

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

**UNITED STATES,**

**v.**

**OMAR BEY**

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**CRIMINAL ACTION**

**NO. 10-164-01**

**DuBois, J.**

**December 31, 2014**

**MEMORANDUM**

**I. INTRODUCTION**

On September 15, 2010, petitioner Omar Bey plead guilty, pursuant to a plea agreement, to three counts of engaging in illicit sexual conduct in foreign places, in violation of 18 U.S.C. § 2423(c). Petitioner was thereafter sentenced, *inter alia*, to 97 months imprisonment. Presently before the Court are petitioner’s *pro se* Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence (“§ 2255 Motion”); *pro se* Petitioner’s Memorandum of Law in Support of Petition Under § 2255; *pro se* Petitioner’s Motion to Amend His Previously Filed 28 U.S.C. § 2255 Motion Pursuant to Federal Rules [of] Civil Procedure Rule 15(a) (“First Motion to Amend”); and Petitioner Omar Rashaad Bey’s Answer to Oppose Respondent’s Response to Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255, construed as *pro se* petitioner’s Second Motion to Amend. For the reasons that follow, the Motion to Vacate, Set Aside, or Correct a Sentence, as amended, is denied and dismissed. An evidentiary hearing to determine facts is not necessary because the motion and the record in the case conclusively show that Bey is not entitled to relief. *Virgin Islands v. Forte*, 865 F.2d 59, 62 (3d Cir. 1989).

## **II. BACKGROUND**

Bey is a citizen of the United States, and was born in 1977 in Philadelphia, Pennsylvania. Bey converted to Islam as a young adult in 1995 and reported travelling to Morocco, Senegal, and Egypt for religious and language studies. In approximately 2005, Bey entered into a union purporting to be an Islamic marriage with T.Y.D., a minor female who was fourteen to fifteen years old at the time. From approximately 2005 through 2007, Bey and T.Y.D. had a sexual relationship, including sexual intercourse, while both lived in Egypt. On February 21, 2006, at the age of fifteen, T.Y.D. gave birth to a son while living in Egypt. On April 15, 2008, at the age of seventeen, T.Y.D. gave birth to a daughter while living in Egypt. Bey is the biological father of both children.

From approximately 2004 through 2005, Bey also engaged in a sexual relationship, including sexual intercourse, with T.Y.D.'s sister, T.S.D., while she lived in Egypt. T.S.D. was under sixteen years of age at that time.

In 2006, Bey entered into another union purporting to be an Islamic marriage with A.G., who was approximately fifteen years old at the time. During the Islamic ceremony, A.G. was located in Philadelphia, Pennsylvania, and Bey participated via an internet video hookup.<sup>1</sup> On August 24, 2006, Bey accompanied A.G. from Philadelphia, Pennsylvania to Egypt, and from approximately August 2006 through May 2007, Bey engaged in a sexual relationship, including sexual intercourse, with A.G. in Egypt. On March 20, 2007, at the age of fifteen, A.G. gave birth to a son while living in Egypt. Bey is the child's biological father.

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<sup>1</sup> The record does not reveal Bey's location at the time of the purported marriage ceremony.

On March 18, 2010, a grand jury in the Eastern District of Pennsylvania returned a seven-count indictment against Bey, in which he was charged with four counts of travelling in foreign commerce for the purpose of engaging in illicit sexual conduct, in violation of 18 U.S.C. § 2423(b), and three counts of engaging in illicit sexual conduct in foreign places, in violation of 18 U.S.C. § 2423(c).

A. Bey's Plea Agreement and Waiver of His Right to Collaterally Attack His Conviction and Sentence

On September 15, 2010, Bey plead guilty, pursuant to a plea agreement, to three counts of engaging in illicit sexual conduct in foreign places, in violation of 18 U.S.C. § 2423(c) (Counts 4, 5, and 7).<sup>2</sup> As part of Bey's plea agreement, the government agreed to move to dismiss all counts under 18 U.S.C. § 2423(b) — Counts 1, 2, 3, and 6 — at sentencing. The total maximum sentence for the counts to which defendant plead was 90 years imprisonment, lifetime supervised release, a \$750,000 fine, and a \$300 special assessment. (Guilty Plea Agreement ¶ 4.) Pursuant to the U.S. Sentencing Guidelines ("U.S.S.G.") § 6B1.4, effective November 1, 2008, the parties entered into a number of stipulations: (1) pursuant to U.S.S.G. § 2G1.3, the base offense level for each of the three counts was 24; (2) Bey was eligible for a two level downward

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<sup>2</sup> Adopted in 2003 as part of the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act ("the PROTECT Act"), 18 U.S.C. § 2423(c) provides: "Any United States citizen or alien admitted for permanent residence 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 shall be fined under this title or imprisoned not more than 30 years, or both." The statute defines illicit sexual conduct as "(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 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." 18 U.S.C. § 2423(f). Bey was indicted under the first subpart of § 2423(f), which criminalizes noncommercial sex with a minor.

adjustment under U.S.S.G. § 3E1.1(a) as he had demonstrated acceptance of responsibility for his offense; and (3) Bey was eligible for a one level downward adjustment under U.S.S.G. § 3E1.1(b) for assisting authorities in the “investigation or prosecution of his own misconduct by timely notifying the government of his intent to plead guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently.” (Guilty Plea Agreement ¶¶ 6(a)–(c).) The parties further agreed that:

... (1) the parties are free to argue the applicability of any other provision of the Sentencing Guidelines, including offense conduct, offense characteristics, criminal history, adjustments and departures; (2) these stipulations are not binding upon either the Probation Department or the Court; and (3) the Court may make factual and legal determinations that differ from these stipulations and that may result in an increase or decrease in the Sentencing Guidelines range and the sentence that may be imposed.

(Guilty Plea Agreement ¶ 6.) Finally, the plea agreement provided that Bey could not withdraw his plea because the Court declined to follow “any recommendation, motion or stipulation by the parties to [the] agreement” and affirmed that no one had promised or guaranteed Bey that the Court would impose a particular sentence. (Guilty Plea Agreement ¶ 5.)

As part of the plea agreement, Bey agreed to waive his right to appeal and collaterally attack his conviction, sentence, or any other matter relating to his prosecution. Specifically, Bey’s agreement, in relevant part, stated:

In exchange for the undertakings made by the government in entering this plea agreement, the defendant voluntarily and expressly waives all rights to appeal or collaterally attack the defendant’s conviction, sentence, or any other matter relating to this prosecution, whether such a right to appeal or collateral attack arises under 18 U.S.C. § 3742, 28 U.S.C. § 1291, 28 U.S.C. § 2255, or any other provision of law. This waiver is not intended to bar the assertion of constitutional claims that the relevant case law holds cannot be waived.

(Guilty Plea Agreement ¶ 7.)

Bey agreed that he was “satisfied with the legal representation provided” by his counsel and that he had fully discussed the plea agreement with counsel. (Guilty Plea Agreement ¶ 9.) The parties further affirmed that the agreement “contains no additional promises, agreements or understandings other than those set forth in this written guilty plea agreement, and that no additional promises, agreements or understandings will be entered into unless in writing and signed by the parties.” (Guilty Plea Agreement ¶ 10.)

B. Change of Plea Hearing

This Court held a Change of Plea Hearing on September 15, 2010. At the hearing, the Court engaged in an extensive colloquy with Bey pursuant to Federal Rule of Criminal Procedure 11(b), during which the Court discussed, *inter alia*, Bey’s waiver of his right to collaterally attack his sentence and the potential length of his sentence.

As to Bey’s waiver of the right to collaterally attack his sentence, the government explained at the hearing that the plea agreement provided that Bey voluntarily and expressly waived his right to collaterally attack his conviction, sentence, or any other matter related to his prosecution. (Change of Plea Hr’g Tr., Sept. 15, 2010, 19–20.) The government further explained that the waiver was “not intended to bar the assertion of constitutional claims that the relevant case law holds cannot be waived.” *Id.* at 20. The Court reiterated that Bey would be giving up his right to file a habeas corpus motion and that the most common argument raised in such a motion was that defense counsel was ineffective. *Id.* at 20. The Court then engaged in the following exchange with Bey:

THE COURT: Did you understand what Mr. Davison [AUSA] said about...the giving up of your right to file a habeas corpus motion?

THE DEFENDANT: Yes, your Honor.

THE COURT: Have you discussed that provision of the plea agreement and indeed all the provisions of the plea agreement with Mr. Perri [defense counsel]?

THE DEFENDANT: Yes, yes, your Honor.

THE COURT: Do you have any questions about any of those things?

THE DEFENDANT: No, your Honor.

THE COURT: Do you understand them?

THE DEFENDANT: Yes.

...

THE COURT: Do you have any questions about the giving up of your right to file what I've referred to as a writ of — a motion for writ of habeas corpus?

THE DEFENDANT: No, your Honor.

THE COURT: Alright, have you understood all of my questions so far?

THE DEFENDANT: Yes.

THE COURT: Have you answered them truthfully?

THE DEFENDANT: Yes, your Honor.

THE COURT: Do you understand that by pleading guilty and by waiving the rights I have discussed with you you cannot later come to any court and claim that you were not guilty or that your rights have been violated?

THE DEFENDANT: Yes, your Honor.

*Id.* at 21–22.

As to the possible length of Bey's sentence, the government explained that the total maximum sentence was 90 years imprisonment, lifetime supervised release, a \$750,000 fine, and

a \$300 special assessment, and that there was a mandatory minimum five years of supervised release. *Id.* at 12. The Court asked Bey whether he understood the potential maximum penalty that could be imposed as a result of the guilty plea, to which Bey responded that he did and that he had no questions. *Id.* at 12–13.

The Court next examined the effect that the guilty plea would have on the applicable U.S. Sentencing Guidelines range. In summarizing the terms of the plea agreement, the government stated that it was “free to make whatever sentencing recommendation as to imprisonment, fines, forfeiture, restitution and other matters which the Government deems appropriate,” *id.* at 27, and that “defendant may not withdraw his plea because the Court declines to follow any recommendation, motion or stipulation by the parties to this agreement,” *id.* at 29. The government then outlined the stipulations in the plea agreement concerning the Sentencing Guidelines range: (1) that the base offense level for defendant’s crimes would be 24, and (2) defendant would be entitled to a two-level reduction for acceptance of responsibility and a one-level reduction for assisting authorities in the investigation or prosecution of his own misconduct by timely notifying the government of his intent to plead guilty. *Id.* at 29–30.

After the government completed the explanation of the plea agreement, the Court asked Bey whether he understood the government’s summary of the plea agreement and whether what the government said about the plea agreement was the same as Bey’s understanding of the agreement. Bey answered both questions in the affirmative. *Id.* at 30. Bey further stated that he had no questions about the plea agreement. *Id.*

Next, the Court clarified that there could be upward adjustments that would increase the possible sentence above the level stipulated in the plea agreement — from a base offense level of 24, up to an offense level of 31 or higher. *Id.* at 33.

THE COURT: . . . based upon what is said, the offense level, the base offense level with the added enhancements could be as high as 31 and it might be higher. And from that figure you're entitled to a three-level reduction in acceptance — for acceptance of responsibility, there is no doubt about that.

There is some doubt about the nature of the enhancements but I think I'll share with you the worst case scenario known to us now with a caveat or a proviso that until the day of sentencing I will not know enough about the case to make final Sentencing Guideline rulings. Do you understand that?

THE DEFENDANT: Yes, your Honor.

...

THE COURT: Well, assuming that these figures remain unchanged as of the time of sentencing . . . the guideline imprisonment range is 78 to 97 months. Do you understand that?<sup>3</sup>

THE DEFENDANT: Yes, your Honor.

THE COURT: You understand that's a worst case scenario?

THE DEFENDANT: Yes, your Honor.

THE COURT: And you understand that until I learn more about the case I will not be able to make final Sentencing Guideline rulings. Do you understand that?

THE DEFENDANT: Yes, your Honor.

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<sup>3</sup> As discussed in Part II.C, *infra*, the guideline sentencing range was ultimately determined to be higher — 97 to 121 months — and the Court sentenced Bey to 97 months imprisonment.

THE COURT: Do you understand that I am not bound by the plea agreement and I will not be able to determine a reasonable sentence in this case until the day of sentencing?

THE DEFENDANT: Yes, your Honor.

*Id.* at 33–35.

The Court also asked Bey if he understood that if he got “a longer sentence than you may expect or if you find that prison is worse than you thought you will still be stuck with your guilty plea?” *Id.* at 22–23. Bey answered that he understood. *Id.* at 23. The Court further inquired into whether anyone had promised Bey “a particular sentence of a certain number of months, three years, four years, five years or any number of months” if he plead guilty. Bey responded that no one had made such a promise. *Id.* at 35–36.

The Court further inquired as to whether the plea agreement was Bey’s only agreement with the government, and Bey affirmed that it was. *Id.* at 35. Furthermore, Bey stated that he was satisfied with his counsel, *id.* at 9, that he had decided to plead guilty of his own free will, *id.* at 36, that he had read and understood the plea agreement before signing it, *id.* at 23, and that he had not been forced into signing the plea agreement, *id.* at 36.

The Court accepted Bey’s plea of guilty to Counts 4, 5, and 7 of the Indictment on September 15, 2010.

C. Sentencing

Bey’s sentencing hearing was held on March 10, 2011. Prior to sentencing, Bey’s counsel objected to that part of the Presentence Investigation Report (“PSI”) that recommended a two

level enhancement, pursuant to U.S.S.G. § 2G1.3(b)(1)(B),<sup>4</sup> with respect to T.Y.D. and A.G., on the grounds that the minors were in the custody, care, or supervisory control of the defendant at the time of the illicit conduct. Bey’s counsel argued that the enhancement only applied to teachers, day care providers, babysitters, or temporary caretakers, not to persons in a “marital relationship” with the minor. (Sentencing Mem. of Def. Omar Rashaad Bey 2; *see also* PSI 18.) The government contended, however, that U.S.S.G. § 2G1.3(b)(1)(B), Application Note 2(A),<sup>5</sup> required the Court to “look at the actual relationship that existed between the defendant and the minor and not simply the legal status of the defendant-minor relationship.” (PSI 18; *see also* Government’s Sentencing Mem. 5–6.) According to the government, both T.Y.D. and A.G. had been in the care, custody, or supervisory control of Bey as the relationship between Bey and the minors was not legally recognized as a marriage in either the United States or Egypt, and Bey had exerted control over “nearly all facets of [T.Y.D.’s and A.G.’s] lives” while they were living in Egypt. (Government’s Sentencing Mem. 6. *See also* PSI 18; Government’s Sentencing Mem. 5–10.)

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<sup>4</sup> The edition of the Sentencing Guidelines Manual used to calculate the guidelines in the Presentence Investigation Report was that incorporating amendments effective November 1, 2010.

<sup>5</sup> Application Note 2(A) reads: “Custody, Care, or Supervisory Control.—Subsection (b)(1) is intended to have broad application and includes offenses involving a victim less than 18 years of age entrusted to the defendant, whether temporarily or permanently. For example, teachers, day care providers, baby-sitters, or other temporary caretakers are among those who would be subject to this enhancement. In determining whether to apply this enhancement, the court should look to the actual relationship that existed between the defendant and the minor and not simply to the legal status of the defendant-minor relationship.” U.S. SENTENCING GUIDELINES MANUAL § 2G1.3, Appl. Note 2(A) (2010).

At the sentencing hearing, T.Y.D. testified to the nature of her relationship with Bey while she was living in Egypt, including his extensive control over her daily life, and was cross-examined by Bey’s counsel on this issue. The Court concluded that T.Y.D. had been in the care, custody, or supervisory control of Bey but that the government had presented no evidence to support the same conclusion with respect to A.G. Consequently, the Court overruled the objection and applied the enhancement as to T.Y.D. and sustained the objection as to A.G. (Sentencing Hr’g Tr., Mar. 10, 2011, 34.)

The Court concluded that Bey’s applicable guideline range under the United States Sentencing Guidelines was 97 to 121 months,<sup>6</sup> and determined that a sentence of 97 months, “at the low end of the sentencing range,” was reasonable under the circumstances. (Sentencing Hr’g Tr., Mar. 10, 2011, 86.) The Court also sentenced defendant to ten years of supervised release, a \$2,500 fine, and a special assessment of \$300.

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<sup>6</sup> The Guideline range was calculated as follows: The applicable Guideline for a violation of 18 U.S.C. § 2423(c) is § 2G1.3. Pursuant to § 2G1.3(d), because the charges involved more than one minor, the Guidelines must be calculated as to each minor. First, the base offense level for a violation of 28 U.S.C. § 2423(c) is 24, pursuant to U.S.S.G. § 2G1.3(a)(4). Because the offense involved the commission of a sex act or sexual contact, the offense level for each victim was increased by two levels, pursuant to § 2G1.3(b)(4)(A) — to 26. Next, the offense level with respect to each victim was raised by two levels pursuant to § 2G1.3(b)(2)(B) and Application Note 3(b) as Bey was at least 10 years older than each minor victim — resulting in an offense level of 28. With respect to T.Y.D., the offense level was raised an additional two levels pursuant to § 2G1.3(b)(1)(B) as the Court concluded that T.Y.D. was under the care, custody, or supervisory control of Bey after the Islamic ceremony was performed. This resulted in an offense level of 30 as to T.Y.D., 28 as to T.S.D., and 28 as to A.G. Next, three offense levels were added to the Group with the highest offense level (T.Y.D. – 30) pursuant to the multiple count adjustment under § 3D1.4, for an offense level of 33. Finally, as Bey was entitled to a three level reduction in offense level for acceptance of responsibility and assisting the authorities in the investigation or prosecution of his own misconduct under §§ 3E1.1(a) and (b), the total offense level was 30. As Bey had no criminal history, he was placed in Criminal History Category I. With a total offense level of 30, in Criminal History Category I, the Guideline Imprisonment Range was 97 to 121 months.

Bey filed a *pro se* notice of appeal on January 10, 2012, requesting that the Court provide him with copies of documents on the record to assist in his appeal. The government filed a Motion to Enforce Appellate Waiver and for Summary Affirmance on February 16, 2012. On April 5, 2012, defense counsel, Fortunato Perri, filed a Motion to Withdraw as Counsel on the basis that Perri agreed with the government that Bey's appeal presented no non-frivolous issues and that the appellate waiver contained in Bey's plea agreement was enforceable. Bey was given leave to file a *pro se* response to the government's Motion to Enforce Appellate Waiver and for Summary Affirmance, but did not do so. On July 18, 2012, the U.S. Court of Appeals for the Third Circuit issued an order granting both the government's motion to enforce the waiver and for summary affirmance and Perri's motion to withdraw as counsel. Bey did not file a petition for rehearing. Consequently, on October 10, 2012, the Third Circuit issued an order in lieu of a formal mandate dismissing Bey's appeal.

### **III. DEFENDANT'S MOTION PURSUANT TO 28 U.S.C. § 2255**

On March 5, 2012, Bey filed a *pro se* Motion to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody pursuant to 28 U.S.C. § 2255. Bey raised two claims in his § 2255 Motion. First, Bey claims that his defense counsel was ineffective for failing to argue that the Court did not have jurisdiction under 18 U.S.C. § 2423(c) because the statute is unconstitutional. Specifically, Bey contends that counsel was ineffective for failing to argue that: (1) 18 U.S.C. § 2423(c) is unconstitutional as Congress exceeded its authority under the Foreign Commerce Clause of the U.S. Constitution in enacting a statute that criminalizes conduct occurring in a foreign territory; (2) 18 U.S.C. § 2423(c) violates substantive due process, under the Fifth Amendment of the U.S. Constitution, because it "criminalizes foreign misconduct

which does not affect the United States”; (3) jurisdiction was lacking because the Eastern District of Pennsylvania was not the proper venue for Bey’s case; and (4) the jurisdictional element of 18 U.S.C. § 2423(c) violates international legal principles limiting states’ exercise of extra-territorial jurisdiction. Second, Bey claims that defense counsel was in his challenge that the two-level enhancement for having care, custody, or supervisory control of the minor child with whom the sexual conduct occurred, pursuant to U.S.S.G. § 2G1.3(b)(1)(B), did not apply to Bey.

Subsequently, on December 4, 2012, Bey filed a Motion to Amend His Previously Filed 28 U.S.C. § 2255 Motion Pursuant to Federal Rules [of] Civil Procedure Rule 15(a).<sup>7</sup> In his First Amended Ground, Bey claims that the Court should not enforce the collateral attack waiver because doing so would work a miscarriage of justice. In particular, Bey argues that the Court did not have subject matter jurisdiction over his case because Congress lacked “constitutional authority to reach alleged crimes in foreign countries,” and thus enforcing a waiver to prevent him from challenging the Court’s lack of jurisdiction would work a miscarriage of justice. (Pet.’s First Mot. Am. 5.) In his Second Amended Ground, Bey again contends that 18 U.S.C. § 2423(c) is unconstitutional as applied to his conduct “on the ground that congress [sic] lacked the authority to extend the jurisdiction of the United States to conduct in Egypt.” (Pet.’s First Mot.

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<sup>7</sup> Federal Rule of Civil Procedure 15(a) provides that a party may amend his pleading once as a matter of course at any time before a responsive pleading is filed. *See United States v. Duffus*, 174 F.3d 333, 336 (3d Cir. 1999). Defendants filing § 2255 Motions must file any motion to amend within one year of when their judgment of conviction became final. 28 U.S.C. § 2255(f)(1). Bey’s judgment of conviction became final 90 days after the Third Circuit dismissed Bey’s appeal, when the time to seek certiorari review expired. *See Kapral v. United States*, 166 F.3d 565, 569 (3d Cir. 1999). In the present case, Bey sought to amend his § 2255 Motion prior to the government filing its response and prior to the date on which his judgment of conviction became final. The government did not object to Bey’s Motion to Amend in its Opposition to Bey’s § 2255 Motion, filed January 28, 2013. The Court concludes that Bey’s Motion to Amend of December 4, 2012 was timely filed and thus grants the Motion.

Am. 8.) Bey further argues that the purpose of his travel to Egypt was not to engage in sex with minors but to advance his knowledge and commitment to the Islamic faith. Bey argues that 18 U.S.C. § 2423(c) was enacted to address the situation of men traveling for the sole purpose of engaging in sex with minors and was not intended to cover travel for the purpose of pursuing religious studies. (Pet.'s First Mot. Am. 7.) Finally, Bey contends that the government inappropriately treated him differently from Fardan Abdul-Almuid, a man who allegedly committed the same crime as Bey under 18 U.S.C. § 2423(c) but whose indictment was ultimately dismissed. Bey asserts that he “should have never been charged with any crime just as (Almuid) [sic] wasn't charged. No crime was committed, nor did the United States District court [sic] have jurisdiction to enter such Judgment.” (Pet.'s First Mot. Am. 10.) Bey also requests that the Court grant an evidentiary hearing on these issues.

The government responded to Bey's § 2255 Motion on January 28, 2013 (“Government's Opposition to Omar Bey's Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255”). The government contends that Bey validly waived all of his claims, apart from his jurisdictional claim, as part of his plea agreement, and that these claims should be dismissed pursuant to the plea agreement. With respect to Bey's jurisdictional claim — that 18 U.S.C. § 2423(c) is unconstitutional in so far as it penalizes conduct committed outside the United States and that the Court thus lacked jurisdiction over Bey's case — the government argues that the constitutionality of 18 U.S.C. § 2423(c) is not in question as the Third Circuit held the provision to be constitutional in *United States v. Pendelton*, 658 F.3d 299 (3d Cir. 2011). Thus, the government argues that defense counsel was not constitutionally deficient in not challenging

the Court's jurisdiction as "such a challenge would have been unsuccessful as evidenced by...*Pendelton*." (Government's Opp. to § 2255 Mot. 12.)

Bey filed a Traverse on February 7, 2013, responding to the government's opposition to the § 2255 motion, in which he argues that his collateral attack waiver cannot be enforced as "[a] guilty plea can never consist of a waiver that includes jurisdictional challenges to a conviction." (Pet.'s Traverse 2.) Bey further argues that his jurisdictional claim is not barred simply because the Third Circuit rejected the jurisdictional challenge in *United States v. Pendelton*. (Pet.'s Traverse 3.)

On April 25, 2014, Bey filed an Answer to Oppose Respondent's Response to Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255, in which he presents three arguments: (1) his collateral attack waiver was not knowing and voluntary because he was not aware that, at sentencing, his base offense level could be raised from level 24 to a final offense level of 30; (2) his defense counsel was ineffective for representing that the plea agreement would result in a sentence of between 37 and 46 months, which he argues corresponds to a base offense level of 24 minus three levels for "acceptance of responsibility," for a total offense level of 21, and for rushing him into signing an agreement without disclosing that the sentence could be substantially higher than 37 to 46 months; and (3) the government breached the plea agreement when the Presentence Investigation Report recommended an offense level of 30, which was higher than the base offense level of 24 stipulated in the plea agreement.<sup>8</sup> Bey also requests an evidentiary hearing as to these claims.

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<sup>8</sup> Bey raises new claims in his Answer of April 25, 2014. The Court will treat the Answer as a motion to amend his § 2255 Motion. Motions to amend a § 2255 motion must be filed within one

The government filed its Response to Petitioner Omar Bey's Answer to Oppose Respondent's [Response to] Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 on June 30, 2014. The government argues that Bey's waiver, and his plea more generally, were knowing and voluntary. The government notes that, during Bey's plea colloquy, "[t]he Court addressed the waiver with the defendant, and also assured more broadly that the defendant was competent, that the plea agreement was explained to the defendant, and that the defendant had a full opportunity to discuss the agreement with counsel and to make an informed decision." (Government's Response 2.) The government also reiterates that defense counsel was not ineffective for declining to raise a jurisdictional challenge in Bey's case as the jurisdictional element of the statute of conviction is constitutional and defense counsel was not deficient for failing to raise a meritless argument. Finally, the government argues that Bey's claim that defense counsel ignored his continued requests to set forth a jurisdictional challenge is undermined by his statements at the time he entered his plea before the Court, in which he indicated he was satisfied with his counsel's performance.

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year after the judgment of conviction becomes final. 28 U.S.C. § 2255(f)(1). Bey's judgment of conviction became final on January 8, 2013, when the period for seeking certiorari review expired. Bey filed his Answer well after the one year statute of limitations expired. 28 U.S.C. § 2255(f)(1). Moreover, the new claims raised in the Answer do not relate back to Bey's § 2255 Motion under Federal Rule of Civil Procedure 15(c). *See United States v. Thomas*, 221 F.3d 430, 436 (3d Cir. 2000); *Duffus*, 174 F.3d at 337. However, neither party briefed the statute of limitations issue, and the Court declines to address it *sua sponte*. *See Day v. McDonough*, 547 U.S. 198, 199 (2006) (noting that "the Court declines to adopt...an inflexible rule requiring dismissal whenever AEDPA's one-year clock has run...Rather, the Court holds that a district court has discretion to decide whether the administration of justice is better served by dismissing the case on statute of limitations grounds or by reaching the merits of the petition."). Without considering the statute of limitations issue, the Court considers all of the claims Bey raises in his Answer in Part IV, *infra*, on the merits and concludes that they are meritless.

#### IV. DISCUSSION

##### A. Bey's Non-Jurisdictional Claims are Barred by the Waiver Provision in the Plea Agreement

The government argues that Bey's claims, apart from those regarding the Court's subject matter jurisdiction,<sup>9</sup> are barred by the waiver provision in Bey's plea agreement. The Court agrees.

The Court first notes that the Third Circuit enforced Bey's waiver of his right to appeal and summarily affirmed the judgment against Bey in its Order of October 10, 2012. In enforcing the waiver, the Third Circuit was required to determine that (1) there was no specific exception set forth in the plea agreement that would prevent enforcement; (2) the waiver was knowing and voluntary; and (3) enforcing the waiver would not work a miscarriage of justice. *See United States v. Goodson*, 544 F.3d 529, 536 (3d Cir. 2008). Although the Third Circuit did not issue an opinion explaining its reasoning, the Court necessarily decided these three issues in favor of the government in enforcing the waiver and summarily affirming the judgment against Bey. Thus, the issues of whether there was a specific exception in the plea agreement that would prevent enforcement of the waiver, whether the waiver was knowing and voluntary, and whether enforcing the waiver with respect to the claims asserted by Bey would work a miscarriage of justice were already decided by the Third Circuit, and the Court may not now consider them in reviewing Bey's § 2255 Motion. *See In re City of Philadelphia Litig.*, 158 F.3d 711, 718 (3d Cir. 1998) (concluding that the law of the case doctrine precludes review of those legal issues

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<sup>9</sup> The Court concludes that Bey's collateral attack waiver does not extend to his challenge to the Court's subject matter jurisdiction and thus the Court addresses the merits of Bey's jurisdictional claim in Part IV.B, *infra*.

decided in a prior appeal); *United States v. Wiley*, 245 F.3d 750, 752 (8th Cir. 2001) (concluding that “[i]ssues raised and decided on direct appeal cannot ordinarily be relitigated in a collateral proceeding based on 28 U.S.C. § 2255.”).

The Court also notes that the Third Circuit has not addressed the question of whether enforcing the waiver with respect to any of the specific claims raised in Bey’s § 2255 Motion would work a miscarriage of justice, as Bey did not identify any claims in his *pro se* Notice of Appeal.<sup>10</sup> Thus, notwithstanding the October 10, 2012 Order, the Court now considers whether enforcing the collateral attack waiver with respect to Bey’s non-jurisdictional claims would work a miscarriage of justice.

(a) Miscarriage of Justice

As the Third Circuit determined that Bey’s waiver was knowing and voluntary, the Court must enforce the waiver unless doing so would work a miscarriage of justice. *United States v. Khattak*, 273 F.3d 557, 563 (3d Cir. 2001). In *United States v. Khattack*, the Third Circuit expressly declined to “ earmark specific situations” in which enforcing a waiver would amount to a “miscarriage of justice.” *Id.* Instead, the Court adopted the approach used by the U.S. Court of Appeals for the First Circuit, which identified the following factors for consideration: “[T]he

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<sup>10</sup> Excepting only ineffective assistance of counsel claims, § 2255 petitioners generally may not raise new arguments on collateral attack that were not raised on direct appeal. *Hodge v. United States*, 554 F.3d 372, 379 (3d Cir. 2009); *Massaro v. United States*, 538 U.S. 500, 504 (2003) (concluding that ineffective assistance of counsel claims are exempted from the procedural default rule). In the present case, the government has not argued that Bey’s claims are procedurally defaulted in any of its briefings before this Court. Although it is within the discretion of the Court to raise the issue of procedural default *sua sponte*, see *Sweger v. Chesney*, 294 F.3d 506, 520 (3d Cir. 2002), the Court declines to do so in this case as the Court determines that Bey’s non-jurisdictional claims are barred by the collateral attack waiver and his jurisdictional claim is meritless. See Part IV(A)(a) and Part IV(B), *infra*.

clarity of the error, its gravity, its character (e.g., whether it concerns a fact issue, a sentencing guideline, or a statutory maximum), the impact of the error on the defendant, the impact of correcting the error on the government, and the extent to which the defendant acquiesced in the result.” *Id.* (quoting *United States v. Teeter*, 257 F.3d 14, 25–26 (1st Cir. 2001)).

The Third Circuit has recognized that enforcing a knowing and voluntary waiver would work a miscarriage of justice in only a few limited circumstances, particularly where “constitutionally deficient lawyering prevented [the defendant] from understanding his plea,” *United States v. Shedrick*, 493 F.3d 292, 298 (3d Cir. 2007), the waiver itself was the product of ineffective assistance of counsel, *United States v. Hernandez*, 242 F.3d 110, 114 (3d Cir. 2001), and the defendant should have been permitted to withdraw his guilty plea, *United States v. Wilson*, 429 F.3d 455, 458 (3d Cir. 2005). Otherwise, the Third Circuit has held that the situations in which an uncorrected error will be found to result in a miscarriage of justice are “unusual,” *Khattak*, 273 F.3d at 562, and that the exception must be “applied sparingly and without undue generosity.” *Wilson*, 429 F.3d at 458. As the Third Circuit has recognized: “Waiver would be nearly meaningless if it included only those appeals that border on the frivolous.... While it may appear unjust to allow criminal defendants to bargain away meritorious appeals, such is the necessary consequence of a system in which the right to appeal may be freely traded.” *Khattak*, 273 F.3d at 562 (internal quotations omitted).

The Court concludes that enforcing the waiver with respect to Bey’s non-jurisdictional claims would not result in the kind of “unusual” circumstance that works a miscarriage of justice. Each of these claims is without merit and thus enforcing the waiver cannot be said to work any injustice against Bey. Each claim is discussed in turn below.

(i) Ineffective Assistance of Counsel

Bey raises two ineffective assistance of counsel claims: (1) defense counsel was ineffective in failing to research and adequately argue that the two-level enhancement, pursuant to U.S.S.G. § 2G1.3(b)(1)(B), for having care, custody, or supervisory control of the minor child with whom the sexual conduct occurred, did not apply to Bey; and (2) defense counsel was ineffective for representing that the plea agreement would result in a sentence of between 37 and 46 months, rather than the 97 months to which Bey was sentenced.

As noted above, the Third Circuit has recognized that “ineffective assistance of counsel may be a basis for setting aside an appellate or collateral review waiver,” *United States v. Mitchell*, 538 F. App’x 201, 203 (3d Cir. 2013), but it has limited such instances to those cases involving extraordinary circumstances, such as those where the waiver itself was the product of ineffective assistance of counsel, *see, e.g., Hernandez*, 242 F.3d at 114, or those where “constitutionally deficient lawyering prevented [the defendant] from understanding his plea or from filing a direct appeal as permitted by his plea agreement,” *see Shedrick*, 493 F.3d at 298. The Court concludes that neither of Bey’s claims is meritorious and thus enforcing the waiver against them does not work a miscarriage of justice.

“*Strickland v. Washington* supplies the standard for addressing a claim of ineffective assistance of counsel.” *United States v. Smack*, 347 F.3d 533, 537 (3d Cir. 2003). “The benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial court cannot be relied on as having produced a just result.” *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

The *Strickland* standard requires a two-part inquiry. “First, the defendant must show that counsel’s performance was deficient,” *id.* at 687, that is, “that counsel’s representation fell below an objective standard of reasonableness,” *id.* at 688. The measure for counsel’s performance under the first prong is “whether counsel’s assistance was reasonable considering all the circumstances,” including “[p]revailing norms of practice.” *Id.* “Second, the defendant must show that [counsel’s] deficient performance prejudiced the defense.” *Id.* at 687. In the context of a plea agreement, the second prong “focuses on whether counsel’s constitutionally ineffective performance affected the outcome of the plea process. In other words, in order to satisfy the ‘prejudice’ requirement, the defendant 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.” *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

The Court first concludes that defense counsel was not deficient in his challenge to the application of the two-level enhancement, pursuant to U.S.S.G. § 2G1.3(b)(1)(B), to Bey’s sentence. The Court rejects this argument because defense counsel did challenge the application of the two-level enhancement to the counts concerning T.Y.D. and A.G., raising the issue both in written objections to the Presentence Investigation Report and at the sentencing hearing. Indeed, at the sentencing hearing, defense counsel engaged in a vigorous cross-examination of T.Y.D., questioning her about her ability to come and go from her residence in Egypt while in a relationship with Bey and her proximity to her mother during this time period, and presented oral argument as to why the sentencing enhancement should not apply. (Sentencing Hr’g Tr., Mar. 10, 2011, 24–26, 27, 31–32.) The fact that the Court did not find defense counsel’s argument to be persuasive does not mean that he was constitutionally deficient in making this argument. *See*

*Strickland*, 466 U.S. at 686 (holding that, to be constitutionally deficient, defense counsel’s conduct must “so undermine[] the proper functioning of the adversarial process that the trial court cannot be relied on as having produced a just result.”).

Bey next contends that defense counsel was ineffective for representing that the plea agreement would result in a sentence between 37 and 46 months, rather than the 97 months to which he was ultimately sentenced, and that he signed the plea agreement based on this understanding. The Court rejects this argument on the ground that the in-court guilty plea colloquy establishes that Bey understood that his sentence could be higher than 37 to 46 months when he entered his plea. During the plea colloquy, the Court informed Bey that his offense level, with enhancements, could be 31 or higher and that he could be imprisoned for as long as 97 months or more. (Change of Plea Hr’g Tr., Sept. 15, 2010, 33–34.) The Court added that it was not bound by the plea agreement and that it would not be able to make a final ruling on the Sentencing Guidelines until the day of sentencing. *Id.* at 34–35. Bey affirmed that he understood. The Court then informed Bey that his guilty plea would stand even if he received a longer sentence than he had expected, and Bey again affirmed that he understood. *Id.* at 22–23. Moreover, Bey affirmed that no one had made him any promises with respect to his possible sentence, *id.* at 35–36, and that he was satisfied with his counsel’s performance, *id.* at 9.

Finally, without addressing the question of what defense counsel told Bey about his potential sentence, “an erroneous sentencing prediction by counsel is not ineffective assistance of counsel where,” as in this case, “an adequate plea hearing was conducted” and the “written plea agreement and in-court guilty plea colloquy clearly establish the defendant’s maximum potential exposure and the sentencing court’s discretion.” *Shedrick*, 493 F.3d at 299; *see also United*

*States v. Jones*, 336 F.3d 245, 254 (3d Cir. 2003) (counsel not ineffective for allegedly promising defendant a sentence of “no more than 71 months” where defendant was advised in open-court colloquy of potential maximum sentence and there were no other promises regarding sentence); *United States v. Mustafa*, 238 F.3d 485, 492 (3d Cir. 2001) (“[A]ny alleged misrepresentations that [defendant’s] former counsel may have made regarding sentencing calculations were dispelled when [defendant] was informed in open court that there was no guarantee as to sentence, and that the court could sentence him to the maximum.”).

Both the written plea agreement and the in-court guilty plea colloquy clearly established Bey’s maximum potential exposure (90 years imprisonment), and Bey affirmed at the plea colloquy that he understood his maximum potential exposure and did not have any questions regarding it. (Change of Plea Hr’g Tr., Sept. 15, 2010, 12–13.) As noted above, the Court also informed Bey of its sentencing discretion and Bey affirmed that he understood. *Id.* at 35. The Court concludes that Bey was properly informed of both his maximum potential exposure from pleading guilty and the Court’s sentencing discretion, and understood that, under the U.S.S.G., he could receive a sentence of 97 months or more. For all of these reasons, the Court concludes that defense counsel was not constitutionally deficient in his representation of Bey with respect to Bey’s guilty plea.

In sum, the Court determines that defense counsel was not constitutionally deficient with respect to either of the claims discussed above, and therefore enforcing the collateral attack waiver with respect to these claims does not work a miscarriage of justice.

(ii) Breach of Plea Agreement

Bey next argues that the government breached the plea agreement when the Presentence Investigation Report recommended a total offense level of 30, which was higher than the base offense level of 24 stipulated in the plea agreement. Bey argues that, if he had known that enhancements could be added to his base offense level — raising the guideline sentencing range to 97 to 121 months from the 37 to 46 month range he claims he was promised — “before the consideration and execution of any plea agreement, there is a reasonable probability he would not have agreed nor entered into such agreement.” (Pet.’s Answer to Opp. Resp.’s Resp. to § 2255 Mot. 6–7.) The Court concludes that this claim is without merit.

When a “prosecutor makes a promise which induced, at least in significant part, a guilty plea...the prosecutor’s promise must be fulfilled.” *Dunn v. Colleran*, 247 F.3d 450, 460 (3d Cir. 2001) (citing *Santobello v. New York*, 404 U.S. 257, 261 (1971)). In this case, however, the government made no promises to Bey with respect to his potential sentence. The plea agreement specifically provided that the government was free to argue for the application of sentencing enhancements not specified in the written agreement; that the stipulations in the agreement were not binding on either the Probation Department or the Court; and that the Court was free to make factual and legal determinations at sentencing that differed from the plea stipulations and that resulted in an increase in the Sentencing Guidelines range and the sentence that was imposed. (Guilty Plea Agreement ¶ 6.) Furthermore, as noted above, Bey affirmed at the plea colloquy that no one had promised him a particular sentence if he plead guilty, (Change of Plea Hr’g Tr., Sept. 15, 2010, 35–36), and that he understood that he could be sentenced to 97 months imprisonment or more, *id.* at 33–34. As the government did not breach any promises that induced Bey to sign

the plea agreement, and Bey was aware at the time he entered his guilty plea that his sentence could exceed the 37 to 46 month range and could be as high as 97 months or more, the Court concludes that Bey's claim is without merit and that enforcing the collateral attack waiver with respect to this claim would not work a miscarriage of justice.

(iii) Selective Prosecution

Bey further argues that the government acted inappropriately in treating him differently from Fardan Abdul-Almuid by dismissing an indictment on the same charges against Abdul-Almuid but refusing to dismiss the indictment against Bey. Bey cites no legal standard to support his claim of differential treatment. As Bey is a *pro se* petitioner, however, the Court "must liberally construe his pleadings" and "apply the applicable law, irrespective of whether the *pro se* litigant has mentioned it by name." *Bush v. City of Philadelphia*, 367 F. Supp. 2d 722, 725 (E.D. Pa. 2005). Thus, the Court considers Bey's argument under a theory of selective prosecution, the legal theory that most closely fits his argument.

"The requirements for a selective-prosecution claim draw on ordinary equal protection standards." *United States v. Armstrong*, 517 U.S. 456, 465 (1996) (internal quotations omitted). "To establish selective prosecution, the defendant must provide evidence that persons similarly situated have not been prosecuted and that the decision to prosecute was made on the basis of an unjustifiable standard, such as race, religion, or some other arbitrary factor." *United States v. Taylor*, 686 F.3d 182, 197 (3d Cir. 2012) (internal citations and quotations omitted); *see also Oylar v. Boles*, 368 U.S. 448, 456 (1962) (noting that a merely "conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation."). The petitioner bears the burden of proof and "must establish these elements with 'clear evidence' sufficient to

overcome the presumption of regularity that attaches to decisions to prosecute.” *Taylor*, 686 F.3d at 197.

Bey argues that the fact that Abdul-Almuid’s indictment was dismissed while his was not is evidence of impermissible conduct on the part of the prosecution. The record demonstrates, however, that the prosecution relied on legitimate differences between the two cases in deciding to prosecute Bey while dismissing the indictment against Abdul-Almuid. At Abdul-Almuid’s sentencing hearing before this Court,<sup>11</sup> the Assistant U.S. Attorney (“AUSA”) placed on the record a number of reasons for this decision, as follows:

- There was one victim in the Abdul-Almuid case whereas there were three victims in Bey’s case. (Sentencing Hr’g Tr., Dec. 14, 2012, 6.)
- Abdul-Almuid was reluctant to enter into the relationship with one minor victim and was encouraged to do so by his iman. Bey actively sought out and willingly entered into relationships with three minors. *Id.* at 6, 8.
- Abdul-Almuid “was backed into [his conduct] by other figures in his life” and while he wanted to get out of the relationship, he found it difficult to do so because “he was in a family situation and he would lose support of the iman which could cause a problem in his community.” *Id.* at 9.
- Abdul-Almuid believed, based on the assurances of his mother and the victim’s mother, that his “marriage” to the minor victim could be legally binding. *Id.* at 7–8. In contrast,

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<sup>11</sup> Abdul-Almuid was indicted in two cases, the first under 18 U.S.C. §§ 2423(b)–(c) and the second under 18 U.S.C. § 545 (smuggling goods). The prosecution dismissed the indictment in the former case and Abdul-Almuid plead guilty to the charges in the latter case.

Bey completed immigration paperwork “acknowledging that there was no marital relationship between he [sic] and the victims.” *Id.* at 8. Bey also engaged in sexual relations with T.S.D. despite not having undergone an Islamic “marriage” ceremony with her, evidence that Bey did not engage in this conduct because he believed he was in a legitimate marriage. *Id.*

- Abdul-Almuid cooperated with the government whereas Bey did not. *Id.* at 10.
- Bey “stranded” his victims in Egypt during his travels<sup>12</sup> while Abdul-Almuid treated his “Islamic wife” and children with greater care. *Id.* at 11.

The reasons given by the AUSA explaining the government’s prosecutorial decision-making demonstrate that the government did not have an impermissible purpose in continuing the case against Bey and dismissing Abdul-Almuid’s Indictment on similar charges. The Court thus determines that the government did not engage in selective prosecution with respect to Bey, and that enforcing the collateral attack waiver as to this claim would not work a miscarriage of justice.

(iv) Purpose of Travel

Bey argues that 18 U.S.C. § 2423(c) is inapplicable to his conduct in Egypt as his “purpose for initially traveling to [S]enegal and later [E]gypt had nothing whatsoever to do with sex, but rather, education and committing himself to the religion of [I]slam.” (Pet.’s First Mot.

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<sup>12</sup> At Bey’s sentencing hearing, for example, T.Y.D. testified that, while she was living in Egypt, Bey would frequently travel to the United States for months at a time. (Sentencing Hr’g Tr., Mar. 10, 2011, 24.) She testified that in 2008 she wanted to return to the United States but Bey was in the United States and told her that he could not provide her with the money to return. T.Y.D. testified that she was ultimately able to return to the United States with the assistance of the U.S. Embassy in Cairo. (Sentencing Hr’g Tr., Mar. 10, 2011, 17–18.)

Am. 8.) Bey’s purpose for traveling to Egypt, however, is irrelevant as 18 U.S.C. § 2423(c) has no *mens rea* requirement. Although 18 U.S.C. § 2423(b) criminalizes interstate travel “for the purpose of engaging in any illicit sexual conduct,” those charges against Bey were dropped. In contrast, 18 U.S.C. § 2423(c) “targets the same individuals as does § 2423(b)” but “does so by focusing the court’s attention on the defendant’s *actual conduct* in the foreign nation.” *United States v. Pendelton*, 658 F.3d 299, 304 (3d Cir. 2011) (emphasis added). Thus, with respect to the charges under § 2423(c), Bey’s purpose for traveling is irrelevant and his claim that the provision does not apply to his conduct is meritless.

In sum, the Court concludes that enforcing the waiver with respect to Bey’s non-jurisdictional claims would not work a miscarriage of justice as they are all meritless. Therefore, the Court will enforce the waiver and dismiss the § 2255 Motion with respect to those claims.

**B. Bey’s Jurisdictional Claim is Without Merit**

Bey does assert one constitutional claim that cannot be waived: namely, that defense counsel was ineffective in failing to argue that the jurisdictional element of 18 U.S.C. § 2423(c) is unconstitutional and thus that the Court lacked subject matter jurisdiction over Bey’s case.<sup>13</sup> *See United States v. Cotton*, 535 U.S. 625, 630 (2002) (holding that “because [subject matter jurisdiction] involves a court’s power to hear a case, [it] can never be forfeited or waived.”); *see also* Guilty Plea Agreement, ¶ 7 (“This waiver is not intended to bar the assertion of

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<sup>13</sup> In his First Motion to Amend, Bey argues that enforcing the collateral attack waiver with respect to the Court’s alleged lack of subject matter jurisdiction would work a miscarriage of justice. Furthermore, in his Traverse of February 7, 2013, Bey contends that his collateral attack waiver cannot be enforced because “[a] guilty plea can never consist of a waiver that includes jurisdictional challenges to a conviction.” (Pet.’s Traverse 2.) These arguments, however, miss the point as Bey did not waive his right to challenge the Court’s subject matter jurisdiction.

constitutional claims that the relevant case law holds cannot be waived.”). In particular, Bey argues that 18 U.S.C. § 2423(c) exceeds congressional authority under the Foreign Commerce Clause, U.S. CONST. art. 1, § 8, cl. 3, and that it is also unconstitutional as a matter of substantive due process under the Fifth Amendment, because it criminalizes foreign misconduct which does not affect the United States. Bey further argues that the Court lacked jurisdiction in his case because venue was not proper in the Eastern District of Pennsylvania, as the “essential conduct” of the alleged crime did not occur there. Finally, Bey contends that jurisdiction is barred by international law as 18 U.S.C. § 2423(c) violates applicable limitations on the exercise of extra-territorial jurisdiction.

The Court concludes that Bey’s jurisdictional arguments are meritless. In *United States v. Pendelton*, the Third Circuit held that the jurisdictional provision of 18 U.S.C. § 2423(c) was a valid exercise of Congress’s power under the Foreign Commerce Clause, and affirmed defendant Pendelton’s conviction under the provision for engaging in illicit sexual conduct with a minor in Germany. 658 F.3d 299, 311 (3d Cir. 2011) (“And just as Congress may cast a wide net to stop sex offenders from traveling in interstate commerce to evade state registration requirements, so too may it attempt to prevent sex tourists from using the channels of foreign commerce to abuse children.”); *see also United States v. Bianchi*, 386 F. App’x 156, 160–62 (3d Cir. 2010) (holding in a non-precedential opinion that Congress did not exceed its authority under the Foreign Commerce Clause when it enacted 18 U.S.C. § 2423(c)).

The Third Circuit in *Pendelton* also declined to disturb the District Court’s holding that the jurisdictional element of 18 U.S.C. § 2423(c) does not violate substantive due process. In so ruling, the District Court in *Pendelton* relied on *United States v. Martinez-Hidalgo*, in which the

Third Circuit determined that the extraterritorial application of a statute does not violate the Fifth Amendment where the statute is applied “exactly as Congress intended — extraterritorially, without regard for a nexus between a defendant’s conduct and the United States,” *United States v. Pendelton*, No. 08-111, 2009 WL 330965, at \*5 (D. Del. Feb. 11, 2009), *aff’d* *United States v. Pendelton*, 658 F.3d 299 (3d Cir. 2011) (quoting *United States v. Martinez-Hidalgo*, 993 F.2d 1052, 1056 (3d Cir. 1993)) (internal quotations omitted); *see also* *Pendelton*, 658 F.3d at 302 n.2 (declining to reconsider the holding in *Martinez-Hidalgo*). The District Court determined that Congress intended 18 U.S.C. § 2423(c) to have extraterritorial application, and thus concluded that “U.S. citizenship alone provides a sufficient basis for the constitutional exercise of jurisdiction over the defendant [under this statute].” 2009 WL 330965, at \*5. In the present case, the Court agrees with the District Court in *Pendelton* that Congress intended 18 U.S.C. § 2423(c) to be applied extraterritorially, without regard for a nexus between a defendant’s conduct and the United States, and that U.S. citizenship is sufficient for the Court to exercise jurisdiction over a defendant charged under this statute. As it is undisputed that Bey is a U.S. citizen, the Court’s exercise of jurisdiction over him under 18 U.S.C. § 2423(c) does not violate substantive due process.

With respect to proper venue,<sup>14</sup> the Third Circuit in *Pendelton* held that, under the PROTECT Act, venue is proper in the district of arrest, not simply where the “essential conduct”

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<sup>14</sup> A number of circuit courts have held that improper venue is not a cognizable claim in a § 2255 proceeding. *See, e.g., Baeza v. United States*, 543 F.2d 575 (5th Cir. 1976) (concluding that the claim of improper venue was waived by petitioner’s guilty plea and was not cognizable in the § 2255 proceeding); *Williams v. United States*, 582 F.2d 1039, 1041 (6th Cir. 1978) (holding that improper venue is not a jurisdictional prerequisite and concluding that it is not a cognizable claim in a § 2255 proceeding); *Houser v. United States*, 508 F.2d 509, 515 (8th Cir. 1978)

of the alleged crime occurred. *Pendelton*, 658 F.3d at 303–05. As Bey was arrested in the Eastern District of Pennsylvania, venue is proper.

Finally, with respect to Bey’s argument under international law, the Court determines that the extraterritorial application of 18 U.S.C. § 2423(c) to Bey does not violate principles of international law. Although the legal presumption is that Congress ordinarily intends federal statutes to have only domestic application, *Small v. United States*, 544 U.S. 385, 388 (2005), this presumption may be overcome when there is “affirmative evidence of intended extraterritorial application,” *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 176 (1993). The language of 18 U.S.C. § 2423(c) is explicit as to its application outside the United States, as the provision is titled “Engaging in illicit sexual conduct in foreign places” and states that it covers people “who travel[ ] in foreign commerce” or reside in a foreign country and engage in illicit sexual conduct. In *Pendelton*, the Third Circuit acknowledged that Congress intended that 18 U.S.C. § 2423(c) be applied to conduct occurring outside the United States. 658 F.3d at 310–11.

Having concluded that Congress intended a law to have extraterritorial application, the Court must determine whether the exercise of extraterritorial jurisdiction comports with principles of international law. *See United States v. Harvey*, 2 F.3d 1318, 1328 (3d Cir. 1993). The Third Circuit has held that “[n]o tenet of international law prohibits Congress from punishing the wrongful conduct of its citizens, even if some of that conduct occurs abroad,” *id.* at 1329, and has affirmed that international law permits criminal jurisdiction as to a state’s

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(holding that, as a “pretrial matter,” venue is not cognizable under § 2255). The Court concludes that it is unnecessary to decide whether Bey’s improper venue claim is cognizable in this habeas action as, regardless, the claim is without merit.

nationals regardless of where they are located, *id.* at 1328–29 (citing *United States v. Wright-Barker*, 784 F.2d 161, 167 n.5 (3d Cir. 1986) (“International law generally recognizes five theories of criminal jurisdiction: [including]...2) nationality — as applied to nationals, wherever located...”). The Ninth Circuit upheld the extraterritorial reach of 18 U.S.C. § 2423(c) as compatible with principles of international law on the same rationale. *United States v. Clark*, 435 F.3d 1100, 1106–07 (9th Cir. 2006) (“Jurisdiction based solely on the defendant’s status as a U.S. citizen is firmly established by our precedent.”). As noted above, Bey is a U.S. citizen; thus, his U.S. nationality is a sufficient basis for the statute of conviction to reach him extraterritorially under principles of international law.

For the above reasons, Bey’s claim that the Court lacked subject matter jurisdiction over his case is without merit. Thus, Bey’s ineffective assistance of claim for failure to challenge jurisdiction also fails. First, defense counsel was not constitutionally deficient for failing to challenge the Court’s jurisdiction, as “[t]here can be no Sixth Amendment deprivation of effective counsel based on an attorney’s failure to raise a meritless argument.” *United States v. Sanders*, 165 F.3d 248, 253 (3d Cir. 1999). Second, defense counsel’s performance in this regard did not prejudice Bey as the claim is meritless. Thus, the Court concludes that defense counsel was not ineffective in this regard and the Court denies the Motion with respect to this claim.

### C. Request for Evidentiary Hearing

Bey requests that the Court hold an evidentiary hearing with respect to his claims. Under 28 U.S.C. § 2255, “the question of whether to order a hearing is committed to the sound discretion of the district court.” *Virgin Islands v. Forte*, 865 F.2d 59, 62 (3d Cir. 1989). In exercising that discretion, the Court must order an evidentiary hearing to determine the facts

unless the motion and record in the case show conclusively that the petitioner is not entitled to relief. *Id.*; see also *United States v. Day*, 969 F.2d 39, 41–42 (3d Cir. 1992). In the instant case, the Court finds no need for an evidentiary hearing, since the record conclusively establishes that Bey is not entitled to the relief sought in his § 2255 Motion.

## **V. CONCLUSION**

For the reasons stated above, the Court denies and dismisses Bey’s § 2255 Motion, as amended. An appropriate order follows. A certificate of appealability will not issue as to any of Bey’s claims because reasonable jurists would not debate whether the petition states a valid claim of the denial of a constitutional right as required under 28 U.S.C. § 2253(c)(2). See *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

**UNITED STATES**

**CRIMINAL ACTION**

**v.**

**OMAR BEY**

**NO. 10-164-01**

**ORDER**

**AND NOW**, this 31st day of December, 2014, upon consideration of petitioner's *pro se* Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence (Document No. 50, filed March 5, 2012); *pro se* Petitioner's Memorandum of Law in Support of Petition Under § 2255 (Document No. 49, filed March 5, 2012); *pro se* Petitioner's Motion to Amend His Previously Filed 28 U.S.C. § 2255 Motion Pursuant to Federal Rules [of] Civil Procedure Rule 15(a) (Document No. 53, filed December 4, 2012); Government's Opposition to Omar Bey's Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 (Document No. 57, filed January 28, 2013); *pro se* Petitioner's Traverse (Document No. 58, filed February 7, 2013); *pro se* Petitioner Omar Rashaad Bey's Answer to Oppose Respondent's Response to Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 (Document No. 59, filed April 25, 2014); and Government's Response to Petitioner Omar Bey's Answer to

Oppose Respondent's [Response to] Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 (Document No. 65, filed June 30, 2014), for the reasons set forth in the accompanying Memorandum dated December 31, 2014, **IT IS ORDERED** as follows:

1. Petitioner's *pro se* Motion to Amend His Previously Filed 28 U.S.C. § 2255 Motion Pursuant to Federal Rules [of] Civil Procedure Rule 15(a) (Document No. 53) is **GRANTED**;
2. Petitioner's *pro se* Answer to Oppose Respondent's Response to Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 (Document No. 59), construed as a Second Motion to Amend Petitioner's Motion Under 28 U.S.C. § 2255, is **GRANTED**;
3. Petitioner's *pro se* Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence, as amended, is **DENIED** and **DISMISSED**;
4. Petitioner's request for an evidentiary hearing is **DENIED**;
5. A certificate of appealability will not issue for any of petitioner's claims because reasonable jurists would not debate whether the petition states a valid claim of the denial of a constitutional right as required under 28 U.S.C. § 2253(c)(2). *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000); and
6. The Clerk of Court shall **MARK** the case **CLOSED**.

**BY THE COURT:**

/s/ Hon. Jan E. DuBois

**DuBOIS, JAN E., J.**

