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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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EARL MALLOY,

Plaintiff, : 16 Civ. 4186

: **DECISION AND ORDER**

UNITED STATES OF AMERICA,

Defendant. :
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VICTOR MARRERO, United States District Judge.

Earl Malloy ("Malloy") pleaded guilty to indictment 07 Cr. 898, which charged him with one count of possessing a gun after being convicted of a felony, in violation of 18 U.S.C. Section 922(g) ("Section 922(g)"), and one count of carjacking, in violation of 18 U.S.C. Section 2119(1). The Court sentenced Malloy on September 19, 2008 to a term of 275 months' imprisonment and 5 years of supervised release. (See 07 Cr. 898, Dkt. No. 13.) Malloy appealed his sentence, and the United States Court of Appeals for the Second Circuit issued a summary affirmance on December 8, 2009. (See 07 Cr. 898, Dkt. No. 16.) Malloy then filed a motion to vacate his sentence pursuant to 28 U.S.C. Section 2255 ("Section 2255"). (See 16 Civ. 4186, Dkt. No. 1; 07 Cr. 898, Dkt. No. 17.) The Court denied the motion on August 8, 2019. (See 16 Civ. 4186, Dkt. No. 16; 07 Cr. 898, Dkt. No. 22.)

On September 27, 2019, Malloy filed a Motion to Amend his earlier Section 2255 motion to add a claim under Rehaif

v. United States, 139 S. Ct. 2191 (2019). (See "Motion," 16 Civ. 4186, Dkt. No. 17.) The Government filed its opposition on December 18, 2019. (See "Government Opposition," 16 Civ. 4186, Dkt. No. 22; 07 Cr. 898, Dkt. No. 24.) Malloy responded on March 19, 2020. (See "Malloy Reply," 16 Civ. 4186, Dkt. No. 25.) Malloy also submitted, on March 25, 2020, a letter calling the Court's attention to a recent relevant decision by the Fourth Circuit in United States v. Gary, 954 F.3d 194 (4th Cir. 2020). (See "March 25 Letter," 16 Civ. 4186, Dkt. No. 26.) The Court directed the Government to respond, which it did on April 24, 2020. (See "Government Letter," 16 Civ. 4186, Dkt. No. 28.) Having reviewed the parties' submissions and relevant case law, the Court now denies the Motion and Malloy's request for a certificate of appealability.¹

Count One charged Malloy with violating Section 922(g), which prohibits certain categories of people from possessing a gun, including convicted felons. See 18 U.S.C. § 922(g) (prohibiting any person "who has been convicted in any court

¹ The Court notes that Malloy's Motion is styled as a motion to amend his earlier Section 2255 petition. The Government argues that the pending Motion is merely a successive Section 2255 motion for which he has not obtained the required certification. (Government Opposition at 4-5.) Malloy counters that the requirement to seek leave to file a successive Section 2255 motion is not triggered until the adjudication of a previous Section 2255 motion is complete, and since the time to appeal the Court's August 2, 2019 ruling had not yet expired at the time he filed his Motion, his Motion is not improper. (Malloy Reply at 2.) The Court need not resolve this dispute because it finds that the Motion is both procedurally defaulted and meritless, even if properly brought as a motion to amend his earlier petition.

of[] a crime punishable by imprisonment for a term exceeding one year" from possessing firearms or ammunition). In Rehaif, the Supreme Court held that in order to convict a defendant of violating Section 922(g), the Government must prove not only that the defendant knew that he possessed a gun but that he "knew he belonged to the relevant category of persons barred from possessing a firearm." Rehaif, 139 S. Ct. at 2200. Malloy argues that his conviction is invalid because the indictment did not allege that he knew, when he possessed the gun, that he had previously "been convicted in any court of[] a crime punishable by imprisonment for a term exceeding one year." 18 U.S.C. § 922(g). Because the indictment fails to allege all of the statutory elements of a Section 922(g) offense, Malloy argues, the Court lacked subject matter jurisdiction over Count One. (Motion at 5-6.)

In his reply brief and supplemental letter, Malloy concedes that this Court is bound by the Second Circuit's decision in United States v. Balde, 943 F.3d 73 (2d Cir. 2019), which ruled that the district court was not deprived of jurisdiction even though the indictment in that case failed to allege that the defendant knew he belonged to the relevant category of persons barred from possessing a firearm. (Malloy Reply at 3.) In Balde, like here, the defendant did not raise his objections to his plea below, and the appellant's Rehaif

claim was thus reviewed for plain error. Malloy agrees that the Court must deny his Motion in light of Balde, but argues that the Court should nevertheless grant a certificate of appealability so that he may (1) seek en banc and Supreme Court review of the Balde decision, and (2) urge the Second Circuit to adopt the Fourth Circuit's reasoning in Gary, which held that "a standalone Rehaif error satisfies plain error review because such an error is structural, which per se affects a defendant's substantial rights." 954 F.3d at 200. (March 25 Letter at 2.)

The Court denies both the Motion and the request for a certificate of appealability. First, with respect to the Motion, Malloy's claim is procedurally defaulted. A court may not consider, in a Section 2255 motion, any claim that could have been but was not raised on direct review. Bousley v. United States, 523 U.S. 614, 622 (1998). A defendant who brings a procedurally defaulted claim must show both cause excusing his procedural default and prejudice resulting from the error. Id. Malloy cannot demonstrate that his failure to raise a Rehaif claim actually prejudiced him, because -- as the Government points out -- several of his prior felony convictions not only carried potential sentences of greater than one year, but he actually received sentences greater than one year. (Government Opposition at 5-6.) There is "no

reason to think that the government would have had any difficulty at all in offering overwhelming proof that [Malloy] knew that he had previously been convicted of offenses punishable by more than a year in prison." United States v. Burghardt, 939 F.3d 397, 404 (1st Cir. 2019).² Malloy argues that the Court should excuse his procedural default because his claim pertains to subject matter jurisdiction, and such claims cannot be procedurally defaulted. (Malloy Reply at 2 (citing Sapia v. United States, 433 F.3d 212, 216 (2d Cir. 2005))). Nevertheless, the Court is -- as Malloy concedes -- bound by the Second Circuit's decision in Balde, which makes clear that Malloy's claim does not, in fact, affect the Court's subject matter jurisdiction. See also United States v. Keith, 797 F. App'x 649, 651 (2d Cir. 2020) (failure of indictment to include the element required by Rehaif did not affect the district court's

² With respect to whether cause exists that would excuse Malloy's procedural default, the Government urges the Court that it is insufficient to show that a claim is merely "unacceptable" to a particular court at a particular time. See Bousley, 523 U.S. at 623. Perhaps so, but before the Supreme Court's decision in Rehaif, "no court of appeals had required the Government to establish a defendant's knowledge of his status in the analogous context of felon-in-possession prosecutions." Rehaif, 139 S. Ct. at 2195 (emphasis added). In any event, because the Court holds that Malloy cannot demonstrate actual prejudice, it need not resolve whether he can demonstrate cause.

jurisdiction). Thus, Malloy's claim cannot overcome procedural default.³

Second, Malloy's claim is not entitled to a certificate of appealability. For the same reason that his arguments regarding procedural default fail, Malloy cannot make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The Court is constrained by the binding precedent of Balde, and given the lack of prejudice, no jurist of reason would conclude that his claim should proceed. See Miller-El v. Cockrell, 537 U.S. 322, 327 (2003); Sanders v. United States, 1 F. App'x 57, 60 (2d Cir. 2001) (no certificate of appealability warranted where the defendant was unable to demonstrate prejudice as required by Strickland v. Washington, 466 U.S. 668 (1984)). The fact that the Second Circuit explained its subject matter jurisdiction holding at some length in Balde does not mean that the Circuit was equivocating, as Malloy suggests, and as the Balde court pointed out, the Supreme Court itself did not treat the error in Rehaif as jurisdictional, but rather remanded to determine whether the error was harmless. 943 F.3d at 92 (citing Rehaif, 139 S. Ct. at 2200). Malloy's reliance on the Fourth Circuit's opinion in Gary is similarly unavailing. Although Gary held

³ A defendant who cannot demonstrate cause and actual prejudice may still prevail by establishing actual innocence, but Malloy would have the burden of establishing actual innocence, which he does not attempt to show.

that a Rehaif error is a structural error that "per se affects a defendant's substantial rights," that holding is simply inconsistent with the law in this Circuit. 954 F.3d at 200. While the Gary decision demonstrates that, in the abstract, jurists of reason may disagree whether Rehaif errors are structural (or even constitutional), no jurist of reason would conclude that Malloy's claim, in this Circuit, and given the lack of actual prejudice, "deserve[s] encouragement to proceed further." Miller-El, 537 U.S. at 327.

Accordingly, it is hereby

ORDERED that plaintiff Earl Malloy's motion to amend his motion pursuant to 28 U.S.C. Section 2255 (16 Civ. 4186, Dkt. Nos. 17, 25, and 26) is **DENIED**. As petitioner has not made a substantial showing of the denial of a constitutional right, a certificate of appealability will not issue. See 28 U.S.C. § 2253(c)(2); Love v. McCray, 413 F.3d 192, 195 (2d Cir. 2005).

SO ORDERED:

Dated: New York, New York
30 April 2020



Victor Marrero
U.S.D.J.