 S. Ct. at 1703. *Banister* thus directly contradicts the District Court's reasoning, which *insists* that a Rule 59(e) motion is cognizable only if it "raises new arguments or issues." CVDE 17:3 (stating that the District Court

would deny the Rule 59(e) motion because it "raises no new arguments or issues"). This conflict must of course be resolved in the Supreme Court's favor. *See McGinley v. Houston*, 361 F.3d 1328, 1331 (11th Cir. 2004) (per curiam) ("[A] decision by the Supreme Court binds all circuit and district courts."). And that means the District Court's hypothetical "denial" of Mr. De Jesus' Rule 59(e) motion rests on an error of law and should be reversed.

For at least two reasons, the Government cannot escape that conclusion by relying on this Court's decision in *Michael Linet, Inc. v. Village of Wellington*, 408 F.3d 757, 763 (11th Cir. 2005), which rejected a Rule 59(e) motion for being "essentially a motion to reconsider" an earlier order of the district court. *First*, the Court's holding in *Michael Linet* contradicts the Court's earlier recognition in *Gordon v. Heimann*, 715 F.2d 531, 537 (11th Cir. 1983), that the "purpose of Rule 59(e) [is] to permit a court to rectify its mistakes" by "reconsider[ing] its holdings of law and fact to determine whether its prior judgment was correct." *See also Lucas v. Fla. Power & Light Co.*, 729 F.2d 1300, 1301 (11th Cir. 1984) (holding a motion for costs does not qualify as a motion under Rule 59(e) because it "does not seek reconsideration of substantive issues resolved in the judgment"). Because it came first in time, *Gordon* must control under this Court's prior panel precedent rule. *See Phillips v. Barnhart*, 357 F.3d 1232, 1243 n.14 (11th Cir. 2004).

Second, the relevant part of *Michael Linet* must give way to the Supreme Court's holding in *Banister* that a Rule 59(e) motion may reassert already presented arguments in an effort to convince the district court to reconsider or clarify its decision. *See* 140 S. Ct. at 1703.

The Supreme Court's discussion of the proper scope of Rule 59(e) relief qualifies as a holding because it was essential to the Court's determination that Rule 59(e) motions are consistent with, and not displaced by, the provisions of AEDPA presumptively barring second or successive habeas petitions, even when the Rule 59(e) motions attack the merits of earlier habeas decisions.[12] *See United States v. Caraballo-Martinez*, 866 F.3d 1233, 1244 (11th Cir. 2017) ("The holding of a case comprises both the result of the case and those portions of the opinion necessary to that result." (quotation marks and citation omitted)). As the Supreme Court explained, AEDPA does not displace Rule 59(e) motions because they—unlike Rule 60(b) motions—promote efficiency and finality by allowing "only … reconsideration of matters properly encompassed in the challenged judgment" so that "habeas courts [may] … clarify their reasoning" or "fix any mistakes" before a single appeal. *Banister*, 140 S. Ct. at 1708–10. *Banister* therefore abrogates *Michael Linet*'s holding that a Rule 59(e) motion may not reassert already-made arguments in an attempt to convince a district court to correct an earlier, mistaken rejection of those arguments.[13] *See United States v.*

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[12] Indeed, the petitioner's filing urged the district court to correct errors in its judgment, *Banister*, 140 S. Ct. at 1704, and the Supreme Court stated that he "properly brought a Rule 59(e) motion in the District Court," *id.* at 1711.

[13] For the reasons discussed in the text, the Government likewise cannot rely on decisions similar to or following *Michael Linet*. *See, e.g.*, *Richardson v. Johnson*, 598 F.3d 734, 740 (11th Cir. 2010); *Jacobs v. Tempur-Pedic Int'l, Inc.*, 626 F.3d 1327, 1344 (11th Cir. 2010); *Application of Consorcio Ecuatoriano de Telecommunicaciones S.A. v. JAS Forwarding (USA), Inc.*, 747 F.3d 1262, 1274–75 (11th Cir. 2014).

Madden, 733 F.3d 1314, 1319 (11th Cir. 2013) ("[O]ur precedent is no longer binding once it has been substantially undermined or overruled by Supreme Court jurisprudence." (quoting *United States v. Gallo*, 195 F.3d 1278, 1284 (11th Cir. 1999))).[14]

* * *

In short, the District Court based its statement that it would deny Mr. De Jesus' Rule 59(e) motion entirely on a misunderstanding of the sorts of arguments cognizable under Rule 59(e). CVDE 16:2–3. Because it rested on an error of law, the District Court's statement cannot support affirmance of the denial of the Rule 59(e) motion. *See Gray ex rel. Alexander v. Bostic*, 613 F.3d 1035, 1042 (11th Cir. 2010) ("That error of law requires us to vacate the court's order … and to remand for additional proceedings free from the error."); *Bivins v. Wrap it Up, Inc.*, 548 F.3d 1348, 1351 (11th Cir. 2008) (per curiam) ("An error of law is *per se* abuse of discretion."). The Court therefore should remand with instructions for the District Court to address the arguments contained in Mr. De Jesus' Rule 59(e) motion on their merits. *See Callahan v. U.S. Dep't of Health & Hum. Servs.*, 939 F.3d 1251, 1266 (11th Cir. 2019) ("We are, after all, a court of review, not a court of first view.").

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[14] To the extent the Court deems itself bound by *Michael Linet* or decisions like it, Mr. De Jesus preserves his argument that those decisions were based on an erroneous understanding of the arguments available under Rule 59(e), as confirmed by *Banister*.

C. The District Court Misunderstood the Arguments in Mr. De Jesus' Rule 59(e) Motion, Which Did More Than Reassert Earlier Arguments.

The District Court committed reversible error even on its own, erroneously narrow understanding of Rule 59(e). That is so because Mr. De Jesus invoked Rule 59(e) not simply to "rehash[ ]" old arguments (CVDE 17:3), but also to: clarify his arguments in light of the District Court's misunderstanding; address an issue the District Court introduced into the case in its order denying relief under Section 2255; and seek an opportunity to present evidence that was not earlier available. CVDE 16. This Court should not address the merits of those arguments in the first instance. *See Callahan* , 939 F.3d at 1266. Rather, the point here is that Rule 59(e) properly serves each of those purposes, and the District Court reversibly erred in failing to recognize that Mr. De Jesus made the sorts of arguments cognizable under Rule 59(e).

First, Mr. De Jesus in his *pro se* Rule 59(e) motion attempted to clarify his arguments, which the District Court "passed over or misunderstood" in ruling on Mr. De Jesus' "less-than-limpid *pro se*" Section 2255 motion. *Banister*, 140 S. Ct. at 1708 (noting this is a proper use of Rule 59(e)). Read liberally, Mr. De Jesus' uncounseled Rule 59(e) motion sought to clarify an important feature of his argument challenging his convictions under 18 U.S.C. § 2423(c)[15] (Counts 1 and

[15] Section 2423(c) provides: "Any United States citizen … who travels in foreign commerce or resides, either temporarily or permanently, in a foreign country, and engaged in any illicit sexual conduct with another person shall be fined under this title or imprisoned not more than 30 years, or both." A successful

3) and 18 U.S.C. § 2422(b)[16] (Counts 5 and 6), which were based on Mr. De Jesus' engagement in and attempt to engage in illicit sexual conduct in Colombia with persons under 18 years of age. CRDE 26:1–3; *see Day v. Hall*, 528 F.3d 1315, 1317 (11th Cir. 2008) (per curiam) ("*Pro se* pleadings are held to a less stringent standard than pleadings drafted by attorneys and will, therefore, be liberally construed."). Specifically, Mr. De Jesus sought to clarify that his challenges did not turn on the extraterritorial application of those laws alone, but instead on the fact that the underlying conduct was legal in Colombia, such that Section 2422(b) and Section 2423(c) did not and could not constitutionally reach it. CVDE 16:1–2 (arguing the legality of the conduct in Colombia and that the statutes therefore are "unconstitutional[ ]"); *id.* at 3 (arguing that the statute should not reach "conduct that the authoritative sovereigns consider legal").

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challenge to Mr. De Jesus' convictions on Counts 1 and 3 would result in a 60-month reduction of Mr. De Jesus' sentence. CRDE 49:3.

[16] Section 2422(b) provides: "Whoever, using the mail or any facility or means of interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title and imprisoned not less than 10 years or for life." Without identifying any underlying law, the superseding indictment charged Mr. De Jesus based on "sexual activity for which a person can be charged with a criminal offense." CRDE 26:3. As a result, these Counts fail to charge a crime if Mr. De Jesus' conduct was legal in Colombia and Counts 1 and 3 fall—because in that instance, it will be clear that no one can be charged with a criminal offense for the conduct in question.

That clarification was necessary because the District Court denied Mr. De Jesus' Section 2255 motion based primarily on the principle that the United States government can criminalize extraterritorial conduct, while mentioning the legality of the conduct in Colombia only in passing—and without addressing the implications of the legality of the conduct for issues of comity and constitutionality.[17] CVDE 14:6–7.

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[17] The District Court relied on *United States v. Frank*, 599 F.3d 1221, 1233 (11th Cir. 2010), in which this Court held that Congress may criminalize acts of United States citizens in foreign nations under the nationality principle. But *Frank* did not address whether that remained true when the acts were legal in the nation where the acts occurred or were to occur. And that fact should make a difference on remand. The Supreme Court has made clear that, in construing statutes, courts should "assume that legislators take account of the legitimate sovereign interests of other nations." *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004); *see Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 124 (2013) (despite its open-ended language, declining to allow liability under the Alien Tort Statute for "violations of the law of nations occurring outside the United States"); *Microsoft Corp. v. AT & T Corp.*, 550 U.S. 437, 455–56 (2007) (presumption not rebutted just because statute "specifically addresses" extraterritorial application (citation omitted)).

Moreover, at the time of the Founding, it was understood that "every nation possesse[d] an exclusive jurisdiction over its own territory." Joseph Story, Commentaries on the Conflict of Laws 189, 21 (Hilliard, Gray & Co. 1834); *see also Schooner Exch. v. McFaddon*, 11 U.S. 116, 136 (1812) (Marshall, C.J.) ("The jurisdiction of the nation within its own territory is necessarily exclusive and absolute."). The Constitution was adopted against that backdrop, which at a minimum means that Congress' authority to criminalize conduct does not extend to conduct that is legal in the foreign nation in which it occurs. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 421 (2003) ("A State cannot punish a defendant for conduct that may have been

Second, Mr. De Jesus sought in his Rule 59(e) motion to clarify a second argument that the District Court had "misunderstood." *Banister*, 140 S. Ct. at 1708. In his Section 2255 motion, Mr. De Jesus challenged his convictions under 18 U.S.C. § 2423(c) and 18 U.S.C. § 2422(b) on the ground that, because those statutes override the law of the jurisdiction in which the conduct occurred, they impermissibly and unconstitutionally fail to give fair notice of what is prohibited. CVDE 1:4. In its order denying Mr. De Jesus relief under Section 2255, the District Court reframed this contention as consisting entirely of "a classic mistake of law argument," which the District Court summarily rejected. CVDE 14:6. Mr. De Jesus therefore appropriately used Rule 59(e) in his effort to correct the District Court's misapprehension by highlighting his constitutional claim.[18]

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lawful where it occurred."); *see also Baston v. United States*, 137 S. Ct. 850, 851 (2017) (Thomas, J., dissenting from denial of certiorari) (arguing that the foreign commerce clause does not empower Congress to criminalize "conduct occurring entirely within the jurisdiction of a foreign sovereign"). Mr. De Jesus therefore preserves his argument that his convictions on these Counts exceed Congress' power under the Constitution.

[18] Though it is a matter that should be addressed by the District Court in the first instance, the Supreme Court has stressed the constitutionally mandated need for fair notice in a variety of contexts. The most common context, of course, involves situations where a statute's terms fail to convey a sufficiently discernible meaning. *See, e.g.*, *United States v. Williams*, 553 U.S. 285, 304–05 (2008). But the constitutional mandate of fair notice is not limited to that context, as confirmed by Supreme Court decisions holding for other reasons that punishment was unconstitutionally imposed without fair notice. *See F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 254 (2012) (retroactive application of change in regulatory policy); *BMW of N. Am., Inc.*

Third, in his uncounseled Rule 59(e) motion Mr. De Jesus addressed an issue the District Court injected into the case in its order denying his Section 2255 motion. Specifically, in that order, the District Court reframed Mr. De Jesus' challenges to his convictions as challenges to the effectiveness of his trial counsel, deeming that course required because Mr. De Jesus pled guilty. CVDE 14:2–3. Courts apply a deferential standard to ineffective assistance claims, under which a claim will fail so long as a competent attorney might have taken the course chosen by counsel. *See Strickland v. Washington*, 466 U.S. 668, 690 (1984). Mr. De Jesus recognized that the District Court's framing might have colored consideration of his claims, *see Equal Emp. Opportunity Comm'n v. BDO USA, L.L.P.*, 876 F.3d 690, 698–99 (5th Cir. 2017), which

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v. Gore, 517 U.S. 559, 574 (1996) (punitive award unconstitutional because defendant "did not receive adequate notice of the magnitude of the sanction that [the state] might impose"); *see also Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 157 (2012) (rejecting assertion that pharmaceutical company violated Fair Labor Standards Act because the "statute and regulations certainly do not provide clear notice" that a longstanding industry practice ran afoul of the Act). Indeed, the Court has explicitly noted that the Due Process Clause—and the principles of fair notice it embodies—forbid punishment of conduct that was legal where it occurred. *See Gore*, 517 U.S. at 572–73 (holding that a state "does not have the power, however, to punish [a defendant] for conduct that was lawful where it occurred"); *see also State Farm*, 538 U.S. at 421 (due process prohibits punishing "a defendant for conduct that may have been lawful where it occurred"). Mr. De Jesus' argument fits comfortably within those cases, because it is only natural that one taking an action would consider the laws of the sovereign wherein the acts are to take place in evaluating whether those acts are permitted.

involved legal issues that otherwise would be considered without deference to counsel's decisions, *see United States v. Cespedes*, 151 F.3d 1329, 1331 (11th Cir. 1998) ("The constitutionality of a statute is a question of law subject to *de novo* review."). In his uncounseled Rule 59(e) motion, therefore, Mr. De Jesus urged the District Court to reconsider his arguments without the ineffective-assistance framing, arguing that his guilty plea did not require otherwise because he claimed that his convictions were based on conduct that had not been made and could not have been constitutionally made a crime.[19] CVDE 16:2. In

[19] Although it is a matter to be addressed on remand, Mr. De Jesus notes that the District Court in its Section 2255 order erred in concluding that Mr. De Jesus' guilty plea barred his direct challenges to his convictions. That is so because a plea of guilty does not bar a claim that the defendant was convicted for a non-offense—conduct that the law either does not or cannot constitutionally reach. *See, e.g.*, *Class v. United States*, 138 S. Ct. 798, 801–02 (2018) (holding that a guilty plea does not "bar a criminal defendant" from challenging his conviction on the ground that it rests on a statute that "violates the constitution"); *United States v. Peter*, 310 F.3d 709, 713 (11th Cir. 2002) (per curiam) ("[A] district court is without jurisdiction to accept a guilty plea to a non-offense." (quotation marks and citation omitted)); *United States v. Mirelez*, 496 F.2d 915, 917 (5th Cir. 1974) (per curiam). *See also Askew v. Alabama*, 398 F.2d 825, 825 n.1 (5th Cir. 1968) (per curiam) ("A guilty plea … does not waive the right of an accused to challenge the constitutionality of the statute under which he is convicted. Rather, the waiver extends only to violations of those procedural rights guaranteed by due process which are incident to the criminal investigation and prosecution."). In any event, Mr. De Jesus also preserves his arguments that: (1) his guilty plea was invalid because he was misinformed as to the nature of the charges against him, particularly the significance of the legality of the underlying conduct under Colombian law, which rendered his conduct a non-offense, *see, e.g.*, *Bousley v. United States*, 523 U.S. 614, 618

short, Mr. De Jesus addressed an issue that was raised in the order for which he sought reconsideration. This, too, was a proper use of Rule 59(e). *See Banister*, 140 S. Ct. at 1708 (Rule 59(e) is properly used to "give[] the court a brief chance to fix mistakes").

Finally, Mr. De Jesus used his *pro se* Rule 59(e) motion to argue that the District Court should have allowed him additional time and an evidentiary hearing to present his arguments, because his "indigency" and the District Court's "summary ruling" prevented him from gathering and presenting evidence before the District Court denied his Section 2255 motion. CVDE 16:1–2. In other words, Mr. De Jesus sought an opportunity to present evidence that was not earlier available to him—a longstanding basis for relief under Rule 59(e). *See* 11 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2810.1 (3d ed. 2020) ("[T]he motion [to amend or alter] may be granted so that the moving party may present newly discovered or previously unavailable evidence."); *In re La. Crawfish Producers*, 852 F.3d 456, 465–69 (5th Cir. 2017) (reversing district court's denial of reconsideration because

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(1998); and (2) trial counsel provided ineffective assistance in failing to raise the arguments discussed in the text before he pleaded guilty, that counsel's failure prejudiced him, and that he would not have pleaded guilty had he been aware of those arguments, *see Strickland*, 466 U.S. at 688. Although Mr. De Jesus stated at his change of plea hearing that he had "fully discussed the charges and the case in general with [his] attorney" (CRDE 51:5), as a non-lawyer Mr. De Jesus had no way of fully understanding the significance of Colombian law, which his lawyer did not discuss with him.

district court declined to review new, previously unavailable evidence).

* * *

The bottom line is that Mr. De Jesus' Rule 59(e) motion presented the *sorts* of arguments cognizable under Rule 59(e). While the merits of those arguments are not currently before this Court, the fact that those arguments fall within the ambit of Rule 59(e) suffices to establish that the District Court's brief comments on the substance of Mr. De Jesus' Rule 59(e) motion should not preclude reversal here. Accordingly, this Court should vacate the District Court's order refusing Mr. De Jesus' relief under Rule 59(e), with instructions for the District Court to address Mr. De Jesus' arguments on their merits.

CONCLUSION

For the foregoing reasons, the Court should reverse the District Court's order rejecting Mr. De Jesus' Rule 59(e) motion for lack of jurisdiction, with instructions for the District Court to address the arguments made in that motion on their merits.

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1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and Eleventh Circuit Rule 32-4 because this brief contains 8,489 words, excluding the accompanying documents authorized by Federal Rule of Appellate Procedure 32(f).

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CERTIFICATE OF SERVICE

I hereby certify that, on August 12, 2020, I electronically filed the foregoing Supplemental Brief using the Court's Appellate PACER system, which will automatically send e-mail notification of such filing to the attorneys of record who are registered participants in the Court's electronic notice and filing system and each of whom may access this filing via the Court's Appellate PACER system. Under Eleventh Circuit Rule 25-3(a), no independent service by other means is required.

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