No. 19-8161

IN THE

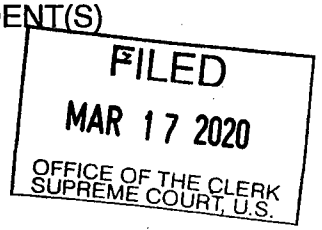
SUPREME COURT OF THE UNITED STATES

In re: SMITH — PETITIONER
(Your Name)

vs.

DIANE P. WOOD, et al., — RESPONDENT(S)

ORIGINAL



ON PETITION FOR WRIT OF MANDAMUS

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF MANDAMUS

Curtis Lee Smith
(Your Name)

FCI-TEXARKANA
P.O. BOX 7000
(Address)

Texarkana, TX 75505
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

I.

Did the court of appeal adopt divergent interpretation of the gatekeeper standard? Does the gatekeeper standard needs to be **"re-visited?"** by this Supreme Court, because different court of appeals adopted divergent interpretations of the gatekeeper standard? See, **Felker v. Turpin, 518 U.S. 651**, 664, 116 S.Ct. 2333, 2340, 135 L.ed.2d. 827 (1996)(Three Justices filed a **concurrence warning** that "the question whether the statute exceeded Congress's Exceptions Clause power" **might need to be revisited** "if the court of appeals **adopted divergent interpretations on the gatekeeper standard."** Id. at 667, 116 S. Ct.at 2342 (Souter, J., concurring).

II.

Did the court of appeal commit procedural errors and violated In re: Smith's statutory and constitutional rights by not sending the §§2244(b); 2255(h)'s **applicaiton("s")** to be **de novo reviewed by the District court**, on the merits, before the court of appeals **sua sponte** ruling that Smith was ineligible for relief under Johnson (2015), **Nelson(2017)**, and **Rehaif, without giving the district court "notice"** first, in order to give Smith the chance to be heard?

III.

Did the United States Court of Appeals for the Seventh Circuit impose an improper and unduly burdensome sum of $500.00 sanction fee and fine on movant petitioner for filing 28 U.S. C. §§ 2244(b); 2255(h)'s **applications** claim seeking relief under **Johnson(2015), Nelson(2017)**, and Rehaif(2019)? Even after Movant Petitioner having paid the sum of $500.00 in full for a previous sanction fine? Here, Movant had one-year to file his **Johnson(2015) Nelson(2017)**, and **Rehaif(2019) §§ 2244(b), 2255(h) applicantions.**

IV.

Did the Seventh Circuit deprive Smith of due process? Did the the Seventh Circuit cause controversy with the Eleventh Circuit's binding precedent case law "In re: Leonard, 655 F. Appx' 765, 766-779 (11th Cir. 2016)??

LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

[X] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

1. **Diane P. Wood,** Chief Judge, United States Court of Appeals for the Seventh Circuit.

2. **Ilana Diamond Rovner,** Circuit Judge, United States Court of Appeals for the Seventh Circuit.

3. **Michael B. Brennan,** Circuit Judge, United States Court of Appeals for the Seventh Circuit.

4. **Ann Claire Williams,** Circuit Judge, United States Court of Appeals for the Seventh Circuit.

5. **William J. Hibbler,** District Court Judge, for the Northern District of Illinois-Chicago Division.

6. **Susan S. Kister,** court appointed **appellate** attorney, from St. Louis, Missouri.

7 **Sheri H. Mecklenburg,** assistance attorney for the United States of America, Chicago, Illinois.

8. **Eric E. Sussman,** assistance attorney for the United States of America, Chicago, Illinois.

9. **Carrie E. Hamilton,** lead assistance attorney for the United States of America, Chicago, Illinois.

10. **Michael J. Finn,** paid-private attorney pretrial, trial, and new trial critical stage of proceedings counsel.

11 **Jack I. Rodgon,** paid private attorney pretrial, suppression of evidence and statement, and Quash Arrest critcal stage of proceedings.

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IN THE SUPREME COURT OF THE UNITED STATES

PETITION FOR ALL WRIT ACT, 28 U.S.C. § 1651(a)
WRIT OF MANDAMUS

Petitioner respectfully prays that a Writ of Prohibition or a Writ of Mandamus, or both, and a Writ of Habeas Corpus 28 U.S.C. § 2241 issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix A, at pp.18-19; APPENDIX B, at pp.5-6; APPENDIX C, at pp.12-13; See also, APPENDIX D, at pp.1-6, to the petition for Writ of Mandamus or Writ of Prohibition or both. And a Writ of Habeas Corpus under 28 U.S.C. § 2241.

[ ] reported at N/A; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the United States district court appears at Appendix the petition and is

[X] reported at 2011 U.S. Dist. LEXIS 91807 (N.D. ILL 2011); or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[x] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was **August 5, 2019**.

[x] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: **N/A**, and a copy of the order denying rehearing appears at Appendix **N/A**.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including **N/A** (date) on **N/A** (date) in Application No. **A**.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

STATEMENT OF JURISDICTION

The court of appeals originally exercised jurisdiction under 28 U.S.C. § 1291, which provides it with jurisdiction over all federal crimes. This Court has jurisdiction under 28 U.S.C. § 1254, which provides it with jurisdiction over appeals from final judgments of the court of appeals and district courts. This appeal is taken from the court of appeals for the Seventh Circuit's order **sua sponte** denying relief under Rehaif v. United States, 139 S.Ct. 2191 (2019) on **August 5, 2019**; Nelson v. Colorado, 137 S.Ct. 1249 (2017) on **May 15, 2019**; and also, Johnson v. united States, 137 S. Ct. 2551 (2015) on **February 8, 2019. SMITH** was **barred in 2013** from filing any motions in the Seventh Circuit until he **paid in full $500 sanction fee.** On **December 20, 2018, SMITH** received **conformation letter** that his **$500** sanction fee was **paid-in-full.** Thereafter, **SMITH** filed the above aforementioned motions, which the Seventh Circuit says **SMITH** used the wrong vehicle and that his motions were filed **too late.** Then the Seventh Circuit **barred** him again from filing any motions in any courts in Seventh Circuit Until he **paid-in-full another $500 sanction fee.**

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

I

The **Fifth** Amendment to the United States Constitution provides in pertinent part:

No person .... shall be deprived of life, liberty, or property without **due process of law.**

II

The **Fourteenth** Amendment to the United States Constitution provides in pertinent part:

No state .... shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any states deprive any person of life, liberty, or property without **due process of law.**

I. STATEMENT OF THE CASE

1. In 2015, this Supreme Court's ruling in Johnson v. United States, 135 S.Ct 2551 (2015) which struct down part of the Armed Career Criminal Act("ACCA"), as unconstitutionally vague. SMITH could not file his Johnson(2015) claim in ['2015 or 2016'] in the Seventh Circuit. Because the Seventh Circuit ["barred"] Him on ["July 9, 2013, case: 13-2317), and imposed a $500 dollars sanction fine and fee, against SMITH, He was not allowed to file any motion in any court in the Seventh Circuit, until he paid-off in full the $500 sanction fee.(Id., at APPENDIX C #1-11

On December 20, 2018, SMITH received a conformation letter from the Seventh Circuit showing that He had paid - in - full the $500 sanction fee fine. Immediately, thereafter, on December 26, 2018, SMITH submitted a ["handwritten used 28 USC §§2244(b); 2255(h) application"] because USP-ATLANTA's prison was on Modified lock-down condition for over 2 years"] at that point in time. (Id., see APPENDIX C.). SMITH was deprived access to the USP-ATLANTA's law library 28 USC §§2244(b); 2255(h)'s applications, legal support law books, typewriters, papers, and law computers. Which he needed to file a claim 28 USC § 2255(h) application. But nonetheless, SMITH's 28 USC §2244(b) application was timely filed in the prison's mail system on December 26, 2018. But the Seventh Circuit stated, that SMTIH's "application was filed - too - late." (Id., at Smith v. United States, No. 19-1092, Submitted January 14, 2019; Denied on February 8, 2019)...(Id., at APPENDIX C #12-13).

2. (Id., at Smith v. United States, No. 19-1858; at APPENDIX B) On May 1, 2019, SMITH submitted his ['application'] under §2244(b); § 2255(h) motion seeking permission for leave from the Seventh Circuit, to send his case back down to the district court. So, that he may challenge the district court's United States v. Watts, 519 U.S. 148 (1997), offense relevant conduct determination 4-level Points sentencing enhancement, pursuant to Nelson v. Colorado, 137 S. Ct. 1249 (2017). SMITH was Eligible to file His claim under Nelson, because he had paid off - in - full His July 9, 2013, $500 dollars sanction fee.(Id.,at APPENDIX D, at p.4-5.).

On May 15, 2019, the Seventh Circuit Court of Appeals sua sponte denied SMITH's ['application'] claim seeking to invoke Nelson, to overrule the district court's found facts relevant conduct sentence enhancement under United States v. Watts...

3. (Id. at Smith v. United States, No.19-2314; and APPENDIX A, at pp. 1-15) SMITH filed in the United States Court of Appeals for the Seventh Circuit, his ['Application'] for Leave to File a Second or Successive Motion to Vacate, Set Aside or Correct Sentence 28 USC § 2255 By a Prisoner in Federal Custody; and (Id. at APPENDIX A, at pp. 16-17), SMITH in the Seventh Circuit filed a Motion for

Appointment of Counsel to Represent him with presenting His claim and Argumentation, that he is **"entitled" to the ['same'] relief as** [Rehaif v. United States, 588 U.S.__(2019), under § 2255 because there is Evidence in the Record that show Movant is Actually Innocent of Violating § 922(g)(1). Based upon Evidence that Movant **[did not know ("knowingly")]** that the Firearm having, "in and affected interstate commerce prior to possessing it. (Id.) On **July 8, 2019, SMITH** had mailed the above aforementioned § 2255 **['Application']** to the Seventh Circuit, and it was Docketed Submitted on **July 11, 2019.** (Id., at **APPENDIX A**, p. 5, ¶.10). **SMITH** states in Ground One: Movant Smith is entitled to immediate release under **"Rehaif"** - because he is actually innocent of violating 18 U. S.C. § 922(g)(1); and Movant Smith is entitled to § 2255 relief, because there is evidence in the record, that shows that he is actually innocent of violating § 922(g)(1), because Smith **did not know** that he fell into one of the categories of persons to whom the offense applies. Movant Smith is entitled to § 2255 relief - because his case is **["similarly - situated"]** with **Rehaif**, therefore, Smith should be granted the same relief as Rehaif v. United States, 588 U.S.__(2019).

(Id. at **APPENDIX A**, p. 5, ¶.10). **SMITH** states that: Movant Smith have found a lot of **["new evidence"]** showing 1) that the United States and its Government's Witnesse(s) committed prejury, lied and committed fraud on the court("s") at every critical stages of proceedings; 2) that his appellate and trial counsel("s") had abandoned him at critical stages of proceedings; and 3) Reasons why evidence **was not previously available to him** - is because his ineffective attorney("s") had **["refused"]** to present evidence when it should have been presented to the Seventh Circuit, and to district court; and 4) that the district court - **never - reviewed** Movant's **newly discovered evidence** at any post trial evidentiary hearing... (Id., at **APPENDIX A**, at pp. 8-15), which more fully explain **SMITH's newly discovered evidence** which the Seventh Circuit nor any district court held an evidentiary hearing to redress the matter of the case on its merits.(Id., see also **APPENDIX D, pp.3-10).**

(Id., at Smith v. United States, No. 19-2314; at **APPENDIX A**, pp.18-19) On **August 5, 2019**, the Seventh Circuit Court of Appeals **sua sponte denied SMITH's ['application']** for relief under § 2255, without sending the **application** back down to the **["lower district court"]**, to make its determination on the merits whether **SMITH** has a claim under **"Rehaif(2019)." The Court of Appeals for the Seventh Circuit states:** "WE therefore **DENY** authorization and **DISMISS** Smith's **application.** Further, we **DENY** his request for counsel,**as there are no potentially meritorious issues to argue.** And because Smith persisted in filing claims that plainly do not satisfy **§2255(h) - we impose the following SANCTION:** Smith **is fined $500.** Until he pays that sum in full to the clerk of this court, **any collateral attack on his federal convictions or sentences from 2008 that he files in court of this circuit will be returned unfiled. Any applications**

for leave to file successive collateral attacks on these convictions or sentences will be deemed denied 30 days after filing unless the court orders otherwise. See Alexander v. United States, 121 F.3d 312 (7th Cir. 1997).

Note: Smith is very poor, and he has no money of his own, it will be very difficult for Smith to rise $500 now after being in prison for over 15 years, his brother Donald Smith just died, is the person that provided Smith the previous $500 to pay off sanction fee. Since Smith have been in prison his family base have die. He may never get another $500 to paid-off the full sum of the sanction fee fine, before his prison release date of September 2025.

Because of the modified lock-down condition at the USP-ATLANTA's prison for over 3 years Smith was deprived adequate opportunity and time to the prison law library books, papers, typewriter or law computers, needed to learn the proper vehicle and procedures for filing such petitions and motion. There is evidence in the record that show, Smith's original 28USC §2244(b) applications were hand written, and he re-used previously used 28 USC §2244(b) application SMITH, could not get to the prison Law Library.

NOTE: In re Smith, (Id. see, Smith v. WOOD, et al., No. 1:19-CV-3673-SDG, Doc. 1, at PACER, filed: August 14, 2019). Smith filed a Bivens complaint under 28 U.S.C. § 1331, because he was placed under modified lock-down condition, for 3-years, based upon other unknown inmates bad behavior. Therefore, he had to reuse previously filed 28 U.S.C. 2244(b) application seeking permission to file a second or successive § 2255(h) motion for releif. Because he could not go to the Law Library.

4. BACKGROUND OF THE ENTIRE CRIMINAL AND CIVIL CASE PROCEDURE

A. On April 11, 2008, SMITH was convicted of (1) unlawful possession of a firearm by a felon, in violation of 18 U.S.C. § 922(g)(1) (Count-one); and Possession with intent to distribute powder cocaine (Dkt. No.64). On Februray 24, 2009, the district court sentence him to serve concurrent terms of imprisonment of 262 months on each of Counts One and Two.(Dkt. No. 29).

On August 12, 2009, the Seventh Circuit affirmed this Court's judgment, but ordered a limited remand for the court to correct specific errors in the judgment. Specifically, the court of appeals noted that, although the PSR stated and government counsel confirmed at sentencing that defendant was subject to at statutory sentencing range of 5 to 40 years on Count Two, given that the offense involved 2.2 grams of heroin and .1 gram of cocaine, the statutory range for Count-Two actually was 0 to 20 years pursuant to 21 U.S.C. §841(b)(1) (C), and sentenced SMITH to a term of 262-months imprisonment the district court imposed had exceeded the statutory maximum. The appellate court noted, that 262 months term of imprisonment as to Count-One possession of firearm, that had traveled, in and affecting commerce prior to defendant's possessing firearm, was correct.(Id., see, **APPENDIX D**, at p. 1).

B. Background of the Jury's Verdict and Defendant's Motion for a New Trial

(Id. at United States v. Smith, No. 1:06-CR-441 Document 122 Filed 08/18/08 Page 1 of 15).

On April 11, 2008, after a four-day jury trial, the jury convicted defendant of the charges contained in Counts One and Two of the Indictment, respectively being a felon in possession of a firearm and possession of a controlled substance with intent to distribute. The jury acquitted defendant of the charges contained in Count Three of the Indictment, which charged defendant with use of a gun in furtherance of a drug crime, under Title 18, United States Code, Section 924(c).

On August 5, 2008, defendant filed an Amended Motion for a New Trial. In his motion, defendant moves, pursuant to Federal Rule of Criminal Procedure 33, and the Due Process Clause of the Fifth Amendment of the United States Constitution, to vacate the jury verdict entered in this case and order a new trial. Defendant asserts that he is entitled to a new trial on a variety of grounds, none of which, alone or cumulatively, are grounds for granting defendant a new trial.

perfectly logical for the jury to believe that because an officer would anticipate relying upon his report for the serial number, he would ensure that he recorded the serial number accurately.

Second, Officer Walker's testimony was not the only evidence of the serial number of the gun. Alvin Green, the fingerprint examiner, testified that he verified the serial number when he examined the gun. Lt. Richard Cap testified that he and others, including Internal Affairs officers, verified the serial number several times throughout the process of identifying the gun for destruction. Mr. Aronstein testified that his company manufactured a gun of the make and model described by each of the witnesses, bearing the same serial number recorded by Officer Walker. Defendant presents no reason why the jury would not believe that the serial number was accurate.

5. The Government Presented Sufficient Evidence of the Chain of Custody of the Gun and Drugs Seized from Defendant.

Defendant's argument that the government did not establish chain of custody of the firearm is inaccurate as well as irrelevant. It is inaccurate because the government established the chain of custody of the gun from Officer O'Donnell seizing the gun, to Officer Walker inventorying the gun, to Officer Green examining the gun, to destruction of the gun. It is irrelevant because defendant never states what the missing link in the chain of custody is, and how it affects whether defendant possessed the gun at the time of his arrest.

Similarly, defendant's argument that the government did not establish a chain of custody for the drugs is inaccurate. Officer Walker testified about his inventory of the drugs and how he signed the inventoried bag. He identified the drugs in court as those seized from defendant, by his signature on the bag. Illinois State Police Crime Lab analyst Rosa Lopez testified that she received the sealed inventory of the drugs, that she opened it, tested it, resealed it, and initialed it. Ms. Lopez identified the drugs in court as those that she received and tested, by her initials on the bag. The chain of

serial number, it is pure speculation to believe that the presence of the gun would change Mr. Aronstein's testimony based upon the serial number.

Defendant also argues that he could not cross-examine Officer Walker on the serial number of the gun, in the absence of the gun. Officer Walker's testimony about the serial number was a matter of credibility, credibility which the jury was able to assess in light of the corroboration of the serial number by other evidence. The serial number was corroborated by Officer Green when he examined the gun, was corroborated by Lt. Cap and others in processing the gun for destruction, and was corroborated by Mr. Aronstein's research showing that the serial number came back to the same make and model gun as that described by the witnesses and in the reports. Thus, defendant's claim that the availability of the gun would have allowed him to effectively cross-examine Officer Walker about the serial number is pure speculation, which does not warrant a new trial. *See U.S. ex rel. Darcy v. Handy*, 351 U.S. 454 (1956)(a defendant bears the burden of proving that he is entitled to a new trial and does not satisfy that burden through speculation). (Id. at **APPENDIX D, pp.3-5**).

C. **Movant-Defendant SMITH is Eligible for a New Trial, or Remand to Vacate or Reverse His Convictions under the All Writ Act, 28 U.S.C. § 1651(a), that includes both, a Writ of Mandamus and a Writ of Prohibition.** The Court should issue a Writ of Mandamus for SMITH, because he has no other adequate means to attain the new trial relief at this very late 16-years incarceration point in time. Because in the following page("s") 10-21 provides ample evidence in the record showing that SMITH is actually innocent, and legally innocent. Because Jury's verdict is incredible-it goes against the weight presented at trail showing that the United States prosecutor never asked expert witness GREEN any question regarding a serial number being on the gun.

C. Background of Officers GREEN; O'DONNELL; and Lt. CAP's testimonies regarding the Destruction of the "gun"

(Id., at Trial Transcript pp. 41-41). Officer O'ONNELL testified that he "did-not-see" a "serial-number-on-the-gun," more fully explained on the following pages ("11-12; 13-16; 17-21").

2. (Id.,at Trial, p. 160). Lt. CAP testified 'It usually takes "Two-to-Three-years" before he "even get the chance, the opportunity" to look into the weapon and see if it's needed anymore," before he know whether it going to be destroyed. (Id., at Trial, p.162). Lt. CAP testified that he ["was-asked-by-Unkown-Named-Prosecutor"] to check the weapon vault, and put the gun recovered from the arrest of Curtis Smith on a list to be destroyed in NOVEMBER 2006. (Id.,at Trial p.162) Lt. CAP testified that he had ["an officer-working-under-His-supervision-to-reseach"] the disposition of said gun. And ["Lt. CAP had discovered the case("nolle'd")-by-the-state."].(Id.,at Trial, p.167).Lt. CAP testified that he [did-not-know-the-state("nolle'd) the case. (Id.,at Trial, p.178).Lt. CAP testified that this was the first time a gun was destroyed that should-not have-been-destroyed-in the Chicago Police Department's Evidence and Recovered Property Section.

3. (Id.,at Trial, pp.179-180). Officer Alvin GREEN testfied that he is an Evidence Technician that examined the "gun" in the Chicago Police Department("PD") Crime Lab. (Id., at Trial, pp.181-182). GREEN testified that he 'laser tested and inspected the gun for fingerprint and GREEN analyzed and inventoried the gun in connection with SMITH's arrest. (Id., at Trial, pp.183-186). GREEN testified that he did not find any identifiable fingerprints on the gun. (Id. See, APPENDIX F, at pp.18).

A. Yes.
Q. You said that the gun that was found in the van was a little beat up?
A. It was beat up, yes.
Q. Was there any rust on the gun?
A. You know, it's difficult to remember because it was three years ago, the appearance. But I remember it being a beat-up handgun. It was beat up.
Q. Was it -- was there scratches on the finish or nicks?
A. There were -- best way I can describe it is beat up. I can't get into specifics because it's been three years and this isn't the actual weapon.
Q. Now, you indicated on direct examination that there was a serial number in the breech here on the gun --
A. Yes.
Q. -- that was found in the van, is that correct?
A. Yes.
Q. Now, was this portion, this breech as you called it, a little beat up as well?
A. I don't recall because I think Officer Walker got that information because he inventoried the items and related it to me, because he was the inventorying officer.
Q. So you never really saw this serial number that was on the gun that was found in the van?
A. I probably did -- looked at the weapon. But as far as

getting the exact numbers -- because I always do. It's just a matter of procedure. I believe probably Officer Walker wrote it down and gave it to me.

Q. I'm confused.

A. Because he writes the weapon description down and then gives it to me.

Q. Does that mean you did look at the serial --

A. I probably did because I definitely -- every weapon that's recovered, which is by procedure, I look at it.

Q. Okay. And you don't remember the condition of this breech --

A. I don't.

Q. -- what --

A. It's been over three years. I don't. I just know that the weapon was beat up.

Q. Did you take any special precaution to ensure that the serial numbers you read off this beat-up weapon were correct?

A. You will have to ask Officer Walker because he did the inventory on it.

Q. When Officer Walker relayed the serial numbers to you, did you then look at the weapon to see if those were the same numbers you saw?

A. I don't -- I probably didn't because I wouldn't double-check -- my partner would be doing anyway.

Q. Officer O'Donnell, you said this area was well lit --

research it in the main frame. We go into the court mainframe for Cook County. And we check the -- the reference numeral, the RD number, the case number. And we look up the -- what the final disposition is of the court case. Naturally if the Court case is still being held or is still going on or continued, we are not going to destroy the weapon.

Usually on average I would say it's two to three years before we even get the chance, the opportunity, to look into the weapon and see if it's needed anymore. Then we check the final disposition. If it's no longer needed, then we check it again to make sure it's not reported as stolen or anything of that nature.

We put it on a list. The list is -- I usually go over the list again to make sure everything is correct. And then we take it to the city, our attorney with the police department, who presents it to a Judge to signs off on it and allows us to dispose of these guns.

Q. Now, after you get the court order from a Judge authorizing the destruction of certain guns on -- when you said you list them, what do you do to get the guns ready for destruction?

A. The weapons are then taken out of the bags that I said that they were put in, the bag that I put them in. And then we open that bag, and inside the bag that's sort of sealed up as the evidence. We remove it from that bag. And then we check the serial number against the actual inventory sheet. We make sure

the pallet, and then locked in an area with an internal affairs lock until that evening, when it's opened, put on a truck and taken to the steel mill to be melted.

Q. Now, let's talk about the gun in this case. You were asked to check to see if when you came into -- when you returned to ERPS as a lieutenant in 2006, whether this gun was actually in the weapons vault. And did you check that?

A. Yes.

Q. And was the gun that was recovered from the arrest of Curtis Smith in the gun -- in the gun vault at the time you returned to ERPS in 2006?

A. Yes, it was.

Q. And after you returned to ERPS, did an officer under your supervision research the status of the state charges that were then pending against the defendant Curtis Smith?

A. Yes, they did.

Q. And what did they discover in terms of the status of the case?

A. The case was nolle'd by the state.

Q. What does nolle'd mean?

A. Means that they are not going to go prosecute it at that time. And there is no prosecution at that time for the case.

Q. And did the research of the -- you said you go into the Cook County computer and look --

A. Yes.

Q. Chain of custody?

A. Chain of custody.

Q. Paperwork?

A. Yes.

Q. Okay. You said that -- it sounds like there is a lot of paperwork involved in this process, which is a good thing, I think. Don't you?

A. Oh, yes, very much so.

Q. Because you don't want to destroy a gun that's supposed to be used in evidence in court, do you?

A. Well, unfortunately I made a mistake this time and it got by me. And I have to admit that it was -- it was a mistake. It should have been held. I was revamping the way that things were done. And unfortunately I missed that -- I missed the part where they nolle'd the case. And I didn't realize that it was picked up and was going to be prosecuted again.

Had I did that, I would have definitely not have destroyed the evidence.

Q. All right. And the way you check to see the status of a case, you go to the clerk's office and you use their database, correct?

A. Yes.

Q. And basically that's public information, correct?

A. Well, I don't know if it's complete public information. It could be. I'm not sure. I have access through the Chicago

burn, over I believe on that burn 1600 guns that were destroyed that same day.

Q. Do you -- I don't mean to offend you. But does this happen a lot where a gun is destroyed that shouldn't be destroyed?

A. No, this was actually -- it's quite embarrassing. It's the first one that's happened to me since I've been back there.

Q. Do you remember what the gun looked like, sir?

A. I believe I read earlier I think it was a Derringer, High Standard Derringer, I believe.

Q. That's correct.

And did you -- you probably -- you see a lot of guns, I imagine, is that correct?

A. I do. Approximately 15 to 1600 I box up. I check them. I check them just so there is -- I'm there while they are being boxed. I -- not that I don't trust people who work with me, but I want to be part of this because I'm signing off on this. And I feel that it's in my obligation of my job to be there, make sure that everything is correct.

Q. You want to do your job the best that you can, don't you?

A. I sure hope I do. Like I say, I tried my hardest. Sometimes mistakes are made.

MR. FINN: No more questions, Judge.

THE COURT: Any redirect?

MS. MECKLENBURG: No, your Honor.

THE COURT: Thank you, lieutenant. You may step down.

D. Background of the Brief of the United States' [Statement of Facts] failure to corroborate Officer Walker's trial testimony regarding a Criminal Confidential Informer, described ["Curt"] van as white with ["ladders"]. (Id. at p. 2)(see Trial, pp.137-138), more fully explained on following pages 19,20,21...

E. Background of the Brief of the United States' [Statement of Facts] failure to corroborate Officer O'Donnell's trial testimony regarding Officer O'Donnell approached driver's side of van, and see "Curtis Smith" "making furtive movements."].. (Id., at p. 3)(see, Trial, p.12).

STATEMENT OF FACTS

Defendant's arrest

On January 30, 2005, Chicago Police Sixth District Tactical Officers Michael O'Donnell and Corey Walker received information from a confidential source ("CS") that a man named "Curt" was selling heroin out of his van. Tr. 3-5, 98. The CS described "Curt," and further described his van as white with ladders on the side. Tr. 4-5. At the direction of the officers, the CS contacted Curt and set up a drug transaction that day at 80th and South Ashland. Tr. 5-6, 98-100. The officers proceeded to that area to make an undercover purchase of drugs from Curt, with Officer O'Donnell in the car and Officer Walker on foot with the CS. Tr. 5-6, 10, 100-01. When the officers arrived at the designated area, they saw defendant drive up in a white van with ladders. Tr. 10, 13, 102. In the passenger seat of defendant's van sat a male, identified as Steven Sanford, and on his lap sat a female, identified as Felicia Jackson. Tr. 13, 20.[2] As Officer

[2]Defendant identified Steve Sanford as having a drug habit. Tr. 247-48. Defendant described Felicia Jackson as "a known prostitute." Tr. 254-55.

Walker approached defendant's van on foot to make an undercover purchase of drugs, he observed a female approach the van, hand defendant money, and accept a small object from defendant. Tr. 11, 103-04, 107. Officer Walker signaled Officer O'Donnell to approach the van's occupants. Tr. 12. As Officer O'Donnell did so, Officer Walker stopped the female, and recovered from her hand a small plastic bag containing approximately .1 grams of heroin. Tr. 11, 12, 106-07. The female was arrested and later charged with possession of heroin. Tr. 107.

As Officer O'Donnell approached the driver's side of the van, he saw defendant reach into his lap, "making furtive movements." Tr. 13-14. This caused Officer O'Donnell to draw his weapon. Tr. 13. Officer O'Donnell saw defendant reach back with his left hand and stuff a white object behind his seat. Tr. 13-15. Officer O'Donnell ordered defendant to keep his hands visible, and then Officer O'Donnell opened the door and ordered defendant out of the van. Tr. 15-16. Officer O'Donnell patted down defendant and recovered $139 from defendant's pants pocket. Tr. 20. Officer O'Donnell looked inside the van, at the area where the defendant had reached back with his left hand holding the white object. Tr. 16-17. There, Officer O'Donnell found a white hand towel. Officer O'Donnell unwrapped the towel, and inside he found small individually packaged bags of narcotics and a .22 caliber pistol. Tr. 17, 110. The narcotics in the towel

Q. So he had called Curtis Smith before?
A. Yes.
Q. And he had called for delivery of drugs before?
A. Yes.
Q. And were you present at those deliveries?
A. No, sir.
Q. And you used this informant before in the past, correct?
A. Yes, sir.
Q. You still use him today?
A. Yes, sir.
Q. Have you ever taken him in front of a magistrate judge to get a warrant?
A. No, sir.
Q. And when your informant told you that he had this number, he identified the seller, didn't he?
A. Yes.
Q. And how did he identify the seller?
A. I believe he said Curt. I believe he said Curt.
Q. All right. And he said he is a male, right?
A. Yes.
Q. He said he is black?
A. Yes.
Q. What else did he say?
A. He drives a white van.
Q. With ladders on top or just a white van?

A. Just a white van.
Q. Officer Walker, I don't need you to come down -- you know what? I do, sir.
MR. FINN: Judge, may he step down from the --
THE COURT: Sure.
(Witness left the witness stand.)
MR. FINN: I will try do this so --
BY MR. FINN:
Q. Officer, this is an exhibit that has been labeled Government Exhibit Map. What is this right here, sir? I'm pointing to the median area.
A. What is it?
Q. Yes.
A. It's a median, concrete median.
Q. And is this kind of like a raised planter type thing where they put --
A. Flowers and stuff.
Q. Yes.
A. Yes.
Q. Are there any trees in this area?
Let me rephrase that. Were there any trees in that area on January 30, 2005?
A. Not that I recall, no.
Q. On January 30, 2005, was there snow on the ground?
A. Not that I recall. I know it was 30 degrees. It was cold

A. That's when Officer Walker kind of flagged me, come on, come on.
Q. When you say Officer Walker kind of flagged you, what --
A. He was making a hand motion like -- like this (indicating).
Q. And what did you understand him to be meaning?
A. To move.
Q. To you?
A. Yes.
Q. Okay. And what did you do after seeing that flagging motion from Officer Walker?
A. U, pulled up in front of the van.
Q. Okay. And what if anything did you see Officer Walker do as you made the U-turn and pulled in front of the van?
A. He went and got the female.
Q. And what did you do at that point?
A. I immediately got out of the car, walked to the driver's side, opened the door, and told the driver, who I now know to be the defendant Curtis Smith, to turn the vehicle off.
Q. Let me back you up for a second.

As you're walking towards the van, can you see who is inside the van?
A. There was multiple people.
Q. Okay. Who did you see and where did you see them?
A. There was a female, a male on the passenger's side and a male sitting on the driver's side.

II. REASONS FOR GRANTING THE PETITION

Argument

A. This is an Extraordinary Case, Under the All Writ Act: 28 U.S.C. § 1651(a). That includes ['both'] the Writ of Mandamus and the Writ of Prohibition. see, Cheney v. United States, below.

Under the All Writs Act, federal courts "may issue all writs necessary or appropriate in aid of their respective{2019 U.S. App. LEXIS 5} jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). That includes the writ of **mandamus** requested here. *See, e.g., Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380, 124 S. Ct. 2576, 159 L. Ed. 2d 459 (2004). But because **mandamus** "is one of the most potent weapons in the judicial arsenal, three conditions must be satisfied before it may issue." *Ibid.* (quotation omitted). The Supreme Court has explained:

> First, the party seeking issuance of the writ [must] have no other adequate means to attain the relief he desires-a condition designed to ensure that the writ will not be used as a substitute for the regular appeals process. Second, the petitioner must satisfy the burden of showing that [his] right to issuance of the writ is clear and indisputable. Third, even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances.*Id.* at 380-81 (alterations in original) (quotations omitted).

"These hurdles, however demanding, are not insuperable." *Id.* at 381. They simply reserve the writ "for really extraordinary causes." *Id.* at 380 (quoting *Ex parte Fahey*, 332 U.S. 258, 259-60, 67 S. Ct. 1558, 91 L. Ed. 2041 (1947)). And in extraordinary cases, **mandamus** petitions "serve as useful 'safety valve[s]' for promptly correcting serious errors." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 111, 130 S. Ct. 599, 175 L. Ed. 2d 458 (2009) (alteration in original).

"The{2019 U.S. App. LEXIS 6} clearest traditional office of **mandamus** and prohibition has been to control jurisdictional excesses, whether the lower court has acted without power or has refused to act when it had no power to refuse." 16 Charles Alan Wright et al., Federal Practice and Procedure § 3933.1 (3d ed.) [hereinafter Wright & Miller]. That was true at common law. *See* 3 William Blackstone, Commentaries *112 (explaining the **writ of prohibition** issued to "any inferior court, commanding them to cease" a case that did "not belong to that jurisdiction"). And it's true today.

Because the Court of Appeals for the Seventh Circuit have adopted divergent interpretations of the gatekeeper standard and acted without power, and or authority or jurisdiction, by refusing to send timely filed claims under Johnson(2015); Nelson(2017); and Rehaif(2019), 28 U.S.C. §§ 2244(b); 2255(h) **"Application(s)"** to the [lower district court'] to do a **de novo** review first, before the court of appeal **sua sponte** denying §§2244(b); and 2255(h) **applications.** Which must be ceased because the Seventh Circuit actions has created controversy with the Eleventh Circuit's binding precedent case law **In re: Leonard,** 655 Fed. Appx' 765, 766-779 (2016).

A Writ of Prohibition and a Writ of Mandamus should be granted because this Court should command the court of appeals to **cease,** because jurisdiction does not belong to them first to deny **sua sponte,** before the district court have first de novo reviewed those § 2255(h) application on the merits.

B. By **sua sponte** issuing a denial, a court of appeal deprives a prisoner of that statutory, one-time right. At a minimum, a prisoner who is granted a statutory right to litigate a one-time claim of such importance is entitled to notice to be served on the district court and on the United States Attorney's Office, and the right to be heard before a court of appeal denies a **"§§2244(b); 2255(h)" ["Application"]**. Richards, 517 U.S. at 799; Greenholtz, 442 U.S. at 16. By denying **Smith** relief without giving him the chance to be heard at the district court, the court of appeal violated his due process rights. See, **In re: Leonard**, 655 F. Appx. at 778-779; and (Id., at **APPENDIX E, p. 11**).

{655 Fed. Appx. 778} On the topic of this court's singular approach, I add one more observation. The Supreme Court recently granted certiorari in the case of a Texas prisoner named Duane Buck. See Buck v. Stephens, No. 15-8049, __ S. Ct. __, 136 S. Ct. 2409, 195 L. Ed. 2d 779, 2016 WL 531661 (U.S. June 6, 2016). The Court{2016 U.S. App. LEXIS 37} took the case even though the lower court ruled that Mr. Buck's appeal was so meritless that he couldn't even file it. Mr. Buck's petition for certiorari asked: "did the United States Court of Appeals for the Fifth Circuit impose an improper and unduly burdensome Certificate of Appealability (COA) standard?" Our treatment of applications for successive § 2255 motions may be even more troubling than the issue raised in Buck. Unlike the denial of a COA, the statute governing applications like Mr. Leonard's provides that "denial of an authorization . . . to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari." 28 U.S.C. § 2244(b)(3)(E). This means no motion for reconsideration, no motion for en banc review, no appeal, and no petition for cert. The decisions we make in these cases are therefore, as a practical matter, not reviewable.

A month after AEDPA (and with it, § 2244(b)(3)(E)) became law in April 1996, the Supreme Court held that these "new restrictions on successive petitions . . . do not amount to a 'suspension' of the writ." Felker v. Turpin, 518 U.S. 651, 664, 116 S. Ct. 2333, 2340, 135 L. Ed. 2d 827 (1996). Three Justices filed a concurrence warning that "the question whether the statute exceeded Congress's Exceptions Clause power" might{2016 U.S. App. LEXIS 38} need to be revisited "if the courts of appeals adopted divergent interpretations of the gatekeeper standard." Id. at 667, 116 S. Ct. at 2342 (Souter, J., concurring). I hope someone better equipped than me will take this opportunity to look at whether the divergent views taken by this court require reexamination of this question asked by these Justices so soon after AEDPA was enacted.10

In deciding whether an inmate gets to pursue relief based on the Supreme Court's Johnson ruling, I believe the question should simply be whether his sentence was based on crimes that met ACCA's "violent felony" definition before Johnson but no longer do.11 The approach our court has taken instead is, I believe, fraught {655 Fed. Appx. 779} with hazard and subject to error. As long as we continue this approach, we are bound to make more mistakes. Our mistakes don't go away when we deny an application. Prisoners whose applications we've mistakenly denied will file again. And well they should. The federal courts are the branch of government charged with administering justice in individual cases. If we've made mistakes it is our job to fix them. I hope Mr. Leonard's case is an exception, but I fear it is not. And "if there are others who are wrongfully detained without a remedy, we{2016 U.S. App. LEXIS 40} should devote the time and incur the expense to hear their cases. What is the role of the courts, if not this?" Gilbert v. United States, 640 F.3d 1293, 1336 (11th Cir. 2011) (en banc) (Martin, J., dissenting). In the cases we've gotten wrong, I hope lawyers continue to let us know.

C. SMITH's Reason for this Court to Grant his Petition under 28 U.S.C. § 2241, is because in BOOSE V. MARSKE, No. 17-cv-303; 2019 U.S Dist. LEXIS 156342 (W.D. Wis., Sept. 13, 2019) the United States' Attorney ['conceded'] that § 2241 is the proper avenue for this type of challenge and that Rehaif applies Retroactively.

Boose also moves to amend his habeas petition. Dkt. 40. Here he makes an entirely new argument: that following**{2019 U.S. Dist. LEXIS 5}** a recent United States Supreme Court decision, his felon-in-possession conviction should be vacated because the government didn't prove that he knew that he was a felon when he possessed ammunition. *Rehaif v. United States*, 139 S. Ct. 2191, 204 L. Ed. 2d 594 (June 21, 2019) ("To convict a defendant, the Government therefore must show that the defendant knew he possessed a firearm and also that he knew he had the relevant status when he possessed it."). The government doesn't oppose the motion to amend as procedurally improper, and it concedes-at least for purposes of this motion-that § **2241 is the proper avenue for this type of challenge** and that *Rehaif* applies retroactively. So I will consider Boose's motion, but I will deny it because it is futile.

Boose can succeed on this § 2241 petition only if he can show that he is actually innocent of the charged crime. *See, e.g., Hill v. Werlinger*, 695 F.3d 644, 648 (7th Cir. 2012). "Actual innocence" means factual innocence, not mere legal insufficiency of proof of guilt. *Bousley v. United States*, 523 U.S. 614, 623, 118 S. Ct. 1604, 140 L. Ed. 2d 828 (1998). **Boose** needs to present "evidence of innocence so strong" that "'it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt.'" *House v. Bell*, 547 U.S. 518, 536-37, 126 S. Ct. 2064, 165 L. Ed. 2d 1 (2006) (quoting *Schlup v. Delo*, 513 U.S. 298, 316, 327, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995)). Boose's claim fails under this standard.

The question in *Rehaif* was whether the government had to prove to the jury**{2019 U.S. Dist. LEXIS 6}** that Rehaif knew that he was an alien "illegally or unlawfully in the United States," which barred him from possessing a firearm. The Court concluded that the government indeed needed to prove that Rehaif knew that he was in illegal alien status. Here the question would be whether **Boose** knew that he was a felon. **Boose** contends that "the government didn't endeavor to prove [he] knew he was a felon." Dkt. 40, at 2. **Boose** is right, because under pre-*Rehaif* practice, the government had to prove that Rehaif was a felon, but it did not have to prove that **Boose** *knew* that he was a felon.

But the government's failure to prove Boose's knowledge does not mean that **Boose** actually lacked that knowledge. Here, respondent has submitted transcripts from Boose's trial showing that **Boose** signed a stipulation stating that he had previously "been convicted of a felony offense for which he could receive a term of imprisonment greater than one year." Dkt. 44-1, at 5-6. On direct examination, **Boose** admitted that he had been convicted of several felonies with potential sentences of more than one year,

APPLICABLE LAW

Section 2241. Power to Grant Writ.

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless —

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination. [*Last amended Pub. L. 89-590, Sept. 19, 1966.*]

[c] 28 U.S.C. § 2242

Section 2242. Application.

Application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf.

It shall allege the facts concerning the applicant's commitment or detention, the name of the person who has custody over him and by virtue of what claim or authority, if known.

It may be amended or supplemented as provided in the rules of procedure applicable to civil actions.

If addressed to the Supreme Court, a justice thereof or a circuit judge it shall state the reasons for not making application to the district court of the district in which the applicant is held. [*Adopted 1948 ch. 646, June 25, 1948.*]

[d] 28 U.S.C. § 2243

Section 2243. Issuance of Writ; Return; Hearing; Decision.

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.

The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.
Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.
The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.
The return and all suggestions made against it may be amended, by leave of court, before or after being filed.
The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require. [*Adopted 1948 ch. 646, June 25, 1948.*]

1. **SMITH** can succeed on this § 2241 petition only if he can show that he is **actually innocent** of the charged crime. see, **Boose** v. Marske, 2019 U.S. Dist LEXIS 156342 (W.D. Wis., Sept. 13, 2019)(Boose can succeed on this § 2241 petition only if he can show that he is **actually innocent** of the charged crime. see, e.g., Hill v. Werlinger, 695 F.3d 644, 648 (7th Cir. 2012). "Actually Innocent" means factual innocent, not mere legal insufficiency of proof of guilt. Bousley v. United States, 523 U.S. 614, 623, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998). Boose, needs to present "evidence of innocence so strong" that "'it is more likely than not that no reasonable juror would have found petitioner guilty beyond a doubt.'" House v. Bell, 547 U.S. 518, 538-37, 126 S.Ct. 2064, 165 L.Ed.2d 1 (2006)(quoting Schlup v. Delo, 513 U.S. 298, 316, 327, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995)). (Id., at **Trial, pp. 179-186**) the United States **prosecutor("s") ["never asked"] its Government's key-eye-witness ["Alvin GREEN,"] the Forensic Evidence Technician,** any question("s") regarding a **["serial number" - being - on - the - gun"]**. (Id., at **Trial**) **SMITH's** ineffective assistance of counsel, Mr. Finn, **["never asked"]** the Government's

Note: (Id. at APPENDIX D, pp.3-6, at *2009 U.S. App. LEXIS 3-8*; see APPENDIX D, pp.8-9, at III. Prosecutorial Misconduct, and V. Ineffective assistance of counsel; see also APPENDIX E, pp.1-8, at Officer GREEN's testimony on direct-examination).

key-eye-witness ["Alvin GREEN, Forensic Evidence Technician"] any question("s") regarding a ["serial number" being,(Id., at Trial, pp. 179-190), being on the ["old-rusted-out-trigger-gun"]....

2. Here, the United States failed to satisfy its burden of proving the elements in its 2005 Title 18 U.S.C. § 922(g)(1)'s (Id., at United States v. Smith, No. 06-CR-441, Jan.30, 2005 (N.D. Ill. 2005), indictment charging Curtis SMITH, defendant herein, having previously been convicted of a crime punishable by imprisonment for a term exceeding one year, did knowingly possess a firearm, in and affecting interstate commerce in that the firearm had traveled in interstate commerce prior to defendant's possession of the firearm, namely, a High Standard Pistol, bearing serial number 2479759; In violation of Title 18, United States Code, Section 922(g)(1), based upon evidence in the record, **no verified fingerprints on the gun by SMITH** and (Id., at Trial), **old - rusted - out - trigger - gun** - which was **["found by Officer Walker-in-Steve Sanford's tool-bag, in the ("rear portion") of SMITH's** Chevy construction company work van"). Id.

3. see, Rehaif v. United States, 139 S.Ct. 2191, 204 L.Ed.2d 594 (2019)("To convict a defendant, the government therefore must show that the defendant knew he possessed a firearm and also that he knew he had the relevant status when he possessed it."); see also, Boose, "the government doesn't oppose motion to amend as procedurally improper, and it concedes - at least for purposes of this motion - that § 2241 is the proper avenue for this type of challege and that Rehaif applies Retroactively."

4. Smith is Eligible for relief under Rehaif(2019), because after Lieutenant Richard Cap, illegally destroyed firearm immediately after Smith filed motion for Government to Produce the firearm for Inspection in the Open Court, in order for Smith to show the district court, that an alleged serial number on the gun had ["rusted off"]. Therefore, without a serial number being on the gun, then the Government could not prove by a preponderance of the evidence that the firearm had traveled, in and affecting interstate commerce, prior to defendant possession of firearm.

THERE IS EVIDENCE IN THE RECORD SHOWING THAT LIEUTENANT CAP, HAD RECEIVED ORDER BY TELEPHONE TO DESTROY THE GUN

5. Testimony of Lieutenant Richard Cap, regarding the ["Telephone - Order"] that he received from an ["Unknown Named Person"] on the other end of the phone, had told Lieutenant Cap, to ["find the gun in the weapon vault and destroy it"]. Here, the Government, lied and committed fraud on the courts, by stating in its Government's Response to Smith's original § 2255 motion, that the gun was ["inadvertently destroyed by a mistake"].

Testimony of Chicago Police Officer. Lieutenant Richard Cap, who testified on direct examination, that in 2006, he had received a telephone call from a person. And the person on the other end of the phone, had ordered him to check the weapon vault, and to see whether the gun recovered from Smith's arrest, was that gun still actually inside of the weapon vault. (Id., at Trial, p. 162).

6. Lieutenant Cap, testified that, he told the person on the telephone, that the gun was still inside of the weapon vault.

Lieutenant("Lt") Cap, testified and said that once he finished talking with that person on the telephone, "he Ordered an officer working under his supervision to do research the status of the state of Illinois' charges that were pending against Smith. Lt. Cap, testified that his research had found that Illinois had ["Nolle Prosequi'd its case against Smith"].(Id., at trial p. 163), and based on this information and his ["research"], that the case was ["Nolle Prosequi'd"], he marked the gun for destruction, and on March 29, 2007, he put the gun in the furnace and destroyed it. (Id., at Trial, p. 165)...

7. On Cross-Examination, Lieutenant Cap, testified that he did not know that that case had been ["Nolle Prosequi'd"], so he destroyed the gun by a mistake.

On cross-examination, Lt. Cap, testified that, due to inadvertent, he marked the gun for destruction, by a mistake. Lieutenant Cap testimony as follows: [Mr. Finn]: Q. Okay. You said that -- it sound like there is a lot of paper work involved in this process, which is a good thing, I think. Don't you? A. Oh, yes, very much so. Q. Because you don't want to destroy a gun that is suppose to be

used in evidence in court, do you? A. Well, unfortunately I made a mistake this time and it got by me. And I have to admit that it was — it was a mistake. (Id., at Trial, p. 167), It should have been held. I was revamping the was that thing were done. And unfortunately I missed that -- I missed the part where Illinois they ["Nolle Prosequi'd"] the case. (Id., at Trial, p. 167)...

8. **Smith is Eligible for relief under Rehaif(2019), because the United States failure to have its Government's Key-eye-witness Alvin Green (Forensic Evidence Technican) testify that he had seen a serial number on the gun.**

Smith argues that his conviction under 18 U.S.C. § 922(g)(1) is invalid. Because the Government did not provide any evidence in the record that the gun had a serial number on it. Because the United States never ask Alvin Green, forensic Evidence Technican, did the gun have a serial number on it.

9. The United States' prosecutor and Smith's Ineffective assistance of counsel asked Alvin Green, questions regarding fingerprints and the condition of the gun. But, however, the prosecutor nor, Mr. Finn, asked about a serial number being on the gun. Note: the United States prosecutor, told the district court, at the ["Motion for a New Trial"] hearing, that Alvin Green had seen and verified serial number on the gun.

10. Testimony of Chicago Police Officer, Alvin Green. Officer Green testiified that"he don't recall if there was any rust on the gun. (Id., at Trial, pp.179-187). Officer Green testified that he did not find any fingerprints on the gun. (Id., Trial. pp. 188-190). Here, there is no evidence in the record showing that Alvin Green, having testified that he had seen, or "verified any serial number" being on the gun when he examined the gun. (Id., see APPENDIX D, pp.3, at 341 Fed. Appx. 208; and also, APPENDIX D, pp.7-8 at III. Prosecutorial Misconduct.).

D. see Rehaif v. United States, 139 S. Ct. 2191, at 2201 (2019).

{139 S. Ct. 2201} Justice Alito, with whom Justice Thomas joins, dissenting.
The Court casually overturns the long-established interpretation of an important criminal statute, 18 U. S. C. §922(g), an interpretation that has been adopted by every single Court of Appeals to address the question. That interpretation has been used in **thousands of cases** for more than 30 years. According to the majority, every one{2019 U.S. LEXIS 22} of **those cases was flawed**. So today's decision is no minor matter. And §922(g) is no minor provision.

1. **Movant is Eligible for immediate release under Rehaif, because he is actually innocent of violating § 922(g).**

Movant may be eligible for immediate release under Rehaif(2019), because he is actually innocent of violating 18 U.S.C. § 922(g)(1), because Movant **did-not-know ["knowingly"] that he fell into one of the categories** of persons to whom the offenses applies. Movant argues that, there is evidence in the record showing that His case is **["similarly - situated"]** with Rehaif(2019), showing that at trial - documentation("s") which confirm the matter that he did not know ["knowingly"] that the firearm having traveled in interstate, in and affecting interstate commerce prior to firearm being possessed by defendant.

And additionally, **SMITH** wishes to advance His argument that the Justices Alito and Thomas are right in the opinions that §§922(g); 924(a)(2)'s **interpretation** prior to **Rehaif(2019) conviction("s") were "flawed" and ["Missing 9,000 words"].**(see Rehaif,139 S.Ct. at 2203-2204)

Petitioner argues that, when §924(a)(2) and §922(g) are put together, they unambiguously show that a defendant must actually know that he falls into one of the nine enumerated categories. But this purportedly textual argument requires some moves that cannot be justified on the basis of the statutory text. Petitioner's argument tries to hide those moves in the manner of a **sleight-of-hand artist** at a carnival.
Petitioner begins by extracting the term ``knowingly" from §924(a)(2). He{2019 U.S. LEXIS 27} then transplants it into the beginning of §922(g), ignores the extraordinarily awkward prose that this surgery produces, and proclaims that because ``knowingly" appears at the beginning of the enumeration of the elements of the §922(g) offense, we must assume that it modifies the first of those elements, *i.e.*, being a convicted felon, illegal alien, etc. To conclude otherwise, he contends, is to commit the sin of having the term ``knowingly" leap over that element and then land conveniently in front of the second. Pet. for Cert. 8.
But petitioner's reading is guilty of the very sort of leaping that it condemns-and then some. It has ``knowingly" performed a **jump of Olympian** proportions, taking off from §924(a)(2), **sailing backward over more than 9,000 words** in the U. S. Code, and then landing-conveniently-at the beginning of the enumeration of the elements of the §922(g) offense. Of course, there is no logical reason why this jump has to land at that particular point in §922(g). That is petitioner's first sleight of hand.

2. see **Rehaif** v. United States, 139 S. Ct. 2191, at 2212 (2019).

Since a legislative body may enact a valid criminal statute with a strict-liability element, the dispositive question is whether it has done so or, in other words, whether the presumption that petitioner invokes **{139 S. Ct. 2212}** is rebutted. This rebuttal can be done by the statutory text or other persuasive factors. See *Liparota* v. *United States*, 471 U. S. 419, 425, 105 S. Ct. 2084, 85 **{204 L. Ed. 2d 619}** L. Ed. 2d 434 (1985) (applying presumption ``[a]bsent indication of contrary purpose in the language or legislative history"); *X-Citement Video*, 513 U. S., at 70-72, 115 S. Ct. 464, 130 L. Ed. 372 (discussing statutory context in reaching conclusion); *Flores-Figueroa*, 556 U. S., at 652, 129 S. Ct. 1886, 173 L. Ed. 2d 853; *id.*, at 660, 129 S. Ct. 1886, 173 L. Ed. 2d 853 (Alito, J., concurring in part and concurring in judgment). And here, for the**{2019 U.S. LEXIS 49}** reasons discussed above, §922(g) is best interpreted not to require proof that a defendant knew that he fell within one of the covered categories.

I add one last point about what can be inferred regarding Congress's intent. Once it becomes clear that statutory text alone does not answer the question that we face and we are left to infer Congress's intent based on other indicators, there is no reason why we must or should infer that Congress wanted the same *mens rea* to apply to all the elements of the §922(g) offense. As we said in *Staples* v. *United States*, 511 U. S. 600, 609, 114 S. Ct. 1793, 128 L. Ed. 2d 608 (1994), ``different elements of the same offense can require different mental states." And if Congress wanted to require proof of ***some*** *mens rea* with respect to the categories in §922(g), there is absolutely no reason to suppose that it wanted to impose one of the highest degrees of *mens rea*-actual knowledge. Why not require reason to know or recklessness or negligence? To this question, neither petitioner nor the majority has any answer.D

Because the context resolves the interpretive question, neither the canon of constitutional avoidance nor the rule of lenity can be invoked to dictate the result that the majority reaches. As to the canon, we have never held that the Due Process Clause requires *mens rea**{2019 U.S. LEXIS 50}*** for all elements of all offenses, and we have upheld the constitutionality of some strict-liability offenses in the past. See *United States* v. *Freed*, 401 U. S. 601, 91 S. Ct. 1112, 28 L. Ed. 2d 356 (1971); *United States* v. *Dotterweich*, 320 U. S. 277, 64 S. Ct. 134, 88 L. Ed. 48 (1943); *United States* v. *Balint*, 258 U. S. 250, 42 S. Ct. 301, 66 L. Ed. 604, T.D. 3375 (1922); *United States* v. *Behrman*, 258 U. S. 280, 42 S. Ct. 303, 66 L. Ed. 619, T.D. 3376 (1922). In any event, if the avoidance of a serious constitutional question required us to infer that some *mens rea* applies to §922(g)'s status element, that would hardly justify bypassing lower levels of *mens rea* and going all the way to actual knowledge.

As for the rule of lenity, we resort to it ``only if, after seizing everything from which aid can be derived, we can make no more than a guess as to what Congress intended." *Muscarello* v. *United States*, 524 U. S. 125, 138, 118 S. Ct. 1911, 141 L. Ed. 2d 111 (1998) (alterations and internal quotation marks omitted). And what I have just said about the constitutional avoidance canon applies equally to lenity: It cannot possibly justify requiring actual knowledge.III

Although the majority presents its decision as modest, its practical effects will be far reaching and cannot be ignored. Tens of thousands of prisoners are currently serving sentences **{204 L. Ed. 2d 620}** for violating 18 U. S. C. §922(g). 8 It is true that many pleaded **{139 S. Ct. 2213}** guilty, and for most direct review is over. Nevertheless, every one of those prisoners will be able to seek relief by one route or another. Those for whom direct review has not ended will likely be entitled to a new trial.**{2019 U.S. LEXIS 51}** Others may move to have their convictions vacated under 28 U. S. C. §2255, and those within the statute of limitations will be entitled to relief if they can show that they are actually innocent of violating §922(g), which will be the case if they did not know that they fell into one of the categories of persons to whom the offense applies. ***Bousley*** v. *United States*, 523 U. S. 614, 618-619, 118 S. Ct. 1604, 140 L. Ed. 2d 828 (1998). If a prisoner asserts that he lacked that knowledge and therefore was actually innocent, the district courts, in a great many cases, may be

required to hold a hearing, order that the prisoner be brought to court from a distant place of confinement, and make a credibility determination as to the prisoner's subjective mental state at the time of the crime, which may have occurred years in the past. See *United States* v. *Garth*, 188 F. 3d 99, 109 (CA3 1999); *United States* v. *Jones*, 172 F. 3d 381, 384-385 (CA5 1999); *United States* v. *Hellbusch*, 147 F. 3d 782, 784 (CA8 1998); *United States* v. *Benboe*, 157 F. 3d 1181, 1184 (CA9 1998). This will create a substantial burden on lower courts, who are once again left to clean up the mess the Court leaves in its wake as it moves on to the next statute in need of ``fixing." Cf. *Mathis* v. *United States*, 579 U. S. ___, ___-___, 136 S. Ct. 2243, 195 L. Ed. 2d 604, 626 (2016) (Alito, J., dissenting).

3. United States v. **Chealy**, 185 F. Appx' 928, 935-936 (11th Cir. 2006).

We review the constitutionality of a statute *de novo*. *United States v. Ballinger*, 395 F.3d 1218, 1225 (11th Cir.) (*en banc*), *cert. denied* 126 S. Ct. 368, 163 L. Ed. 2d 77 (2005). Where a defendant challenges**{2006 U.S. App. LEXIS 18}** the sufficiency of proof that the firearm **traveled in interstate commerce**, this Court reviews "the evidence to determine whether 'a reasonable jury, viewing the evidence and all reasonable inferences therefrom in the light most favorable to the government could find the defendant[] guilty as charged beyond a reasonable doubt.'" ***United States v. Clay***, 355 F.3d 1281, 1286 (11th Cir. 2004) (citation omitted).

We have consistently upheld the constitutionality of § 922(g). *See* ***Wright***, 392 F.3d at 1280. Indeed, we have noted that "the phrase '**in or affecting commerce**' indicates a **Congressional intent to assert its full Commerce Clause power**," and that enactment of § 922(g)(1) is not an unconstitutional exercise of congressional power. ***United States v. Nichols***, 124 F.3d 1265, 1266 (11th Cir. 1997); *see also* ***United States v. McAllister***, 77 F.3d 387, 389-90 (11th Cir. 1996) (holding that § 922(g)(1) is constitutional and stating that the statute "is an attempt to regulate guns that have a connection to interstate commerce; the statute explicitly requires such a connection," and because the government demonstrated that**{2006 U.S. App. LEXIS 19}** the defendant's firearm previously had **traveled in interstate commerce**, the statute was constitutional as applied to him). "[O]nly the Supreme Court or this Court sitting *en banc* can judicially overrule a prior panel decision." ***Wright***, 392 F.3d at 1280.

To the extent Chealy raises an as-applied challenge to § 922(g), we have held that the "**in or affecting commerce**" language of § 922(g) is a **jurisdictional element** of the offense that the **government is required to prove by demonstrating that the firearm** and ammunition **possessed** by Chealy **traveled in interstate commerce.** ***United States v. Clay***, 355 F.3d 1281, 1286 (11th Cir. 2004). Thus, the dispositive issue is whether a jury could rationally conclude, based on the evidence, that the firearm and ammunition seized from Chealy was **possessed** in and affecting interstate commerce. *Id.* Section 922(g) is not unconstitutional either on its face or as applied to Chealy.

5. SMITH is Eligible for Immediate Release becuase - His 18 USC §§922(g)(1); 924(a)(2) True Bill of Indictment's Contract is ("Flawed") because its ["Missing - 9,000 - words"]

SMITH now argues that he is serving an illegal and unconstitutional [262-months term of imprisonment, because §§ 922(g)(1); 924(a)(2)'s True Bill of Indictment ["contract"] is missing 9,000 words... SMITH argues that this Court recently ruled §922(g) was flawed.

E. A court of appeals cannot deny Rehaif(2019) relief sua sponte.

1. The Due Process Clause guarantees a litigant both notice of the proceeding and "the right to be heard." *Richards v. Jefferson County,* 517 U.S. 793, 799 (1996) ("the right to be heard ensured by the guarantee of due process 'has little reality or worth unless one is informed that the matter is pending'") (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). Indeed, even when the proceeding is one administered by the executive branch to decide whether to grant a benefit that a prisoner has a "mere hope" of obtaining, due process requires notice and the chance to be heard. *See Greenholtz v. Inmates of Neb. Penal & Correctional Complex*, 442 U.S. 1, 11, 16 (1979); *Swihart v. Wilkinson*, 209 F. App'x 456, 459 (6th Cir. 2006) ("Due process in parole proceedings is satisfied as long as the procedure used affords the inmate an opportunity to be heard").

2. At the very least, Smith, had the right to notice and to be heard before the court of appeal denied **"newly discovered evidence"** filed under 28 U.S.C. §§ 2244(b); 2255(h), relief under (Id. at **APPENDIX C, pp.12-13), Johnson(2015)**; (Id. at **APPENDIX B, pp.5-6, Nelson v. Colorado(2017))**; and (Id. at **APPENDIX A, pp18-19, Rehaif v. United States(2019)...** That right inhered in the very fact that **In re: Smith** was a litigant in matter being adjudicated in a court of law. see **Richards**, 517 U.S. at 799. Moreover, Johnson(2015); Nelson(2017); and Rehaif(2019) were filed under **"newly discovered evidence"** Pursuant to **§§2244(b); 2255(h)**

Which gave In re: Smith, the statutory right to litigate a successive collateral attack claim that rested upon evidence establishing Smith's **actual innocence** under §2255(h)(1), and a **new constitutional rule** that this **Supreme Court** made retroactive under §2255(h)(2), and also §2255(f)(3)("requiring motion based on new right to be filed within one-year of right's recognition by Supreme Court. Here, **In re: Smith** has satisfied burden, by meeting aforementioned statutory requirements in all three of his previously filed **Application("s")** for Leave to File a Second or Successive Motion to Vacate, Set Aside or Correct Sentence 28 USC §2255 by a Prisoner In Federal Custody. It provided that he himself could file a **Application** §2244(b), and that if a **Application** was "denied after a complete review of the **Application** on its merits,""by the **lower district court,"** he could not litigate another one. (Id. at **APPENDIX A at pp.30-32**; see, **In re: Leonard**, 655 Fed. Appx' 765, 775-779 (2016)

> At a sentence hearing, a judge has help from lawyers, so she can know exactly the criminal history of the person she is sentencing. Lawyers can debate whether "the elements of the statute of conviction, not [] the facts of each defendant's conduct," required what an ACC A definition requires. Taylor v. United States, 495 U.S. 575, 601, 110 S. Ct. 2143, 2159, 109 L. Ed. 2d 607 (1990). That process can't happen here{2016 U.S. App. LEXIS 30} when we decide these cases "without argument from a lawyer, within a tight 30-day deadline and in a deluge of hundreds of applications." McCall, 2016 U.S. App. LEXIS 11033, 2016 WL 3382006, at *2 (Martin, J., concurring). So we are vulnerable to applying the wrong law. For example, we might overlook that legal rules applied at the time of the sentencing are now known to be wrong. If a decade ago, a man got a longer sentence based on an interpretation of a statute that the Supreme Court has since told us was wrong, then he is entitled to have the correct law applied if he is resentenced now. But our court has over and over again failed to apply the Supreme Court's current interpretation of ACCA when ruling on the applications from prisoners seeking to file a successive § 2255 motion so they can benefit from Johnson.7 I think this is wrong, and at the least, district courts {655 Fed. Appx. 776} should hear these cases. That way, the question of whether judges can decline to apply certain binding precedent will be decided by a lower court, and reviewed here on appeal.
>
> When district courts take the first close look at the cases of these prisoners who believe they are serving illegal sentences after Johnson, we have better odds of avoiding these problems. District courts can hear from lawyers. District courts can see and talk to the person serving the sentence. District courts can find facts. District courts can consider and develop the law. These inmates will best be served by an opportunity, allowed by statute, to have their sentences reviewed by district courts. But when we deny permission to file a successive § 2255 motion, AEDPA bars any further appeal or review of that decision. Our denial of permission is the beginning and end of the case. "Our court's massive effort to decide the merits of hundreds of habeas cases within 30 days each, all over a span of just a few weeks" was never necessary. McCall, 2016 U.S. App. LEXIS 11033, 2016.

Thereafter, on or about-**December 20, 2018,** when Smith had received conformation that the $500 sanction fee was paid off in full. Then, immediatedly thereafter, he had received conformation letter from the court on or about, **December 26, 2018,** Smith sent in his §§2244(b); 2255(h) application for leave to file a second or successive claim seeking relief under **Johnson**(2015) and **Nelson**(2017). (Id.,see **APPENDIX B**, pp.1-6; see also **APPENDIX D**, pp.1-13).

Smith will never get a chance to challenge his ACCA enhanced sentencing, regarding his **["December 9, 2004, simple battery"] prior conviction** in Illinois does not qualify as a predicate prior offense, under USSG § 4B1.4(b)(2) because his prior **judgment** of probation in **["2004"]** for battery, Smith was sentenced to **serve a term of one-year-probation,** instead of one-year term of imprisonment. Smith argues that the states's court's judgement, as to punishment was entitled to deference, as the offenses were **["not punishable"]** by a term of imprisonment, **exceeding - one - year in prison, or jail,** because simple battery **[judgment]** sentence in 2004, it does not meet the United States Sentencing Guidelines § 2L1.2 cmt. Application note. 1, definition of "felony offense." The convictions were not "felony offenses" for U.S.S.G. §§ 4B1.1; 4B1.4's enhance sentencing.

see, **Carachuri-Rosendo** v. Holder, 560 U.S.563, 130, 130 S.Ct. 2577, 177 L.Ed.2d 68 (2010)("[F]or a state conviction to qualify as an 'aggravated felony' under the INA, it is necessary for the underlying conduct to be punishable as a federal felony."); Lopez v. Gonzales, 549 U.S. 47, 60, 127 S. Ct. 625, 166 L.Ed.2d 462 (2006) (holding that because there "is no reason to think Congress meant to allow the States to supplant its own classifications when it

specifically constructed its immigration law to turn on them[,] ... a state offense constitutes a 'felony punishable under the Controlled Substance Act' only if it proscribes conduct punishable as a felony under that federal law").

Smith, is currently serving an illegal and unconstitutuional convictions and sentencing, pursuant to the United States Supreme Court's ruling in **Carachuri-Rosendo**. Smith will never get a chance at challenging his Armed career Criminal Act's § 4B1.4(2)(B)(ii) regarding his simple battery judgment in 2004, in Illinois. Smith's **§§2244(b); 2255(h) application("s")** were mistakenly denied by the Seventh Circuit. Smith **cannot file another §§ 2244(b); 2255(h)** application to correct the errors and mistakes in his case. Because the Seventh Circuit have incorrectly sanctioned Smith another **$500** sanction fee, and again, barred Smith from filing any motion attacking his convictions and sentence, until Smith pay off in full his $500 sanction fee. This time the Seventh Circuit sanctioned Smith $500 sanction fee and barred him from the Seventh Circuit, because Smith had filed **§§2244(b); 2255(h)** under **"newly discovered evidence"** to get a ["Remand to Vacate Conviction and Sentence"]. So, now Smith will not get his Due Process Clause Right to file his **Johnson(2015)**, or **Nelson(2017)** claim because **In re: Smith** have been effectively silenced by the Seventh Circuit's **sua sponte** denying his **§§2244(b); 2255(h) application** and **barring** him out of the Seventh Circuit from litigating. see, English v. Cowell, 10 F.3d 434, 437-438 (7th Cir. 1993)

> Nonetheless, we can think of no reason to justify the denial of an opportunity to respond to a dispositive dismissal motion which entails consideration of extra-pleading evidence. Unless a claim is frivolous, it is rudimentary that a court **cannot sua sponte** enter summary judgment or dismiss a complaint without notifying the parties of its intentions and allowing them an opportunity to cure the defect in the complaint or to respond. *Ricketts v. Midwest Nat'l Bank*, 874 F.2d 1177, 1183-85 (7th

Cir. 1989); *Sawyer v. United States*, 831 F.2d 755, 759 (7th Cir. 1987){1993 U.S. App. LEXIS 10} ("Granting summary judgment sua sponte warrants special caution" and may be granted only if the "'outcome is clear, so long as the opposing party has had an adequate opportunity to respond."). Nor can a court, upon motion by a party, dismiss a complaint with prejudice without affording the plaintiff a reasonable opportunity to present arguments (oral or written) or evidence relevant to the challenged defect in pleading. *Cooper v. United States Penitentiary*, 433 F.2d 596 (10th Cir. 1970); *Karl Kiefer Mach. Co. v. United States Bottlers Mach. Co.*, 113 F.2d 356, 357 (7th Cir. 1940). Similarly, a nonmovant must be afforded an opportunity to present contradicting affidavits or materials in order to cure a jurisdictional or party defect not capable of being resolved on the words of the complaint. *See Fountain v. Filson*, 336 U.S. 681, 93 L. Ed. 971, 69 S. Ct. 754 (1949).

The opportunity to respond is deeply imbedded in our concept of fair play and substantial justice.

The plain language of In re: Leonard, confirms that the Seventh Circuit erred procedurally, acting without statutory authorization. Rehaif(2019), states that ["because the Government had to prove both that defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm. Pursuant to, In re Leonard, 655 Fed. Appx. at 770 (11th Cir.)

While we previously denied Leonard's successive application that raised nearly identical argument as made presently, that decision relied on Leonard's surplus felony conviction for Florida aggravated assault, and under the clear/unclear *Rogers* test, a successive application should{2016 U.S. App. LEXIS 13} be denied only where it is clear that the three ACCA-predicate offenses the district identified and relied upon should be considered. *Id.* at 3-4. Here, based on the records available, the district court did not rely on or make findings as to Leonard's prior aggravated assault conviction. Thus, pursuant to the clear/unclear test announced in *Rogers*, Leonard has made a *prima facie* showing that he may benefit from the rule announced in *Johnson*.

Finally, it is important to note that our threshold determination that an applicant has made a *prima facie* showing that he has met the statutory criteria of § 2255(h), thus warranting our authorization to file a second or successive § 2255 motion, does {655 Fed. Appx. 770} not conclusively resolve that issue. *See Jordan*, 485 F.3d at 1357 (involving the functionally equivalent § 2244(b)(2) successive application standard applicable to state prisoners). In *Jordan*, we emphasized that, once the prisoner files his authorized § 2255 motion in the district court, "the district court not only can, but must, determine for itself whether those requirements are met." *Id.* Notably, the statutory language of § 2244, which is cross referenced in § 2255(h), expressly provides that "[a] district court shall dismiss any claim presented in a second or successive application{2016 U.S. App. LEXIS 14} that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section." *Id.* (quoting 28 U.S.C. § 2244(b)(4)). We rejected the assertion that the district court owes "some deference to a court of appeals' prima facie finding that the requirements have been met." *Id.* at 1357. We explained that, after the district court looks at the § 2255(h) requirements *de novo*, "[o]ur first hard look at whether the § [2255(h)] requirements actually have been met will come, if at all, on appeal from the district court's decision...." *Id.* at 1358; *see also In re Moss*, 703 F.3d 1301, 1303 (11th Cir. 2013) (reiterating that our threshold conclusion in granting a successive application that a *prima facie* showing has been made is necessarily a "limited determination," as the district court then must also decide "fresh" the issue of whether § 2255(h)'s criteria are met, and, if so, proceed to considering the merits of the § 2255 motion).

Accordingly, Leonard has made a *prima facie* showing that he has raised a claim that meets the statutory criteria. His application for leave to file a second or successive motion is hereby GRANTED.

In deciding whether an inmate gets to pursue relief based on the Supreme Court's Johnson ruling, I believe the question should simply be whether his sentence was based on crimes that met ACCA's "violent felony" definition before Johnson but no longer do.11 The approach our court has taken instead is, I believe, fraught {655 Fed. Appx. 779} with hazard and subject to error. As long as we continue this approach, we are bound to make more mistakes. Our mistakes don't go away when we deny an application. Prisoners whose applications we've mistakenly denied will file again. And well they should. The federal courts are the branch of government charged with administering justice in individual cases. If we've made mistakes it is our job to fix them. I hope Mr. Leonard's case is an exception, but I fear it is not. And "if there are others who are wrongfully detained without a remedy, we{2016 U.S. App. LEXIS 40} should devote the time and incur the expense to hear their cases. What is the role of the courts, if not this?" Gilbert v. United States, 640 F.3d 1293, 1336 (11th Cir. 2011) (en banc) (Martin, J., dissenting). In the cases we've gotten wrong, I hope lawyers continue to let us know.

Smith is Eligible for relief under a Retroactive binding precedent Supreme Court's ruling in Johnson(2015)

The United States Court of Appeals for the **Seventh Circuit** erred by **sua sponte** denying §§ 2244(b); 2255(h)'s **application** seeking relief under **Nelson**(2017) and **Johnson**(2015), and by deeming Smith ineligible for relief under ["§§ 2255(f); (h)"], based upon inapplicable law pertaining to retroactive, with respect to **Johnson**(2015).

"We must enforce plain and unambiguous statutory language according to its terms." Hardt v. Reliance Std. Life Ins. Co., 560 U.S. 242, 251 (2010). The **Seventh Circuit** held that Smith is ineligible for imposition of a Remand to vacate conviction, under **Nelson**, and to reduce his enhanced sentencing under **Johnson**(2015), because defendants sentenced as **Armed Career Criminal Act**, are entitled to relief under Johnson(2015). Because there is evidence in the record showing that Smith's 2004 or 1992 for **simple battery judgment** does not qualify for armed career criminal act enhanced sentencing. (Id., see, **APPENDIX C**, at pp. 1-11). Based upon fact that **In re: Smith** having paid in full the entire sum of $500, that made him eligible to file his claim under **Johnson**(2015) and **Nelson**.

THERE IS CONTROVERSY BETWEEN THE SEVENTH AND ELEVENTH CIRCUIT REGARDING 28 USC §§2244(b); 2255(h) GATEKEEPER STANDARD. BECAUSE THE SEVENTH CIRCUIT ADOPTED DIVERGENT INTERPRETATIONS OF THE GATEKEEPER STANDARD BY SUA SPONTE DENYING ["APPLICATION(S)"] FILED UNDER §§2244(b); 2255(h) WITHOUT FIRST SENDING APPLICATIONS TO THE DISTRICT COURT TO DO A DE NOVO REVIEW ON THE MERITS. THE SEVENTH CIRCUIT ["HAS ACTED WITHOUT POWER"] AND EXCEEDED JURISDICTIONAL AUTHORIZATION. SEE, IN RE: LEONARD, 655 F. APPX.765 (2016)

Smith have shown the Court ample evidence in the record that the Seventh Circuit has erred procedurally, acting without authorization by **sua sponte** denying defenfant's §§2244(b); 2255(h) Applications the Seventh Circuit have adopted divergent interpretations of the gatekeeper standard which caused controversy with the **Eleventh Circuit's** binding precedent case law ["In re: Leonard, 655 Fed. Appx' 765, 766-779 (11th Cir. 2016).

Leonard, 655 F. Appx. at 777: I says: "The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion." Of course we never take lightly the word "shall" in a statute. But others who have considered this statute have concluded that "failure to comply with the thirty-day provision does not deprive this Court of the power to grant or deny a motion under § 2244(b)(3)(A)" because "the provision is hortatory or advisory rather than mandatory." In re Siggers, 132 F.3d 333, 336 (6th Cir. 1997). The Ninth Circuit recently observed about its experience deciding Johnson applications: "Given the large volume of second or successive applications our court must process each month, it frequently takes us longer-sometimes much longer-than 30 days to rule." Orona v. United States, 826 F.3d 1196, 2016 U.S. App. LEXIS 11314, 2016 WL 3435692, at *2 (9th Cir. June 22, 2016). I can't help but think that if this court had taken the approach taken by others, our work on these cases would be both less frantic and more accurate.

{655 Fed. Appx. 778} On the topic of this court's singular approach, I add one more observation. The Supreme Court recently granted certiorari in the case of a Texas prisoner named Duane Buck. See Buck v. Stephens, No. 15-8049, __ S. Ct. __, 136 S. Ct. 2409, 195 L. Ed. 2d 779, 2016 WL 531661 (U.S. June 6, 2016). The Court{2016 U.S. App. LEXIS 37} took the case even though the lower court ruled that Mr. Buck's appeal was so meritless that he couldn't even file it. Mr. Buck's petition for certiorari asked: "did the United States Court of Appeals for the Fifth Circuit impose an improper and unduly burdensome Certificate of Appealability (COA) standard?" Our treatment of applications for successive § 2255 motions may be even more troubling than the issue raised in Buck. Unlike the denial of a COA, the statute governing applications like Mr. Leonard's provides that. "denial of an authorization . . . to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari." 28 U.S.C. § 2244(b)(3)(E). This means no motion for reconsideration, no motion for en banc review, no appeal, and no petition for cert. The decisions we make in these cases are therefore, as a practical matter, not reviewable.

A month after AEDPA (and with it, § 2244(b)(3)(E)) became law in April 1996, the Supreme Court held that these "new restrictions on successive petitions . . . do not amount to a 'suspension' of the writ." Felker v. Turpin, 518 U.S. 651, 664, 116 S. Ct. 2333, 2340, 135 L. Ed. 2d 827 (1996). Three Justices filed a concurrence warning that "the question whether the statute exceeded Congress's Exceptions Clause power" might{2016 U.S. App. LEXIS 38} need to be revisited "if the courts of appeals adopted divergent interpretations of the gatekeeper standard." Id. at 667, 116 S. Ct. at 2342 (Souter, J., concurring). I hope someone better equipped than me will take this opportunity to look at whether the divergent views taken by this court require reexamination of this question asked by these Justices so soon after AEDPA was enacted.10

(Id., at APPENDIX A, pp.16-21, 22-32), show ample evidence that the Seventh Circuit have adopted divergent interpretation of the gate-keeper standard. see, Felker v. Turpin, 518 U.S. at 664 (1996).

CONCLUSION

Curtis Lee Smith respectfully that the Court hold that he is eligible for relief under 28 U.S.C. § 2255(h) seeking relief from his Armed Career Criminal Act enhanced sentence pursuant to this Court's ruling in Johnson(2015) and Nelson(2017). And that the Court hold he is eligible for relief under 28 U.S.C. § 2241 seeking relief from his 18 U.S.C. § 922(g)(1) conviction pursuant to this Court's ruling in Rehaif(2019). Furthermore, the Court should hold that court of appeals **sua sponte** denial of **'application'** filed under 28 U.S.C. §§2244(b); 2255(h) relief is a nullity. The Court should remand for the District Court to consider, upon a complete **de nove** review on the merits, whether to impose on Smith a reduced sentence pursuant to this Court's rulings in Johnson(2015) and Nelson(2017), since In re: Smith, timely filed his §§ 2244(b) and 2255(h)'s **applications** after he paid the sum of $500 in full on December 20, 2018 after receiving conformation letter from the clerk. And the Court should remand to the District Court to consider upon a complete **de novo** review on the merits, whether to impose on Smith immediate release pursuant to this Court's ruling in Rehaif(2019)

Respectfully submitted, this **3rd**, day of **February, 2020**.

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