No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

LARRY M. BOLLINGER, PETITIONER

VS.

UNITED STATES OF AMERICA, RESPONDENT

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis.*

Please check the appropriate boxes:

☐ Petitioner has previously been granted leave to proceed *in forma pauperis* in the following court(s):

_____

_____

☒ Petitioner has **not** previously been granted leave to proceed *in forma pauperis* in any other court.

☒ Petitioner's affidavit or declaration in support of this motion is attached hereto.

☐ Petitioner's affidavit or declaration is **not** attached because the court below appointed counsel in the current proceeding, and:

☐ The appointment was made under the following provision of law: _____

_____, or

☐ a copy of the order of appointment is appended.

Larry M. Bollinger

(Signature)

AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, Larry M. Bollinger, am the petitioner in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	**Average monthly amount during the past 12 months**		**Amount expected next month**	
	You	Spouse	You	Spouse
Employment	$ 0	$ 0	$	$
Self-employment	$ 0	$ 0	$	$
Income from real property (such as rental income)	$ 0	$ 500	$	$
Interest and dividends	$ 0	$ 150	$	$
Gifts	$ 200	$ -200	$	$
Alimony	$ 0	$ 0	$	$
Child Support	$ 0	$ 0	$	$
Retirement (such as social security, pensions, annuities, insurance)	$ 2,225*	$ 500	$	$
Disability (such as social security, insurance payments)	$ 0	$ 0	$	$
Unemployment payments	$ 0	$ 0	$	$
Public-assistance (such as welfare)	$ 0	$ 0	$	$
Other (specify): _____	$ 0	$ 0	$	$
Total monthly income:	$ 2,425	$ 950	$	$

* $ 2,225 is turned over to spouse

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
None - incarcerated			$
			$
			$

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
None - retired			$
			$
			$

4. How much cash do you and your spouse have? $ 500.00
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Type of account (e.g., checking or savings)	Amount you have	Amount your spouse has
Checking	$	$ 150,000
Checking	$	$ 8000
Savings	$	$ 15000

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

☒ Home
Value 300,000

☒ Other real estate
Value 350,000

☒ Motor Vehicle #1
Year, make & model 2021 Honda
Value 25000

☐ Motor Vehicle #2
Year, make & model _____
Value _____

Other assets
Description _____
Value _____

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
None	$	$
	$	$
	$	$

7. State the persons who rely on you or your spouse for support. For minor children, list initials instead of names (e.g. "J.S." instead of "John Smith").

Name	Relationship	Age
None		

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home mortgage payment (include lot rented for mobile home) Are real estate taxes included? ☐ Yes ☒ No Is property insurance included? ☐ Yes ☒ No	$	$ 250.00
Utilities (electricity, heating fuel, water, sewer, and telephone)	$	$ 750.00
Home maintenance (repairs and upkeep)	$	$ 350.00
Food	$	$ 500.00
Clothing	$	$ 150.00
Laundry and dry-cleaning	$	$ 50.00
Medical and dental expenses	$	$ 500.00

	You	Your spouse
Transportation (not including motor vehicle payments)	$	$ 250
Recreation, entertainment, newspapers, magazines, etc.	$	$ 150
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	$	$ 150
Life	$	$ 200
Health	$	$
Motor Vehicle	$	$ 75
Other: _____	$	$
Taxes (not deducted from wages or included in mortgage payments)		
(specify): _____	$	$ 1000
Installment payments		
Motor Vehicle	$	$
Credit card(s)	$	$
Department store(s)	$	$
Other: _____	$	$
Alimony, maintenance, and support paid to others	$	$
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$	$ 1000
Other (specify): _____	$	$
Total monthly expenses:	$	$ 5375

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☐ Yes ☒ No If yes, describe on an attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? ☐ Yes ☒ No

If yes, how much? _____

If yes, state the attorney's name, address, and telephone number:

I retained Matthew Gilmartin, Attorney, P.O. Box 939, North Olmsted Ohio 44070, to represent me in the 4th Circuit on direct appeal. After that, I was unable to pay Mr. Gilmartin any more, but he has offered to represent me without fee before this Court for purposes of seeking a writ of certiorari.

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

☐ Yes ☒ No

If yes, how much? _____

If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the costs of this case.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: 10/07, 2021

Larry M. Gollinger
(Signature)

No. _____

In the

Supreme Court of the United States

LARRY MICHAEL BOLLINGER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

MATTHEW T. GILMARTIN
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QUESTIONS PRESENTED

Petitioner Larry M. Bollinger presents the following questions for review:

(1) In an indictment for violation of 18 U.S.C. §§ 2423(c) and (e), does venue lie in any federal district through which the defendant traveled prior to traveling in foreign commerce?

(2) In an indictment for violation of 18 U.S.C. §§ 2423(c) and (e) prior to the 2018 amendment of those statutes, is a defendant actually innocent of the offense of conviction if he is residing in the foreign country at the time of the illicit sexual conduct?

PARTIES TO THE PROCEEDING

Petitioner Larry Michael Bollinger and the United States of America are parties to the proceeding.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Larry Michael Bollinger, by and through his Counsel, respectfully prays that a writ of certiorari be issued to the United States Court of Appeals for the Fourth Circuit, so that this Court may review the judgment below.

OPINIONS BELOW

This matter seeks discretionary review of the refusal of the United States District Court for the Western District of North Carolina and the United States Court of Appeals for the Fourth Circuit to grant Bollinger a certificate of appealability ("COA") to appeal a denial by the District Court of a petition brought pursuant to 28 U.S.C. § 2255. The District Court ruled that Bollinger's issues were without merit. The text of District Court's *Order* appears at Appendix A. The United States Court of Appeals for the Fourth Circuit thereafter issued a *per curiam* opinion holding that Bollinger had not shown that "reasonable jurists could find the district court's assessment of the constitutional claims debatable or wrong." That decision, which was unpublished, appears at Appendix B.

Bollinger sought rehearing, which the Fourth Circuit denied without comment. That decision, which was unpublished, appears at Appendix C.

These opinions are all unreported.

JURISDICTION

This Court has jurisdiction to hear this *Petition* pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment, 18 U.S.C. § 2423 (2009), 18 U.S.C. § 3237, and *Federal Rule of Criminal Procedure* 18 are the principal constitutional, statutory and rules provisions involved in this *Petition*. Those are set out in Appendix D.

STATEMENT OF THE CASE

On May 15, 2012, Bollinger was indicted on two counts of engaging in illicit sexual conduct after having knowingly traveled in foreign commerce, in violation of 18 U.S.C. §§ 2423(c) and (e). He was arrested on May 17, 2012, and has been in custody since that date.

Bollinger sought to dismiss the indictment on the grounds that Congress exceeded its authority under Article I, Section 8, of the Constitution in criminalizing non-commercial illicit sexual contact after traveling in foreign

commerce under 18 U.S.C. § 2423(c), and that the extraterritorial application of 18 U.S.C. § 2423(c) violated the Due Process Clause of the *Fifth Amendment.* The District Court denied the *Motion.* Thereafter, Bollinger entered a conditional plea of guilty to both counts without benefit of a plea agreement, retaining the right to appeal on the previously-presented grounds for dismissal. He was sentenced to 300 months incarceration, lifetime supervised release, a fine of $25,000, and a special assessment of $200.00.

Bollinger's appeal was denied. *United States v. Bollinger,* 798 F.3d 201 (4th Cir. 2015). Thereafter, a petition for writ of *certiorari* was denied by this Court. *Bollinger v. United States,* --- U.S. ---, 136 S.Ct. 2448, 195 L.Ed.2d 263 (2016).

Bollinger timely filed a motion pursuant to 28 U.S.C. § 2255 *Motion,* arguing, *inter alia,* that he received ineffective assistance of counsel because counsel failed to raise a meritorious venue issue. He also sought to amend his § 2255 *Motion* to argue that counsel rendered ineffective assistance by failing to argue that Bollinger's conduct fell outside of 18 U.S.C. § 2423 (2009), because the statute at that time was inapplicable to U.S. citizens living abroad unless they were traveling to the destination, rather than living in the destination country on a temporary or permanent basis. Bollinger cited *United States v. Pepe,* 895 F.3d 679 (9th Cir. 2018) for the proposition that Petitioner actually

innocent of the two 18 U.S.C. § 2423(c) offenses. The District Court denied leave to amend, holding that "the new claim Petitioner seeks to assert was filed well after the expiration of the one-year statute of limitations and does not relate back to his original pleading... Petitioner argues that he was not 'traveling' in Haiti within the meaning of § 2423, but rather, he was "residing" there and, therefore, was not within the scope of the statute as it existed in 2009."

The District Court denied Bollinger a certificate of appealability. Bollinger appealed, seeking grant of the certificate of appealability from the U.S. Court of Appeals for the Fourth Circuit. That application was denied, as was Bollinger's petition for rehearing.

STATEMENT OF FACTS

In 2004, Bollinger, an ordained Lutheran minister, traveled from his home in Gastonia, North Carolina, to Port-Au-Prince, Haiti, to direct the Lazarus Project. Lazarus was a ministry that included a school serving hundreds of children outside of Port-Au-Prince (known as the Village of Hope) and a gated compound. The compound, called Hope House, includes residences and missionary housing. Between 2004 and the summer of 2009, Bollinger and his wife spent most of the year in Haiti, but maintained their home in Gastonia, coming home periodically when their work permitted or for board meetings or

promotional speeches. When Bollinger traveled back and forth between Haiti and the United States, the international flights departed from Florida.

Bollinger has struggled for years with a sex addiction, which caused him initially frequenting adult bookstores and theaters and then in engaging prostitutes. He did so in Haiti as well. Starting in 2009, when Bollinger was in Haiti without his spouse, he began having sexual contact with a 16- or 17-year old Haitian female. After she was thrown out of Lazarus for theft, Bollinger engaged in similar sexual contact with several girls who were 11 years old on four different occasions.

In September 2009, Bollinger confessed his misconduct to his wife and agreed to undergo counseling. A week later, he confessed his addiction to the chair of the Lutheran organization that administered the Village of Hope (but omitted any mention of his misconduct with minors. Bollinger then returned to Haiti to wind up business related to his position, during which time he had no further sexual contact with anyone.

Bollinger left Haiti in November 2009. He and his wife traveled to Houston, where they participated in a three-day intensive session with the psychologist. When Bollinger told the psychologist about his sexual contact with underage females, the psychologist reminded Bollinger that he would have to report any injuries to a child to authorities. Subsequently, the

psychologist and the Bollingers jointly called the National Center for Missing and Exploited Children and reported Bollinger's conduct with the Haitian minors.

The psychologist referred Bollinger to an in-patient treatment program for sex addicts near Dallas, Texas. Bollinger completed a 96-day in-patient program in early 2010, and returned to his home in Gastonia, North Carolina, where he continued with out-patient treatment until he was arrested 26 months later.

REASONS FOR GRANTING THE WRIT

Petitioner raises a question of substantial significance to the over 71,500 criminal cases filed annually in United States district courts. Administrative Office of U.S. Courts, *U.S. District Courts–Combined Civil and Criminal Federal Court Management Statistics* (June 30, 2021).[1] Pro per venue for each one of these cases is not merely a procedural requirement, but a Constitutional imperative. *United States v. Cabrales*, 524 U.S. 1, 6, 118 S. Ct. 1772, 1775-76 (1998)[2] ("The Constitution twice safeguards the defendant's venue right:

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[1] During the 12-month period ending June 30, 2021, 71,635 criminal cases were filed in federal district courts. *Id.* This report may be found at https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile0630.2021.pdf (last visited October 1, 2020).

Article III, § 2, cl. 3 instructs that "Trial of all Crimes... shall be held in the State where the said Crimes shall have been committed"; the Sixth Amendment calls for trial "by an impartial jury of the State and district wherein the crime shall have been committed").

The proper interpretation of 18 U.S.C. § 2423(c) (2009), especially where circuits have split on its meaning, is always a matter of transcendent national importance, where the liberty interests of its citizens are concerned. In this case, had Bollinger resided in Astoria, Washington, rather than Gastonia, North Carolina, he would be actually innocent of the offenses of conviction. Instead of serving 25 years in prison, he would be at home with his wife.

I. In an indictment for violation of 18 U.S.C. §§ 2423(c) and (e), venue does not lie in any federal district through which the defendant traveled prior to the district from which he or she embarks traveling in foreign commerce

Among the Continental Congress's complaints against the King of Great Britain, listed in the Declaration of Independence, was the Crown's

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[2] The holding of *Cabrales*, which related to the venue for an 18 U.S.C. § 1956 money laundering conviction was superseded by statute. *See* § 1004 of *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001*, P.L. 107-56, Title X, § 1004, 115 Stat. 308, 392 (October 26, 2001). Nevertheless, its analysis of the Constitutional underpinnings of venue – absent a specific venue provision such as § 1056(i) – remains solid.

transportation of colonists "beyond Seas to be tried."[3] As noted, both U.S. CONST. Art. III, § 2, cl. 3, and U.S. CONST. amend. VI ensure the right to be tried in the state and district in which the offense was alleged to have been committed. Rule 18 of the *Federal Rules of Criminal Procedure*, providing that "prosecution shall be had in a district in which the offense was committed," echoes these constitutional commands.

Notably, Congress has provided by statute for offenses that are "begun in one district and completed in another." Such crimes, called "continuing offenses," may be "prosecuted in any district in which [the] offense was begun, continued, or completed." 18 U.S.C. § 3237(a). The issue here explores the limits of § 3237(a): Do crimes specifying travel in foreign commerce as an element begin when the defendant steps out of his house, or rather in the federal district in which the travel in foreign commerce commences?

Congress may prescribe specific venue requirements for particular crimes, as it did for 18 U.S.C. § 1956(i) in the wake of *Cabrales*. *United States v. Pendleton*, 658 F.3d 299, 303 (3d Cir. 2011). But where Congress has not done so, as is the case here, a court must determine the crime's *locus delicti*.

---

[3] THE DECLARATION OF INDEPENDENCE, para. 21 (U.S. 1776). See Blume, *The Place of Trial of Criminal Cases: Constitutional Vicinage and Venue*, 43 MICH. L. REV. 59, 64 (1944).

Id.; *see also* BLACK'S LAW DICTIONARY 1025 (9th ed. 2009) (defining *locus delicti* as the "place where an offense was committed"). This Court has held that "the *locus delicti* must be determined from the nature of the crime alleged and the location of the act or acts constituting it." *United States v. Anderson*, 328 U.S. 699, 703 (1946); *accord United States v. Rodriguez-Moreno*, 526 U.S. 275, 279 (1999); *Cabrales, supra* at 524 U.S. 6-7.

To perform this inquiry, a district court must identify the conduct constituting the offense "and then discern the location of the commission of the criminal acts." *Rodriguez-Moreno, supra* at 526 U.S. 279, while being mindful that venue should be narrowly construed. *United States v. Johnson*, 323 U.S. 273, 276 (1944).

So-called "essential conduct elements" must be separated from "circumstance element[s]." *Rodriguez-Moreno, supra* at 526 U.S. at 280 & n.4. For example, in *Cabrales*, the Supreme Court considered that the illegal activity that generated the money later laundered in Florida, money resulting from illegal drug sales in Missouri, was only a "circumstance element" of money laundering. *Rodriguez-Moreno, supra* at 526 U.S. 280 n.4. While the existence of money resulting from specified unlawful activity was an element of the crime that the Government had to prove to the jury, it was a nonetheless "circumstance element" because it was simply a fact that existed at the time

that the defendant performed her laundering acts. Only "essential conduct elements" can provide the basis for venue; "circumstance elements" cannot. *United States v. Bowens*, 224 F.3d 302, 310 (4th Cir. 2000).

Section § 2423(c) (2009) provides that "[a]ny United States citizen or alien admitted for permanent residence who travels in foreign commerce, and engages in any illicit sexual conduct with another person shall be... imprisoned not more than 30 years..." The offense has three elements: American citizenship; travel in foreign commerce; and illicit sexual conduct. *Pendleton*, *supra* at 658 F.3d 304. In *United States v. Perlitz*, 728 F. Supp. 2d 46 (D. Conn. 2010), the court reasoned that the distinction between offenses requiring interstate travel and travel in foreign commerce dictated its conclusion:

> Every case on which the Government relies involves criminal interstate travel, not travel in foreign commerce. This distinction is critical to the venue inquiry. During interstate travel, the travel takes place between judicial districts of different States, and so when interstate travel is the essential criminal conduct it occurs in *every district* through which the defendant travels. Therefore, both definitionally and by necessity interstate travel implicates multiple districts; travel in foreign commerce does not, since a defendant who is charged with travel in foreign commerce may begin his or her international travel without ever having traveled from one district to another. Thus, for travel-in-foreign-commerce prosecutions under § 2423(b) and (c), venue could be limited to just the district from which the defendant left the United States for his or her foreign destination.

Id, at 728 F. Supp. 2d 58-59. Because the elements are travel in foreign commerce followed by an illicit sex act, travel from Connecticut to another

state, and then from that state onto an airplane that entered foreign commerce, was merely a preparatory step not essential to the commission of the offense. Thus, it did not confer venue on Connecticut.

Bollinger's district court ruled that under § 3237(a), "venue was proper in the Western District of North Carolina because, as Ms. Bollinger testified during Petitioner's sentencing hearing, Petitioner and his wife lived in this district before they traveled to Haiti to work in the Village of Hope, and they traveled back and forth between Gastonia and Haiti during the years that Petitioner worked at the Village of Hope. Petitioner traveled in foreign commerce from this district to Haiti, where he committed his offenses against his victims..." But the issue raised herein is not limited to § 2423 and similar cases. Rather, it has arisen in international parental kidnappings (*United States v. Miller*, Case No. 2:11-cr-161-1, 2012 U.S. Dist. LEXIS 57834 [D. Vt. Apr. 25, 2012]), child pornography (*United States v. Sensi*, Case No. 3:08-cr-253, 2011 U.S. Dist. LEXIS 103990 [D. Conn. Sep. 14, 2011]), espionage (*United States v. Mallory*, 337 F. Supp. 3d 621, 625 [E.D. Va. 2018]), and a counterfeit car parts ring (*United States v. Levy Auto Parts*, 787 F.2d 946 [4th Cir. 1986]). A decision by this Court clarifying that the commission of an essential element of travel portion of the offense is central to establishing venue would resolve constitutional venue issues in any of over 100 federal

statutes employing the terms "travel in foreign commerce" or "transport[ation] in foreign commerce."[4]

II In an indictment for violation of 18 U.S.C. §§ 2423(c) and (e) prior to the 2018 amendment of those statutes, a defendant who resided in the foreign country at the time of the illicit sexual conduct was actually innocent of the offense of conviction

In June 2019, Bollinger became aware of the Ninth Circuit's decision in *Pepe*, *supra*, in which the Circuit overruled its previous interpretation of 18 U.S.C. § 2423(c). Prior to that time, the Circuit had held that § 2423(c) applied to *any* American citizen or resident alien who traveled in foreign commerce and subsequently engaged in illicit sexual conduct, no matter whether the citizen had resettled in the host country or not. *United States v. Clark*, 435 F.3d 1100, 1107 (9th Cir. 2006). The *Clark* decision had focused on the word "and," which connected the travel with the conduct, and had construed § 2423(c) to include *all* individuals who at some point traveled in foreign commerce and thereafter engaged in any illicit sexual conduct.

---

[4] Bollinger's district court contended that "[e]ven if venue in this district were not proper under § 3237(b), it would be proper under 18 U.S.C. § 3238, which provides that venue is proper in the district where a defendant is arrested or 'first brought,' where the offense was begun or committed outside of the jurisdiction of any particular state or district." This holding is simply wrong: § 3238 does not apply where the elements of the offense are begun in the United States. Bollinger's offense was *begun* in the Southern District of Florida, from which district Petitioner entered foreign commerce.

However, in 2013, Congress amended 18 U.S.C. §2423(c) in § 1211 of the *Violence Against Women Reauthorization Act of 2013,* Pub.L. 113-4, 127 Stat. 54, 142, to apply to a U.S. citizen or resident alien "who travels in foreign commerce *or resides, either temporarily or permanently, in a foreign country,* and engages in any illicit sexual conduct with another person." 18 U.S.C. § 2423(c) (2013) (emphasis added). The Ninth Circuit explained that the legislative change called *Clark* into question:

> [In] *Clark*... our focus was on the word "and," which connected the travel with the conduct. We construed the statute to mean: travels in foreign commerce *and thereafter* engages in any illicit sexual conduct. We thus saw "no plausible reading of the statute that would exclude its application to Clark's conduct because of [the] limited gap" of two months "between his most recent transit between the United States and Cambodia and his arrest." We speculated that there might be a constitutional problem with a longer gap but had no reason to consider the issue. (citation omitted).
>
> Acknowledging a different interpretive possibility in which "and" means "and concurrently," we dismissed it as leading to absurd results. As a practical matter, we thought it "non-sensical" that Congress would have limited § 2423(c)'s scope "to the unlikely scenario where the abuse occurs while the perpetrator is literally en route." (citation omitted). Such a reading, we explained, "would eviscerate § 2423(c) by severely limiting its use to only those people who commit the offense while physically onboard an international flight, cruise, or other mode of transportation."
>
> * * *
>
> In 2013, Congress amended § 2423(c) as part of the *Violence Against Women Reauthorization Act*... The statute now penalizes a U.S. citizen "who travels in foreign commerce *or resides, either*

> *temporarily or permanently, in a foreign country*, and engages in any illicit sexual conduct." 18 U.S.C. § 2423(c).
>
> This change to the statute makes no sense as we interpreted the original version in *Clark*. "When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect." (citation omitted). Yet the amendment to § 2423(c) would have virtually no effect if the illicit sexual conduct can occur any time after the travel. Almost every U.S. expatriate travels in foreign commerce before residing overseas. Under *Clark*'s analysis, "the only U.S. citizens who could fall outside the reach of § 2423(c) if they engage in illicit sexual conduct abroad are those who never set foot in the United States."

Pepe, supra at 895 F.3d 684-86 (emphasis in original).

The *Pepe* court concluded that "[f]rom the statutory amendment, as well as the accompanying legislative history, it is evident that § 2423(c) was previously inapplicable to U.S. citizens living abroad unless they were traveling — meaning something more than being in transit — when they had illicit sex. Because this subsequent Congressional pronouncement is clearly irreconcilable with our prior construction of the statute, we are not bound by our reasoning in *Clark*... If [the defendant] resided in [the host country] and was no longer 'traveling,' then the prior version of § 2423(c) does not apply to him." *Pepe*, *supra* at 895 F.3d 681-82.

Pepe is directly contrary to a 4th Circuit holding on the applicability of a pre-2013 application of 18 U.S.C. § 2423(c). *United States v. Schmidt*, 845 F.3d 153, 156 (4th Cir. 2017).

The issue, then, is the proper interpretation of the prior statute in the light of subsequent legislative amendment. *See United States v. McNeil*, 362 F.3d 570, 574 (9th Cir. 2004) ("[W]hen Congress amends statutes, our decisions that rely on the older versions of the statutes must be reevaluated in light of the amended statute"), citing *Zazueta-Carrillo v. Ashcroft*, 322 F.3d 1166, 1172 (9th Cir. 2003). The circuit split, coupled with the significant procedural question of how best to alter interpretation of prior versions of statutes based on legislative amendments to those statutes, makes the issue appropriate for this Court's consideration.

Bollinger sought to amend his § 2255 *Motion,* but the district court – without comment on whether *Pepe* suggested Bollinger might be actually innocent of the offenses – ruled that the amendment was barred as untimely by 28 U.S.C. § 2255(f). The Court did so without considering whether Bollinger's alacrity in amending and his colorable claim of actual innocence made the amendment timely under *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013). This Court's determination of the meaning of the pre-2013 statute will settle whether Bollinger's claim to actual innocence has merit.

CONCLUSION

Bollinger raises substantial questions of the determination of venue and statutory interpretation, the resolution of which would resolve Circuit splits

and provide important guidance to the government and criminal defendants.

Thus, this *Petition for Writ of Certiorari* should be granted.

/s/ Matthew T. Gilmartin

October 15, 2021

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APPENDIX A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
3:17-cv-271-RJC
(3:12-cr-173-RJC-1)

LARRY MICHAEL BOLLINGER,	)	
	)	
Petitioner,	)	
	)	
vs.	)	**ORDER**
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	
	)	

THIS MATTER is before the Court on Petitioner's Motion to Vacate, Set Aside or Correct Sentence under 28 U.S.C. § 2255. [CV Doc. 1].[1] Also pending is the Government's Motion to Dismiss and Response, [CV Doc. 10], Petitioner's Pro se Status Report and Motion for Extension of Time to File Response/Reply, [CV Doc. 11], Petitioner's Request for Permission to Amend or Supplement Previously Submitted Pleading, [CV Doc. 14], Petitioner's Motion to Supplement Pleadings, [CV Doc. 15], and Petitioner's Pro se Request of Amend Pending 2255 Motion, [CV Doc. 21].

I. BACKGROUND

A. Petitioner's Underlying Criminal Conduct.

In 2004, Petitioner Larry Michael Bollinger, an ordained Lutheran minister, traveled from his home in Gastonia, North Carolina, to Port Au Prince, Haiti, to direct the Lazarus Project, a

[1] Citations to the record herein contain the relevant document number referenced preceded by either the letters "CV," denoting that the document is listed on the docket in the civil case file number 3:17-cv-00271-RJC, or the letters "CR," denoting that the document is listed on the docket in the criminal case file number 3:12-cr-00173-RJC-1.

ministry that includes a school that serves hundreds of children outside of Port Au Prince, known as the Village of Hope, as well as a gated compound, called Hope House, that includes residences and housing for missionary teams. [CR Doc. 52 at 11, 14-15, 21-22, 37: Tr. Sentencing Hearing; CR Doc. 39-1 at 8-9: Sealed Sentencing Memorandum, Ex. 1]. Between 2004 and the summer of 2009, Petitioner and his wife, Margaret Bollinger, spent most of the year in Haiti but maintained their home in Gastonia, coming home periodically when their work permitted or for board meetings or promotional speeches. [Doc. 52 at 86-87].

For nearly all of his time as an ordained minister, Petitioner, who was married, frequented adult bookstores and ultimately began paying for sex with prostitutes, a pattern of behavior that continued as he moved from one congregation to the next, staying at each for between five and ten years. [CR Doc. 52 at 10, 12; Doc. 39-7 at 7, 15]. About a year-and-a-half after taking over responsibility for the Village of Hope, Petitioner began picking up prostitutes in Haiti, doing so regularly between 2006 and 2009. [Doc. 52 at 14-15, 17; Doc. 39-7 at 15].

In 2009, Petitioner moved from frequenting adult prostitutes to molesting young girls. From early in Petitioner's tenure with the Village of Hope, girls knocked on the gate of the compound, asking to be fed before school. [CR Doc. 52 at 18-19]. In the Spring of 2009, Petitioner began having sexual contact with a 16- or 17-year-old girl, which continued until he "caught her trying to steal a substantial amount of money from the ministry and kicked her out." [CR Doc. 52 at 18; CR Doc. 39-1 at 3]. According to Petitioner, he touched the first victim sexually and she masturbated him but refused to perform oral sex on him. [CR Doc. 39-1 at 3]. In August of 2009, as Petitioner later described it, "some girls came to the [Village of Hope] compound and made themselves available." [CR Doc. 52 at 17, 59; CR Doc. 39-7 at 7-8]. Each of those girls was 11-years old and, on four different occasions, Petitioner engaged in sexual activity with them,

performing oral sex on them, fondling them, rubbing his penis on their genitals until he ejaculated, and having them masturbate him, though not all of this sexual activity occurred on each occasion. [CR Doc. 52 at 17, 50-55; CR Doc. 39-1 at 4-7, 10-11; CR Doc. 39-6 at 3-5; CR Doc. 39-7 at 15]. According to Petitioner's report to National Center for Missing and Exploited Children (NCMEC), these girls "came onto him sexually," "begged [him] to perform oral sex on them," and "wanted to have intercourse with [Petitioner]," but he refused to have intercourse. [CR Doc. 52 at 51-52; CR Doc. 39-1 at 4; CR Doc. 39-6 at 4; see also CR Doc. 39-7 at 7; Doc. 43-7 at 3: Sealed Sentencing Memorandum, Ex. 7].

On September 27, 2009, while Petitioner was in bed with another woman, he received a telephone call from his wife, who was at their home in Gastonia. [CR Doc. 52 at 22, 89]. Petitioner's wife told Petitioner that she had had a restless night and wanted to know if he had been cheating on her. [Id.]. Petitioner confessed that he had, explaining to her that "he had been picking women up on the street and that he just couldn't stop," and agreed to counseling. [Id. at 22-23, 90]. About a week later, Petitioner traveled to Virginia to meet with the chair of the Lutheran organization that administered the Village of Hope, confessing that he had an addiction to sex but omitting any mention of his molestation of young girls. [Id. at 23-24].

Petitioner then went to North Carolina, and he and Ms. Bollinger had a telephone interview with Dr. Milton Magness, a psychologist in Houston, Texas, who specializes in treating clergy members who have sex addictions but are working to stay in their marriages. [Id. at 22, 24-25, 62]. Petitioner and his wife scheduled a three-day session with Dr. Magness for mid-November 2009, and shortly after that interview, in early October, Petitioner returned to Haiti "because [they] had business . . . [he] had to take care of." [Id. at 24-25]. Petitioner testified during his sentencing hearing that he did not have any further sexual contact with any of the young girls in Haiti after

his return, although "[t]he girls came to the gate numerous times[,] . . . still seeking . . . help." [Id. at 25].

Petitioner left Haiti in mid-November 2009 and traveled to Houston, where he and Ms. Bollinger had a three-day intensive session with Dr. Magness. [Id. at 26, 63]. During Petitioner's first individual session with Dr. Magness, he told Dr. Magness about his sexual contact with the young girls in Haiti. [Id. at 27-29]. Dr. Magness stopped him during that session and reminded Petitioner that he had earlier signed an informed consent form and that Dr. Magness would have to report any injuries to a child. [Id. at 64]. Not appearing "overly concerned," Petitioner continued disclosing his sexual contacts, including his contacts with the girls in Haiti. [Id. at 64-65]. When asked whether he had had any sexual contact with children in the United States, Petitioner "was adamant" that he had not. [Id. at 72]. Dr. Magness later testified that "at that point" he did not understand how Petitioner could "seem[] unconcerned about what was happening in another country" but be "adamant about saying that he had not done anything like that in the [United States]," ultimately concluding that "perhaps he thought he was beyond the reach of the law because . . . his behavior had taken place in another country." [Id. at 72-73]. After Petitioner completed his disclosures and made the same disclosures to Ms. Bollinger, Dr. Magness called the National Center for Missing and Exploited Children ("NCMEC"), and both Petitioner and Ms. Bollinger joined the call to ensure that the information provided to NCMEC was accurate. [Id. at 74-75, 93].

Informing Petitioner and Ms. Bollinger that he could not help them further, because he did not treat sex offenders, Dr. Magness referred Petitioner to Sante, an in-patient treatment program for sex addicts near Dallas, Texas. [Id. at 35, 63, 66, 70, 96]. Learning that Sante did not have a bed immediately available, Petitioner decided, against the strenuous advice of Dr. Magness and

the advice of the NCMEC representative, to return to Haiti. [Id. at 77-78, 96; CR Doc. 39-1 at 12; CR Doc. 43-7 at 4). According to Dr. Magness, because Petitioner made a point of saying that the children in Haiti had initiated all sexual contact, he was concerned that Petitioner would make himself available and "believed that he was not at fault because he didn't initiate" the sexual contact. [CR Doc. 52 at 77-78]. Petitioner testified that he did not re-offend during his final stint in Haiti and was admitted at Sante in December 2009, where he stayed in treatment for 96 days. [Id. at 36-37; CR Doc. 39-7 at 23]. Following his release from the in-patient program at Sante, Petitioner moved back to Gastonia, where he began attending Sex Addicts Anonymous meetings, meetings he continued attending until he was arrested. [Doc. 52 at 39, 99-100].

B. Petitioner's Indictment and Guilty Plea.

Petitioner was ultimately indicted by a federal grand jury and charged with two counts of traveling in foreign commerce and engaging in illicit sexual conduct with a minor, in violation of 18 U.S.C. § 2423(c) and (e). [CR Doc. 1]. Seven months after he was charged, Petitioner filed a motion for a bill of particulars, requesting that the Government specify the identity of the victims, as well as whether Petitioner was alleged to have engaged in sexual acts as defined in 18 U.S.C. § 2246 or commercial sexual acts as defined in 18 U.S.C. § 1591. [CR Doc. 18].

In response, the Government identified the two minors, one denominated as CV3 in investigative reports whose date of birth was May 10, 1997, and the other denominated as CV2 in investigative reports whose date of birth was February 17, 1998. [CR Doc. 20]. The Government noted that it intended to prove that Petitioner gained access to his victims by providing them and other local children with food and clothing and engaged in sexual acts with them, as defined in 18 U.S.C. § 2246. [Id.].

Thereafter, Petitioner moved to dismiss the indictment against him, arguing that § 2423(c) is an unconstitutional exercise of the Commerce Clause powers. [CR Doc. 22]. The Government filed a response in opposition to Petitioner's motion, arguing that Congress had the authority to enact § 2423(c) under the Foreign Commerce Clause of the United States Constitution and that, even if not authorized by the Foreign Commerce Clause, §§ 2423(c) and (f)(1) are necessary and proper to the implementation of the international treaty obligations of the United States. [CR Doc. 23]. Two days later, this Court entered a text order denying Petitioner's motion to dismiss, noting that it would ultimately issue a written order. In that order, this Court declined to decide whether § 2423(c) was authorized by the Foreign Commerce Clause but nevertheless upheld its constitutionality, holding that it was authorized by the Necessary and Proper Clause of the Constitution, consistent with the United States' alternative argument. [CR Doc. 34]. The next day, Petitioner entered a conditional guilty plea, without a plea agreement, in accordance with Federal Rule of Criminal Procedure 11(a)(2), in which he reserved his right to appeal the denial of his motion to dismiss. [CR Doc. 24].

C. Petitioner's Sentencing.

The probation office submitted a presentence report ("PSR"), in which it calculated a preliminary Sentencing Guidelines term of life in prison, based on a total offense level of 43 (reduced from a level 44) and a criminal history category of I. [CR Doc. 32 at ¶¶ 43, 53: PSR]. The probation officer also noted, however, that Petitioner was subject to a statutory maximum of 30 years as to each offense, resulting in a total statutory maximum and Guideline term of 60 years in prison. [CR Doc. 32 at 19; see also U.S.S.G. § 5G1.1(a)].

Responding to the draft PSR, the Government objected, first, to the inclusion of paragraphs in the PSR describing sexual contact between Petitioner and victims known as CV1 and CV4 as

part of the offense-level calculation. [CR Doc. 30]. The Government explained that, although the sexual conduct engaged in by Petitioner included CV1's masturbating him and CV4's touching his penis, as well as his fondling both of the girls, his contact with these victims did not constitute "illicit sexual conduct" as defined in 18 U.S.C. § 2246 and should not be considered in calculating Petitioner's offense level. [CR Doc. 30 at 1-2]. The United States also objected to the failure of the probation officer to recommend a five-level enhancement under Sentencing Guidelines § 4B1.5(b), based on Petitioner's status as a repeat and dangerous sex offender against minors, noting that Petitioner admitted during his phone call to NCMEC that he performed oral sex on two eleven-year-old girls on at least four occasions. [CR Doc. 30 at 2].

Petitioner objected to the draft PSR as well, challenging, in addition to the inclusion of his conduct toward CV1 and CV4 in the offense-level calculations, the probation officer's use of Sentencing Guidelines § 2G1.3, rather than § 2A3.1, in calculating Petitioner's base offense level. [CR Doc. 31]. Petitioner also objected to a vulnerable-victim enhancement, calculating a total offense level of 35 and an advisory Guidelines range of imprisonment of between 168 and 210 months in prison. [Id.].

In response to these objections, the probation officer removed Petitioner's conduct toward CV1 and CV4 from the offense-level calculations but added a five-level enhancement based on Petitioner's status as a repeat and dangerous offender, consistent with the Government's objections. [CR Doc. 32 at 22]. The probation officer continued to apply § 2G1.3, noting that the commentary to that guideline includes § 2423 in its entirety. [Id. at 23].

Also, in preparation for Petitioner's sentencing hearing, the Government submitted victim-impact statements from the victims of Petitioner's offense and their family members. CV2, who was 15 years old when she wrote the letter about four years after her abuse, wrote that she feels

ashamed of herself, that "[e]verybody is pointing fingers at [her]," that she does not know what to do, and that she "keep[s] on thinking about that thing." [CR Doc. 43-3 at 4]. CV2 stated further that she "always ha[s] tears in [her] eyes" and that, "[f]or [her], [she] no longer exist[s]." [Id.].

CV3 stated in her impact statement that she is ashamed of herself every day, she is ashamed before her mother, siblings, and friends, and her future is ruined, as everyone in the area knows what happened and points fingers at her when she passes by. [CR Doc. 43-3 at 8]. CV3 stated that she cries every day and that no one can console her, stating:

> As for me, the best solution is to end my life. I don't like to talk about that because every time, I talk about it, it rips out my guts, my dreams are ruined, and it takes a toll on me. Since then, I can no longer do as well in school as I used to before, I can't even explain it to my family.

[Id.]. CV3's mother described believing that Petitioner was doing something good for her daughter, when, instead, he was abusing her. [CR Doc. 43-3 at 1]. According to CV3's mother, CV3 "has no hope in the future" and "lives in pain," does not do well in school anymore, and when CV3 and her mother walk around their neighborhood, "everybody stares at [them] and bad-mouths [them]." [Id.]. CV3's mother concludes, "[e]very time I look at her, it makes me sad, the way I see her being tormented by it." [Id.].

Like the other victims, CV4 stated that she has "great sadness" in her heart and that others in her neighborhood ridicule her, point fingers at her, talk about her, and humiliate her. [CR Doc. 43-3 at 5]. CV4 stated that, because of this reaction, she cannot walk around town and that "[e]very time [she] sit[s] down and think[s] about it, [she] ha[s] tears running in [her] eyes." [Id.]. CV4's uncle corroborated CV4's reports of humiliation, stating that the entire family is bad-mouthed and ridiculed when they go outside, that they "live really badly," and that they "are like scars on the

area." [CR Doc. 43-3 at 7]. Finally, CV1's mother reported that she and her daughter "have been living in the woods as a result" of her daughter's abuse. [CR Doc. 43-3 at 6].

This Court conducted Petitioner's sentencing hearing, during which the Court overruled Petitioner's remaining objections, CR Doc. 52 at 6-7, and calculated a total offense level of 43 and a criminal history category of I, resulting in a preliminary advisory term of life in prison, limited by the statutory maximum of 30 years as to each count of conviction, or 60 years, CR Doc. 52 at 7. During the sentencing hearing, the Court heard testimony from Petitioner and Ms. Bollinger, Dr. Magness, and Dr. William Tyson, a psychologist hired to testify about Petitioner's risk of recidivism, among others.

One of those witnesses, Marie Major, ran an orphanage near the Village of Hope in Haiti and testified that it is not unusual for impoverished young girls in that area to offer themselves sexually in exchange for food because they are poor and hungry. [CR Doc. 52 at 117-19, 129]. Dr. Tyson testified to his examination of Petitioner and his conclusions that Petitioner is not a pedophile, notwithstanding his molestation of the girls in Haiti and his admission that he was sexually aroused by children, CR Doc. 52 at 139, 143-44, 157; that Petitioner is a good candidate for treatment, particularly if it is judicially imposed; and that Petitioner's risk for recidivism is low, Id. at 150-51.

When given the opportunity to allocute, before the district court's pronouncement of sentence, Petitioner acknowledged that he "hurt a lot of girls," as well as his wife, and stated that he wanted help so badly that he "was willing to take the risk" of being punished for his conduct. [CR Doc. 52 at 168-69]. Petitioner regretted that he could not get help without "indict[ing] himself" and that he could not "have received the help that [he] needed before [his] disease progressed to the degree that it did." [CR Doc. 52 at 169-70].

Anthony G. Scheer, one of the two attorneys who represented Petitioner, then argued in favor of a 55-year variance, asking the Court to sentence Petitioner to five years in prison. [CR Doc. 52 at 172]. Although Petitioner, through counsel, acknowledged that he had "molested some girls in Haiti back in 2009," he argued that his life had primarily been one of service and requested that the Court impose a sentence that would enable Petitioner, who was 68 years old, to get out of prison before the end of his life. [Id. at 173-74]. Petitioner also noted that he voluntarily reported his offenses and that leniency in his case would encourage "every sex offender out there lurking in the shadows" to do what he had done. [Id. at 175-76]. Petitioner noted further that he had provided a detailed confession, engaged in therapy, and continued treatment through SAA. [Id.]. Petitioner argued that there was no significant risk that he would reoffend, such that there was no need for specific deterrence, and that by imposing a significant downward-variance sentence, the Court would encourage other offenders to come forward. [Id. at 177-78].

In response to Petitioner's argument that a significant downward variance would benefit children by encouraging others to stop offending and to self-report, this Court asked Petitioner what a "five-year sentence say[s] to the victims and their families in Haiti and to future victims that consider coming forward against a powerful authority figure." [CR Doc. 52 at 178]. In response, Petitioner's counsel stated that he did not think that the victims had "a strong interest" in a long sentence and that a lower sentence would not have a "palpably different" effect on them. [Id. at 178-79]. Petitioner also argued that even if there were people who would misunderstand a five-year sentence, it "would be worth it," if such a sentence caused even one offender to seek help, rather than continuing to victimize young girls out of fear of a long sentence. [CR Doc. 52 at 181].

In response to Petitioner's arguments in mitigation, the Government noted that Petitioner did not express genuine remorse for his victims and, instead, seemed more remorseful that his wife and friends in Haiti were hurt. [CR Doc. 52 at 184]. The Government noted that Petitioner acknowledged that he "sexually acted out" but never said he was sorry to the victims and did not "own[] what he did to th[ose] children." [Id.]. The Government noted further that it was recommending a 25-year sentence, which was more than a 50% reduction, and that Petitioner was asking the court to impose a 90% downward-variance sentence, a sentence the Government suggested would be "an insult to the victims." [Id. at 185]. Addressing Petitioner's argument in favor of leniency based on his having self-reported his offenses, the Government noted that Petitioner had not sought treatment in order to report his offenses and that, while Petitioner "deserve[d] some credit," he did not deserve a 90% reduction for his self-reporting. [Id. at 186].

After hearing Petitioner's evidence, as well as both parties' arguments, this Court sentenced Petitioner to 25 years in prison. [Doc. 52 at 192]. The Court stated that it had "considered the arguments for a variance set forth in the defendant's sentencing memorandum and argued for" during the sentencing hearing, "including but not limited to the arguments for a variance based upon unique factors of this case." [Id. at 188]. In particular, the Court noted that one of the most unique factors was "the out-of-the-shadows self-reporting aspect of the case," noting that the Government "candidly indicate[d] that the prosecution would have never probably happened without that self-reporting." [Id.]. The Court also noted Petitioner's efforts at treatment and self-improvement between his release from Sante and his arrest, which included his assisting others who were combating their addictions. [Id.]. The Court addressed Petitioner's age, noting that he was older than many of the defendants the Court had sentenced for similar offenses and that "[a]ny sentence imposed ... takes on greater significance because of the life span issue

involved." [Doc. 52 at 189]. And, the Court acknowledged the years of pastoral work Petitioner had given to "some of the poorest of poor people," as well as the "impressive" support family and friends and community he enjoyed. [Id.].

The Court then stated, however, that all of Petitioner's positive characteristics and the positive aspects of the case had to be "balanced against the nature and circumstances of [Petitioner's] offense," noting that Petitioner's was "one of the most heinous cases" that the Court had encountered. [CR Doc. 52 at 190]. The Court noted that "[t]he abuse of trust that is involved in an aid worker taking advantage of very poor, very needy children in the way that [Petitioner] did" was an unusual factor, as well as the young age of the victims, which the Court characterized as "very troubling." [Id.]. Addressing Ms. Majors' testimony that young Haitian girls offer themselves as a way of getting food and clothing, the Court stated that "girls in Haiti need protection from molesters of children just as much as any other girls," and the Court "reject[ed] the notion proffered by [Petitioner] repeatedly ... that the girls seduced him." [Id.]. The Court stated further that "the notion that 11 year old girls seduced [Petitioner], a person who learned how to live a double life with great efficiency, ... is preposterous." [Id. at 191]. The Court then referenced the victim-impact statements, noting that the victims reported lacking hope in the future and reported being ridiculed, having difficulty sleeping, and living with pain and heartbreak, with one victim having considered suicide. [Id.]. The Court found that these were foreseeable consequences caused by "[t]he director of the House of Hope engaged in self-absorbed, destructive, denigrating, abusive, degrading conduct that resulted in the loss of hope, loss of trust." [Id.].

The Court then stated that it had considered the sentencing factors set forth in 18 U.S.C. § 3553(a) and found that a substantial variance was warranted if it was to do Petitioner any good,

given his age, but that a variance greater than that recommended by the Government was "not warranted by the facts of this case." [Id.]. The Court concluded that a sentence of 25 years was sufficient, but not greater than necessary, to accomplish the § 3553(a) sentence objectives, including the need for the sentence to reflect the seriousness of the offense, to promote respect for the law, to provide just punishment and adequate deterrence, and to protect the public from further crimes of Petitioner. [Id.].

D. Petitioner's Appeal and Motion to Vacate.

Petitioner appealed his convictions and sentence, arguing that the statute that prohibits traveling in foreign commerce and engaging in illicit sexual conduct, 18 U.S.C. § 2423(c), is unconstitutional. Petitioner also argued that his sentence is procedurally and substantively unreasonable. See United States v. Bollinger, 798 F.3d 201 (4th Cir. 2015). The Fourth Circuit affirmed this Court's judgment. Id. at 222. Petitioner filed a petition for writ of certiorari. United States v. Bollinger, No. 14-4086 (4th Cir.). The Supreme Court denied the petition on May 23, 2016.

Petitioner timely filed the pending motion to vacate on May 22, 2017. [CV Doc. 1]. The Government moved to dismiss Petitioner's motion. [CV Doc. 10]. In support of the motion to dismiss, the Government submitted affidavits from Scheer [CV Doc. 10-1], as well as from Steven T. Meier [CV Doc. 10-2], who also represented Petitioner before this Court. The Petitioner responded to the Government's motion. [CV Doc. 13]. Petitioner has also made two motions to supplement and one motion to amend his motion to vacate. [CV Docs. 14, 15, 21].

II. STANDARD OF REVIEW

Rule 4(b) of the Rules Governing Section 2255 Proceedings provides that courts are to promptly examine motions to vacate, along with "any attached exhibits and the record of prior

proceedings ..." in order to determine whether the petitioner is entitled to any relief on the claims set forth therein. As discussed above, after examining the record in this matter, the Court finds that the arguments presented by Petitioner can be resolved without an evidentiary hearing based on the record and governing case law. See Raines, 423 F.2d at 529.

III. DISCUSSION

A. Petitioner's Claims of Ineffective Assistance of Counsel.

The Sixth Amendment to the U.S. Constitution guarantees that in all criminal prosecutions, the accused has the right to the assistance of counsel for his defense. See U.S. CONST. amend. VI. To show ineffective assistance of counsel, Petitioner must first establish a deficient performance by counsel and, second, that the deficient performance prejudiced him. See Strickland v. Washington, 466 U.S. 668, 687-88 (1984). In making this determination, there is "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689; see also United States v. Luck, 611 F.3d 183, 186 (4th Cir. 2010). Furthermore, in considering the prejudice prong of the analysis, the Court "can only grant relief under . . . Strickland if the 'result of the proceeding was fundamentally unfair or unreliable.'" Sexton v. French, 163 F.3d 874, 882 (4th Cir. 1998) (quoting Lockhart v. Fretwell, 506 U.S. 364, 369 (1993)). Under these circumstances, the petitioner "bears the burden of affirmatively proving prejudice." Bowie v. Branker, 512 F.3d 112, 120 (4th Cir. 2008). If the petitioner fails to meet this burden, a "reviewing court need not even consider the performance prong." United States v. Rhynes, 196 F.3d 207, 232 (4th Cir. 1999), opinion vacated on other grounds, 218 F.3d 310 (4th Cir. 2000).

To establish prejudice in the context of a guilty plea, a petitioner must show that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would

have insisted on going to trial." Meyer v. Branker, 506 F.3d 358, 369 (4th Cir. 2007) (quoting Hill v. Lockhart, 474 U.S. 52, 59 (1985)). In evaluating such a claim, statements made by a defendant under oath at the plea hearing carry a "strong presumption of verity" and present a "formidable barrier" to subsequent collateral attacks. Blackledge v. Allison, 431 U.S. 63, 73-74 (1977). Indeed, "in the absence of extraordinary circumstances, the truth of sworn statements made during a Rule 11 colloquy is conclusively established, and a district court should dismiss ... any § 2255 motion that necessarily relies on allegations that contradict the sworn statements." United States v. Lemaster, 403 F.3d 216, 221-22 (4th Cir. 2005).

When a defendant pleads guilty, he waives all nonjurisdictional defects in the proceedings conducted prior to entry of the plea." United States v. Moussaoui, 591 F.3d 263, 279 (4th Cir. 2010). Thus, a knowing and voluntary guilty plea "forecloses federal collateral review" of prior constitutional deprivations, including allegations of ineffective assistance of counsel that do not affect the voluntariness of the plea. See Fields v. Att'y Gen. of Md., 956 F.2d 1290, 1294-96 (4th Cir. 1992); accord United States v. Torres, 129 F.3d 710, 715 (2d Cir. 1997); Wilson v. United States, 962 F.2d 996, 997 (11th Cir. 1992); Smith v. Estelle, 711 F.2d 677, 682 (5th Cir. 1983). A guilty plea is valid when it "represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." Burket v. Angelone, 208 F.3d 172, 190 (4th Cir. 2000) (citing North Carolina v. Alford, 400 U.S. 25, 31 (1970)).

In Lafler v. Cooper, 566 U.S. 156 (2012), the Supreme Court held that a criminal defendant has a right to the effective representation of counsel during the plea-bargaining stage of the prosecution and that whether this right was abridged is governed by the familiar standard described in Strickland v. Washington, 466 U.S. 668 (1984). Lafler, 566 U.S. at 1620-63. The parties in Lafler agreed that counsel's representation was deficient when he advised the defendant to reject

the plea offer on the grounds he could not be convicted at trial. Id. at 163. Applying Strickland, the Court in Lafler held that where a defendant argues that deficient advice resulted in his rejection of a favorable plea offer, he must show, in addition to the deficient advice, that (1) but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court, (2) that the court would have accepted its terms, and (3) that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed. Id. at 164.

When the ineffective assistance claim relates to a sentencing issue, the petitioner must demonstrate a "'reasonable probability' that his sentence would have been more lenient" but for counsel's error. Royal v. Taylor, 188 F.3d 239, 249 (4th Cilr. 1999) (quoting Strickland, 466 U.S. at 694)). If the petitioner fails to meet this burden, the "reviewing court need not even consider the performance prong." United States v. Rhynes, 196 F.3d 207, 232 (4th Cir. 1999), opinion vacated on other grounds, 218 F.3d 310 (4th Cir. 2000).

1. Petitioner's claim related to counsel's pre-plea advice about the maximum penalties Petitioner faced if convicted without a plea agreement.

Petitioner first argues that his trial counsel provided constitutionally deficient representation by failing to advise him of the role that the United States Sentencing Guidelines would play "in computing his sentence" and by failing to "calculate[] an approximately accurate Guideline offense level and the resulting advisory sentencing range." [CV Doc. 1-2 at 6]. Petitioner asserts that had he been accurately advised of "the looming certainty of an advisory Guideline sentence of life without parole and the strong possibility of a sixty[-]year sentence," he would have urged his lawyers to pursue a written plea agreement that significantly reduced his sentencing exposure. Petitioner states in an affidavit that until his PSR was prepared, he had "no idea" that his advisory Guidelines term would be life in prison. [CV Doc. 1-3 at 2]. Petitioner

also asserts that Scheer admitted that "he 'never saw that coming'" and that Meier advised him that because of his record of community service and lack of criminal history, he likely faced a sentence of "far less" than 30 years. [Id.]. Finally, Petitioner asserts that while he knew that both of the counts he pleaded guilty to carried a maximum penalty of 30 years in prison, he did not know that pleading guilty to both counts could result in a sentence of 60 years in prison and that if he had known about the "strong possibility of a sixty[-]year sentence," "he would have urged his lawyers to pursue a written plea agreement that significantly reduced his potential sentencing exposure." [CV Doc. 1-2 at 8; CV Doc. 1-3 at 2].

Petitioner's allegations are not sufficient to support a claim of constitutionally deficient representation or the prejudice necessary under Strickland. Scheer states in his affidavit that he believed that Petitioner had a "creditable argument" that Sentencing Guidelines § 2A3.1 would govern Petitioner's advisory Guidelines range. [CV Doc. 10-1 at ¶ 7]. This assertion is consistent with Petitioner's objections to the PSR in which Petitioner asserted that his total offense level was 35 and that the advisory Sentencing Guidelines range of imprisonment was 168-210 months. [CR Doc. 31 at 4]. This assertion is also consistent with an email attached to Meier's affidavit in which Petitioner tells an acquaintance in Haiti that the Government had offered to "settle [his] case out of court without having a trial" but he would face "somewhere between 12 and 20 years" in prison. [CV Doc. 10-2 at 14].

Neither the motion to vacate nor Petitioner's affidavit contradict Scheer's assertion that Scheer believed the proper Guidelines calculation yielded an advisory range well below life in prison, and Petitioner has not alleged facts sufficient to support his assertion that his trial counsel provided constitutionally deficient pre-plea representation based on their predictions about the sentence Petitioner might receive. As the Supreme Court has stated, "uncertainty is inherent in

predicting court decisions." McMann v. Richardson, 397 U.S. 759, 771 (1970). Accordingly, an erroneous prediction by counsel of what a court will do or what sentence a defendant is likely to serve does not establish constitutionally ineffective assistance. See Spiller v. United States, 855 F.3d 751, 757 (7th Cir. 2017); Moreno-Espada v. United States, 666 F.3d 60, 65 (1st Cir. 2012); United States v. Washington, 619 F.3d 1252, 1258-59 (10th Cir. 2010); cf. Little v. Allsbrook, 731 F.2d 238, 240 (4th Cir. 1984) (holding that an attorney's "grossly misinform[ing]" a defendant "about parole possibilities" did not establish constitutionally ineffective assistance of counsel requiring the district court to permit him to withdraw his guilty plea).

Additionally, Petitioner asserts that he should have been "accurately apprised of the looming certainty of an advisory sentence of life without parole and the strong possibility of a sixty[-]year sentence." Petitioner, however, never faced an advisory Guidelines term of life without parole, because the applicable statutory maximum terms of imprisonment for the two counts he faced capped the advisory Guidelines term at 60 years. See 18 U.S.C. § 2423(c); U.S.S.G. § 5G1.1(a). Furthermore, there is no evidence that Petitioner ever faced "the strong possibility of a sixty-year sentence." Both the Government and Petitioner sought a downward-variance sentence for Petitioner, who was 68 years old when he was sentenced. This Court granted that request, sentencing Petitioner to 25 years in prison, well below the 60-year sentence that he asserts there was a "strong possibility" he would receive. Petitioner has not shown that the information he received from Meier and Scheer about the sentence he might receive was false or alleged anything more than a possible misjudgment about how this Court might rule on disputed guideline issues. Petitioner, therefore, has not established that either Meier or Scheer provided constitutionally deficient representation based on their pre-plea sentence predictions or advice. This claim, therefore, fails.

Petitioner has also failed to establish prejudice based on the advice he received about the potential sentence he would face. Petitioner asserts that had he known that he faced a Guidelines sentence of life without parole and the strong possibility of a 60-year sentence, "he would have urged his lawyers to pursue a written plea agreement that significantly reduced his potential sentencing exposure." [CV Doc. at 1-2 at 8]. Petitioner also asserts that his trial attorneys should have "sought from the Government a plea agreement that called for the dismissal of one count of the Indictment." [Id. at 9]. This assertion that his trial attorneys should have sought a plea to a single count fails the prejudice prong of Strickland's ineffective-assistance-of-counsel standard; it is speculative and does not establish a reasonable probability of a different result. Petitioner does not assert, for example, that had his trial attorneys negotiated such a plea, he would have accepted it. Additionally, both Scheer and Meier state in their affidavits that the Government offered Petitioner the opportunity to plead guilty to one of the two counts against him, in exchange for the Government's agreement to dismiss the other count, and that Petitioner rejected that offer. [See CV Doc. 10-1 at ¶¶ 5, 6, 8; CV Doc. 10-1 at 5-11; CV Doc. 10-2 at ¶¶ 4, 5; CV Doc. 10-2 at 4].

In sum, this first claim of ineffective assistance of counsel is without merit.

2. Petitioner's claim that counsel was ineffective for failure to convey plea offer.

Petitioner next argues that Meier "failed to convey" a plea offer from the Government that would have resulted in a sentence of eight years and that, had he been aware that he faced a Guidelines term of life without parole and a statutory maximum term of 60 years in prison if convicted of both of the charged offenses, he "would have accepted the eight[-]year offer." [CV Doc. 1-2 at 11]. Petitioner asserts in an affidavit submitted in support of Petitioner's motion to vacate that Meier informed Petitioner that Meier had received a plea offer for 8 years' imprisonment, but that Meier had already turned it down on Petitioner's behalf. [CV Doc. 1-3 at

2]. Petitioner asserts further that when he learned of the plea offer, he "did not fully understand the consequences" of Meier's action in rejecting the offer. [Id.].

Both Meier and Scheer state in their affidavits that Petitioner was unwilling to accept any plea offer that would result in significant jail time, because Petitioner's age and medical condition would mean that even a five-year sentence was effectively a life sentence. [CV Doc. 10-2 at ¶ 3: CV Doc. 10-1 at ¶ 9]. Even if Petitioner's assertions are accepted as true, as they must be when resolving a motion to vacate without an evidentiary hearing, he fails to allege constitutionally deficient representation.

First, Petitioner's statement that he would have accepted the offer had he understood the maximum sentence he could receive for the two charged offenses evidences his understanding that, even at the time he learned of the alleged offer, he understood that he could still accept the offer. Petitioner offers no evidence that the Government's offer had lapsed by the time he learned of it from Meier or that Meier's initial rejection of that offer was not reversible had Petitioner asked Meier to revive the offer. To the contrary, Petitioner's allegations suggest the opposite.

Second, Petitioner asserts that had he been properly advised that the advisory Guideline sentence would be life, he would have accepted the offer, but at the time the offer was extended, the parties were not certain what guideline this Court would apply in calculating Petitioner's advisory Guidelines range. And, as noted above, Petitioner's first condition precedent to accepting the plea—his understanding that he faced an advisory Guidelines term of life in prison—would never have been satisfied because the Guidelines did not advise a sentence of life without parole, no matter what guideline was applied. Petitioner also suggests that had he understood that he faced a sentence of 60 years in prison, he would have accepted the plea. Petitioner, however, was advised of the charges against him and that each offense carried a sentence of 30 years at his initial

appearance in this matter. Petitioner does not assert that Meier advised him that his sentences would run concurrently.

Petitioner alleges that Meier did not convey a plea offer before Meier rejected the offer on Petitioner's behalf, but Petitioner also makes clear that he understood that he nevertheless could have accepted the offer and would have accepted the offer but for Meier's failure to advise Petitioner of the sentencing consequences of his decision to reject the Government's offer. Petitioner's claim of prejudice, therefore, depends on his claim of deficient sentencing advice. Petitioner's allegations, however, do not support his assertion that Meier gave him wrong or bad advice about his sentencing exposure. Because the prejudice Petitioner asserts depends on constitutionally deficient advice and Petitioner has not alleged facts from which this Court could conclude that he received constitutionally deficient advice from Meier, Petitioner cannot show a reasonable probability that he would have accepted the alleged plea offer, even if he had learned about it earlier, and received a lower sentence as a result. See Frye, 566 U.S. at 150 (a defendant must show "a reasonable probability [he] would have accepted the prosecutor's original offer of a plea offer if the offer had been communicated to him").

In sum, this second claim of ineffective assistance of counsel is also without merit.

3. Petitioner's claim that counsel was ineffective for failing to challenge venue.

Petitioner next asserts that his trial counsel improperly failed to challenge this Court's jurisdiction to adjudicate the case against him because venue did not properly lie in the Western District of North Carolina. This argument is meritless.

As a defendant in a criminal trial, Petitioner had a constitutional right to be tried in the district where his crime was committed or where Congress has provided venue. U.S. Const. art. III, § 2. Section 3237(b) of Title 18 of the United States Code provides that where an offense

involves the transportation in foreign commerce, it is a continuing offense and "may be ... prosecuted in any district from, through, or into which such ... person moves." The statute Petitioner was charged with violating, 18 U.S.C. § 2423(c), provides that "[a]ny United States citizen or alien admitted for permanent residence who travels in foreign commerce, and engages in any illicit sexual conduct with another person shall be ... imprisoned not more than 30 years ...." 18 U.S.C. § 2423(c). This offense has three elements: American citizenship; travel in foreign commerce; and illicit sexual conduct. United States v. Pendleton, 658 F.3d 299, 304 (3d Cir. 2011).

Under § 3237(b), venue was proper in the Western District of North Carolina because, as Ms. Bollinger testified during Petitioner's sentencing hearing, Petitioner and his wife lived in this district before they traveled to Haiti to work in the Village of Hope, and they traveled back and forth between Gastonia and Haiti during the years that Petitioner worked at the Village of Hope. [CV Doc. 52 at 161-62]. Petitioner traveled in foreign commerce from this district to Haiti, where he committed his offenses against his victims, and venue was, therefore, proper in this district under Section 3237(b).

Even if venue in this district were not proper under Section 3237(b), it would be proper under 18 U.S.C. § 3238, which provides that venue is proper in the district where a defendant is arrested or "first brought," where the offense was begun or committed outside of the jurisdiction of any particular state or district. The Fourth Circuit held in United States v. Levy Auto Parts that venue in the district of arrest was proper, even though the charged conspiracy "was essentially foreign." 787 F.2d 946, 952 (4th Cir. 1986). And the Third Circuit held in Pendleton that venue for a prosecution under Section 2423(c) was proper in the district of arrest, even though the defendant's offense began in New York but was "essentially foreign" because the illicit sex act

occurred in Germany. Pendleton, 658 F.3d at 305. The Pendleton court noted that the Fourth Circuit's decision in Levy Auto Parts explicitly rejected the argument relied on by the district court in United States v. Perlitz, 729 F. Supp. 2d 46 (D. Conn. 2010), the case on which Petitioner relies. Because Petitioner was arrested in the Western District of North Carolina, venue was proper in this district under Section 3238.

Under either Section 3237(a) or Section 3238, Petitioner was properly prosecuted in this district. Petitioner has not shown, therefore, either deficient representation or prejudice based on his trial attorney's failure to challenge venue.

4. Sentencing advocacy.

Notwithstanding the significant downward-variance sentence he received, Petitioner next argues that his trial counsel improperly "failed to present a comprehensive, all-inclusive argument in mitigation." [CV Doc. 1-2 at 19]. Petitioner complains that his trial counsel failed to obtain statements from the victims addressing their feelings about the punishment Petitioner should receive and failed to argue that his 25-year sentence would create unwarranted sentence disparities among defendants with similar records, see 18 U.S.C. § 3553(a)(6).

With respect to the victim-impact statements and trial counsel's failure to obtain statements from the victims in mitigation, Scheer explains in his affidavit that he tried but was unable to obtain those letters in time for Petitioner's sentencing hearing. [CV Doc. 10-1 at ¶¶ 16-18]. Scheer states that he traveled to Haiti in October of 2012 and again in November of 2013, the latter visit explicitly for the purpose of trying to obtain statements from Petitioner's victims because Scheer had "heard" that the victims felt compassion for Petitioner. [Id. at ¶¶ 17-18]. Scheer states that he attempted for three days to meet with the victims but was unable to get any of the victims to provide a statement. [Id. at ¶ 18]. In September 2015, more than 18 months after Petitioner was

sentenced, Scheer traveled for a third time to Haiti because he had heard that the victims were "surprised and/or dismayed at the sentence [Petitioner] received" and he sought to learn why the victims had written the statements submitted by the Government and considered by this Court during Petitioner's sentencing hearing. [Id. at ¶ 20]. Scheer states that the letters Petitioner now asserts should have been obtained before his sentencing hearing were sent to Scheer after this third trip to Haiti. [Id.].

Petitioner has not established that his trial counsel failed to make reasonable efforts to obtain the more favorable victim statements before his sentencing hearing. Scheer makes clear that he visited Haiti in an effort to obtain favorable statements from the victims just two months before Petitioner was sentenced and stayed there for three days, trying, without success, to obtain helpful statements from Petitioner's victims. And Petitioner does not contradict Scheer's statements that he tried to obtain helpful victim statements in time to assist Petitioner's case in mitigation but was unable to convince any of the victims to give him those statements at that time. Far from deficient representation, the record establishes that Scheer provided Petitioner with vigorous representation in preparation for Petitioner's sentencing hearing in his efforts to provide this Court with victim statements in mitigation.

With respect to the unwarranted-sentence-disparities argument, Petitioner's argument fails because he cannot show a reasonable probability that this Court would have sentenced him to a term below 25 years in prison, even if his trial counsel had argued that his sentence would create unwarranted sentence disparities. Furthermore, due to Petitioner's age and pre-indictment cooperation, Scheer and Meier could reasonably conclude that the most persuasive arguments in mitigation would be the arguments Scheer presented in favor of leniency. Petitioner has not overcome the presumption that his trial attorneys' strategic decision to focus on the arguments

they believed to be the arguments most likely to result in a significant downward-variance sentence—which they achieved for Petitioner—was reasonable and falls well within the range of constitutionally adequate representation. See United States v. Rangel, 781 F.3d 736, 742 (4th Cir. 2015) ("There is a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance,' and 'that, under the circumstances, the challenged action might be considered sound trial strategy.'" (quoting United States v. Higgs, 663 F.3d 726, 739 (4th Cir. 2011))). Having shown neither deficient representation nor prejudice, Petitioner's claim that his attorneys failed to provide adequate representation in seeking leniency on Petitioner's behalf fails.

5. Double jeopardy.

Petitioner argues, finally, that Meier and Scheer improperly failed to challenge certain guideline enhancements as a violation of the double-jeopardy clause of the Fifth Amendment. In particular, Petitioner asserts that two offense-level enhancements violated the Double Jeopardy Clause: (1) the two-level enhancement under Sentencing Guidelines § 2G1.3(b)(4)(A), which this Court applied because the offense involved the commission of a sex act or sexual contact and (2) the five-level enhancement under § 4B1.5(b)(1), which this Court applied because the offense is a covered sex crime, the career-offender guideline did not apply, and Petitioner engaged in a pattern of activity involving prohibited sexual conduct.

This claim of ineffective assistance of counsel fails because each of these enhancements punishes a different offense characteristic. Namely, the base offense level applies to a number of criminal offenses, including the offense Petitioner committed, but also to the transportation of adults in interstate or foreign commerce for the purpose of prostitution, the coercion or enticement of an adult or child to travel in interstate or foreign commerce for the purpose of prostitution, or

the facilitation of travel in interstate or foreign commerce of another person knowing that the person is traveling for the purpose of engaging in illicit sexual contact. See 18 U.S.C. §§ 2421, 2422, 2423(e); U.S.S.G. app. A. Not all these offenses require the commission of a sex act or sexual contact. Therefore, the enhancement based on Petitioner's offenses' having involved sexual contact did not violate double jeopardy. Similarly, the enhancement under § 4B1.5(b)(1) requires a pattern of activity involving prohibited sexual conduct. Neither the base offense level nor the two-level enhancement under § 2G1.3(b)(4)(A) requires a pattern of prohibited sexual conduct. The base offense level and each of these enhancements, therefore, punish different offense characteristics, and their application did not violate double jeopardy.

Because Petitioner has not shown constitutionally deficient representation based on his trial attorneys' failure to challenge the guideline calculation based on double jeopardy, the Court will deny Petitioner's claim of ineffective assistance of counsel on this ground.

B. Petitioner's Motions to Amend and to Supplement.

1. Motions to supplement.

Under Rule 15(d), the Court "may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented." Fed. R. Civ. P. 15(d).

a. First motion to supplement.

In his first motion to amend, Petitioner seeks to supplement his motion to vacate with a copy of an email between Petitioner's trial counsel, Anthony Scheer, and Jean R. Achille, an associate of Petitioner's from Haiti. [CV Doc. 14]. Scheer wrote the email on September 18, 2015, approximately nine months after this Court sentenced Petitioner to 25 years in prison. [Id. at 8]. In the email, Scheer reminds Achilles of Scheer's trip to Haiti in October 2013, which was

for the purpose of obtaining helpful statements from Petitioner's victims before Petitioner's sentencing hearing. In the email to Achilles, Scheer notes that during the October 2013 visit to Haiti "the families were not cooperative anymore." He also states that this was the visit during which the "'man from the embassy' meeting took place," which appears from the remaining context of Petitioner's proposed supplement to refer to the involvement of a mysterious and unidentified man who "followed [the victims' families] to the Oct. 2013 meeting." [Id.]. Scheer opines in the email that the letters that were submitted on behalf of the victims during Petitioner's sentencing hearing were not true, because the girls "were not suicidal and devastated in the ways described in the letters" and "their families were okay with lighter punishment." [Id.]. Scheer speculates that "someone . . . either influenced them to exaggerate/lie in the letter, or possibl[y] wrote the letters for them." [Id.]. Scheer explains that his goal "is to find out if the words and sentiments expressed in those letters was true." [Id.]. (emphasis in original).

The Court will allow Petitioner's motion to supplement his motion to vacate with this email. The email, however, does not change the Court's determination on Plaintiff's claims of ineffective assistance based on sentencing advocacy in this case. The email does not tend to show either deficient representation by Scheer or prejudice. To the contrary, the email corroborates Scheer's statement in his affidavit that he made a significant effort to obtain favorable victim-impact statements before Petitioner's sentencing hearing but was unable to do so. [CV Doc. 10-1 at ¶ 18]. Scheer speculates in the email that the victims may have been pressured to provide more harmful statements than they otherwise would have, but he had no evidence to offer the Court, beyond that speculation, to support his suspicion that the letters did not accurately reflect the girls' feelings.

Petitioner has presented no evidence that Scheer could have found or presented to this Court to impugn the victims' statements. This new evidence Petitioner presents does not show either that Scheer provided deficient representation or that there is a reasonable probability that Petitioner would have received a lower sentence had Scheer performed his duties differently.

b. Second motion to supplement.

On August 28, 2018, Petitioner filed a second motion to supplement his motion to vacate with a letter he received through prison mail on August 23, 2018, purportedly from one of his victims in which the victim makes potentially exculpatory statements.[2] [CV Docs. 15-3, 15-4]. The letter appears to be written in the victim's native Haitian language, perhaps French or Haitian Creole. [See Doc. 15-3]. Following the letter in Petitioner's submission to the Court is what appears to be a non-authenticated translation of the letter with no indication of who translated the letter. [Id.].

The Court will grant Petitioner's motion to supplement the record in his § 2255 proceedings and consider the letter and its putative translation consistent with the aforementioned description. The letter, however, does not relate to any grounds for relief sought by Petitioner. In his motion to supplement, Petitioner refers to his counsel's deficiency "in filing [*sic*] to obtain supportive letters from victims of Petitioner's crimes" and that the letter "sheds additional light on the circumstances surrounding Petitioner's crimes and the aftermath." [CV Doc. 15 at 1-2]. Petitioner's attempt to tie this letter to his claim for ineffective assistance of counsel is ineffectual. The Court has addressed Petitioner's counsel's efforts in sentencing advocacy and this letter, to the extent it is what it purports to be, does nothing to negate those efforts.

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[2] This motion, the letter, and its translation were filed by Petitioner under seal. Because the letter is filed under seal to protect the confidentiality of the victim and a more specific description of the contents of the letter are not necessary to ruling on Petitioner's motion to supplement, the Court does not more specifically describe the victim's statements. [See Doc. 15 and Exhibits].

Further, Petitioner has never claimed that he did not have illicit sexual relations with this victim. In fact, the email that was the subject of Petitioner's first motion to supplement by Scheer to Petitioner's associate, Jean Achille, states that it is "accepted by the Government and us" that Petitioner had "sexual encounters" with this victim when she was "about 11 years old." [Doc. 14 at 7]. Also, this letter at least partially contradicts a previous letter written by this victim to the Court. [See Doc. 1-3 at 11-13]. As such, while the Petitioner's motion to supplement his motion to vacate with this letter is granted, the letter is not relevant to Plaintiff's claims for relief. Even if it were relevant, its only meaningful affect is to call Petitioner's veracity into question.

2. Motion to amend.

Petitioner also seeks to amend his motion to vacate. Whether a defendant may amend his Section 2255 pleading is governed by Federal Rule of Civil Procedure 15. See United States v. Pittman, 209 F.3d 314, 317 (4th Cir. 2000). Rule 15(a) provides that a party may amend its pleading once as a matter of course within 21 days or within 21 days after service of a responsive pleading. Fed. R. Civ. P. 15(a)(1). After 21 days, a party may amend its pleading only with the opposing party's written consent or the court's leave, which should be freely given when "justice so requires." Fed. R. Civ. P. 15(a)(2). "A district court may deny a motion to amend when the amendment would be prejudicial to the opposing party, the moving party has acted in bad faith, or the amendment would be futile." Equal Rights Center v. Niles Bolton Assoc., 602 F.3d 597, 604 (4th Cir. 2010).

The Court first addresses the timeliness of Petitioner's motion to amend. The Government filed its response to Petitioner's motion to vacate on November 15, 2017. [CV Doc. 10]. Petitioner did not file his motion to amend until June 25, 2019, over two years after the Government's

responsive pleading. [Doc. 21]. Because Petitioner's motion to amend is untimely under Rule 15(a)(1), the Court must determine whether it should allow amendment under Rule 15(a)(2).

Petitioner seeks to amend his motion to vacate to allege an additional ground for ineffective assistance of counsel. Petitioner argues that a Ninth Circuit case, United States v. Pepe, 895 F.3d 679 (9th Cir. 2018), makes his conviction unlawful. In Pepe, the Ninth Circuit held that the version of 18 U.S.C. § 2423(c) in effect at the time of Petitioner's conduct was "inapplicable to U.S. citizens living abroad unless they were traveling—meaning something more than being in transit—when they had illicit sex." Pepe, 895 F.3d at 682. Petitioner argues that he was not "traveling" in Haiti within the meaning of § 2423, but rather, he was "residing" there and, therefore, was not within the scope of the statute as it existed in 2009. Petitioner argues that the Court should allow the Petitioner to "amend" his pending Section 2255 motion with this new legal theory because it "'relates back' to the ineffective assistance of counsel claim regarding jurisdiction that Petitioner raised in his original pleading." [CV Doc. 21 at 2].

Section 2255 provides, generally, for a one-year statute of limitations from the date on which a petitioner's judgment becomes final.[3] 28 U.S.C. § 2255(f)(1). The one-year limitations period under 28 U.S.C. § 2255(f)(1) also applies to any supplemental claims raised after an original Section 2255 motion is filed. Farris v. United States, 333 F.3d 1211, 1215 (11th Cir. 2003). Under

[3] A petitioner may also file a Section 2255 petition within one year of when the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, when a right is newly recognized by the U.S. Supreme Court and made retroactively applicable to cases on collateral review, or the petitioner discovered facts supporting the claim that could not have been discovered earlier with due diligence. See 28 U.S.C. §§ 2255(f)(2), (f)(3), and (f)(4). Because none of the latter situations applies in this case, the one-year limitations period began on the date Petitioner's judgment of conviction became final, which in this case occurred when the Supreme Court denied certiorari on May 23, 2016.

Rule 15(c) of the Federal Rules of Civil Procedure, supplemental claims that relate back to the claims in the original, timely motion may be filed after the limitations period has expired. Id. A supplemental claim raised after the limitations period has expired relates back if it arises from the same set of operative facts as the claims in the original motion. Id.; see Mayle v. Felix, 545 U.S. 644, 659 (2005) ("[R]elation back depends on the existence of a common 'core of operative facts' uniting the original and newly asserted claims."); see also United States v. Pittman, 209 F.3d 314, 318 (4th Cir. 2000) (concluding that additional ineffective assistance of counsel claims in an untimely motion to amend did not relate back to the claims in the timely filed petition because the new claims arose from separate occurrences of "both time and type"). "[T]o relate back, an untimely claim must have more in common with the timely filed claim than the mere fact that they arose out of the same trial or sentencing proceeding." Farris, 333 F.3d at 1215. "[N]ew claims alleging different trial errors [are] not part of the same course of conduct, and, as such, [do] not relate back to the date of the . . . timely filed § 2255 motion." Id.

Here, the new claim Petitioner seeks to assert was filed well after the expiration of the one-year statute of limitations and does not relate back to his original pleading. While Petitioner presents several claims of ineffective assistance, see supra, none of those claims arise out of counsel's failure to challenge the scope of § 2423(c). Petitioner argues that his new claim "'relates back' to the ineffective assistance of counsel claim regarding jurisdiction that Petitioner raised in his original pleading." [CV Doc. 21 at 2]. It does not. Counsel's decision not to challenge venue does not arise from the same conduct as a failure to challenge the scope of the statute of conviction. See Turner v. United States, 699 F.3d 578, 585 (1st Cir. 2012) (explaining that the requirement that a claim relate back to the original pleading "cannot be satisfied 'merely by raising some type

of ineffective assistance in the original petition, and then amending the petition to assert another ineffective assistance claim based upon entirely distinct type of attorney misfeasance").

As such, because Petitioner's motion to amend is untimely and does not relate back to his original motion, the Court will deny Petitioner's third motion to amend.

IV. CONCLUSION

For the foregoing reasons, the Court denies and dismisses Petitioner's § 2255 petition.

IT IS, THEREFORE, ORDERED that:

1. Petitioner's Motion to Vacate, Set Aside or Correct Sentence under 28 U.S.C. § 2255 [Doc. 1] is **DENIED** and **DISMISSED**. To this extent, the Government's Motion to Dismiss [Doc. 10] is **GRANTED**.
2. Petitioner's Pro se Status Report and Motion for Extension of Time to File Response/Reply [Doc. 11] is **DENIED** as moot.
3. Petitioner's motions to supplement his Section 2255 Motion to Vacate [Docs. 14, 15] are **GRANTED**.
4. Petitioner's motion to amend his Section 2255 Motion to Vacate [Doc. 21] is **DENIED**.
5. **IT IS FURTHER ORDERED** that pursuant to Rule 11(a) of the Rules Governing Section 2254 and Section 2255 Cases, this Court declines to issue a certificate of appealability. See 28 U.S.C. § 2253(c)(2); Miller-El v. Cockrell, 537 U.S. 322, 338 (2003) (in order to satisfy § 2253(c), a petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong); Slack v. McDaniel, 529 U.S. 473, 484 (2000) (when relief is denied on procedural grounds, a petitioner must establish both that the dispositive

procedural ruling is debatable and that the petition states a debatable claim of the denial of a constitutional right).

Signed: October 8, 2019

Robert J. Conrad, Jr.
United States District Judge

APPENDIX B

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-7808

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

LARRY MICHAEL BOLLINGER,

Defendant - Appellant.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. Robert J. Conrad, Jr., District Judge. (3:12-cr-00173-RJC-1; 3:17-cv-00271-RJC)

Submitted: February 26, 2021 Decided: March 8, 2021

Before GREGORY, Chief Judge, HARRIS, Circuit Judge, and TRAXLER, Senior Circuit Judge.

Dismissed by unpublished per curiam opinion.

Matthew Thomas Gilmartin, MATTHEW GILMARTIN, ATTORNEY AT LAW, LLC, North Olmsted, Ohio, for Appellant.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Larry Michael Bollinger seeks to appeal the district court's order denying relief on his 28 U.S.C. § 2255 motion. The order is not appealable unless a circuit justice or judge issues a certificate of appealability. *See* 28 U.S.C. § 2253(c)(1)(B). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists could find the district court's assessment of the constitutional claims debatable or wrong. *See Buck v. Davis*, 137 S. Ct. 759, 773-74 (2017). When the district court denies relief on procedural grounds, the prisoner must demonstrate both that the dispositive procedural ruling is debatable and that the motion states a debatable claim of the denial of a constitutional right. *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012) (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

We have independently reviewed the record and conclude that Bollinger has not made the requisite showing. Accordingly, we deny a certificate of appealability and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

DISMISSED

APPENDIX C

FILED: May 18, 2021

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-7808
(3:12-cr-00173-RJC-1)
(3:17-cv-00271-RJC)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

LARRY MICHAEL BOLLINGER

Defendant - Appellant

ORDER

The court denies the petition for rehearing.

Entered at the direction of the panel: Chief Judge Gregory, Judge Harris, and Senior Judge Traxler.

For the Court

/s/ Patricia S. Connor, Clerk

APPENDIX D

U.S. Constitution, Article III, Sec. 2:

The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

18 U.S.C. § 2423 (2009) - Transportation of minors (2009)

(a) Transportation with intent to engage in criminal sexual activity. A person who knowingly transports an individual who has not attained the age of 18 years in interstate or foreign commerce, or in any commonwealth, territory or possession of the United States, with intent that the individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, shall be fined under this title and imprisoned not less than 10 years or for life.

(b) Travel with intent to engage in illicit sexual conduct. A person who travels in interstate commerce or travels into the United States, or a United States citizen or an alien admitted for permanent residence in the United States who travels in foreign commerce, for the purpose of engaging in any illicit sexual conduct with another person shall be fined under this title or imprisoned not more than 30 years, or both.

(c) Engaging in illicit sexual conduct in foreign places. Any United States citizen or alien admitted for permanent residence who travels in foreign commerce, and engages in any illicit sexual conduct with another person shall be fined under this title or imprisoned not more than 30 years, or both.

(d) Ancillary offenses. Whoever, for the purpose of commercial advantage or private financial gain, arranges, induces, procures, or facilitates the travel of a person knowing that such a person is traveling in interstate commerce or foreign commerce for the purpose of engaging in illicit sexual conduct shall be fined under this title, imprisoned not more than 30 years, or both.

(e) Attempt and conspiracy. Whoever attempts or conspires to violate subsection (a), (b), (c), or (d) shall be punishable in the same manner as a completed violation of that subsection.

(f) Definition. As used in this section, the term "illicit sexual conduct" means (1) a sexual act (as defined in section 2246 with a person under 18 years of age that would be in violation of chapter 109A et seq.] if the sexual act occurred in the special maritime and territorial jurisdiction of the United States; or (2) any commercial sex act (as defined in section 1591 with a person under 18 years of age.

(g) Defense. In a prosecution under this section based on illicit sexual conduct as defined in subsection (f)(2), it is a defense, which the defendant must establish by a preponderance of the evidence, that the defendant reasonably believed that the person with whom the defendant engaged in the commercial sex act had attained the age of 18 years.

18 U.S.C. § 3237 - Offenses begun in one district and completed in another

(a) Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed. Any offense involving the use of the mails, transportation in interstate or foreign commerce, or the importation of an object or person into the United States is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce, mail matter, or imported object or person moves.

(b) Notwithstanding subsection (a), where an offense is described in section 7203 of the Internal Revenue Code of 1954 [26 USCS § 7203], or where venue for prosecution of an offense described in section 7201 or 7206 (1), (2), or (5) of such Code [26 USCS § 7201 or 7206(1), (2), or (5)] (whether or not the offense is also described in another provision of law) is based solely on a mailing to the Internal Revenue Service, and prosecution is begun in a judicial district other than the judicial district in which the defendant resides, he may upon motion filed in the district in which the prosecution is begun, elect to be tried in the district in which he was residing at the time the alleged offense was committed: Provided, That the motion is filed within twenty days after arraignment of the defendant upon indictment or information.

Federal Rule of Criminal Procedure 18 - Place of Prosecution and Trial

Unless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed. The court must set the place of trial within the district with due regard for the convenience of the defendant, any victim, and the witnesses, and the prompt administration of justice.

No. _____

In the

Supreme Court of the United States

LARRY MICHAEL BOLLINGER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PROOF OF SERVICE

I, MATTHEW T. GILMARTIN, DO SWEAR OR DECLARE THAT ON THIS DATE, OCTOBER 15, 2021, AS REQUIRED BY SUPREME COURT RULE 29, I HAVE SERVED THE ENCLOSED *PETITION FOR A WRIT OF CERTIORARI* ON EACH PARTY TO THE ABOVE PROCEEDING OR THAT PARTY'S COUNSEL, AND ON EVERY OTHER PERSON REQUIRED TO BE SERVED, BY DEPOSITING AN ENVELOPE CONTAINING THE ABOVE DOCUMENTS IN THE UNITED STATES MAIL PROPERLY ADDRESSED TO EACH OF THEM AND WITH FIRST-CLASS POSTAGE PREPAID.

THE NAMES AND ADDRESSES OF THOSE SERVED ARE AS FOLLOWS:

KIMLANI M. FORD, ESQ.
ASSISTANT U.S. ATTORNEY
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SOLICITOR GENERAL OF THE
UNITED STATES
ROOM 5614
DEPARTMENT OF JUSTICE,
950 PENNSYLVANIA AVE., N.W.,
WASHINGTON, D. C. 20530-0001

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT. EXECUTED ON OCTOBER 15, 2021.

/S/ MATTHEW T. GILMARTIN

MATTHEW T. GILMARTIN
COUNSEL TO PETITIONER