United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

March 19, 2021

Before:

Michael Y. Scudder, ***Circuit Judge***
Amy J. St. Eve, ***Circuit Judge***
Thomas L. Kirsch, II, ***Circuit Judge***

RICARDO BURGOS, Petitioner-Appellant, No. 20-3382 v. UNITED STATES OF AMERICA, Respondent-Appellee.	] Appeal from the United] States District Court for] the Northern District of] Illinois, Eastern Division.]] No. 1:19-cv-07305]] Ronald A. Guzman,] Judge.

ORDER

On consideration of the papers filed in this appeal and review if the short record,

IT IS ORDERED that this appeal is DISMISSED for lack of jurisdiction.

Rule 4(a) of the Federal Rules of Appellate Procedure requires that a notice of appeal in a civil case in which the United States is a party be filed in the district court within 60 days of the entry of the judgment or order appealed. In this case judgment was entered on May 1, 2020, and the notice of appeal was filed on November 30, 2020, about five months late. The district court has not granted an extension of the appeal period, *see* Rule 4(a)(5), and this court is not empowered to do so, *see* Fed. R. App. P. 26(b).

-over-

In his notice of appeal petitioner-appellant Ricardo Burgos recounts his non-receipt of the judgment in this case, stating that it was not until he received the district court's docket sheet on November 6, 2020, that he "learned of [the district court's] denial of his § 2255 motion." Petitioner-appellant Ricardo Burgos goes on to "ask[] this Honorable Court to grant this motion for equitable tolling, and accept this Notice of Appeal as timely filed." This certainly looks like a request to reopen the time to appeal under Fed. R. App. P. 4(a)(6). *See* 28 U.S.C. § 2107(c)(2). But, as the government correctly points out, the notice of appeal was filed "outside of the parameters set by Rule 4(a)(6) and § 2107(c)(2)." *See Armstrong v. Louden* 834 F.3d 767 (7th Cir. 2016) (district court lacks authority to reopen time to appeal if Rule 4(a)(6) time limits are not met).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

United States of America,	)	
	)	
	)	**No. 19 C 7305**
v.	)	
	)	**Judge Ronald A. Guzmán**
Ricardo Burgos,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Defendant's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 [1] is denied for the reasons stated below. The Court denies a certificate of appealability. Civil case terminated.

STATEMENT

Section 2255 provides that a criminal defendant is entitled to relief from his conviction and sentence if "the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack." 28 U.S.C. § 2255(b). A court may deny a § 2255 motion without an evidentiary hearing if "the motion and the files and records of the case conclusively show" that the defendant is not entitled to relief. *Id.* Relief under § 2255 is available "only in extraordinary situations, such as an error of constitutional or jurisdictional magnitude or where a fundamental defect has occurred which results in a complete miscarriage of justice." *Blake v. United States*, 723 F.3d 870, 878-79 (7th Cir. 2013).

On direct appeal from Defendant's conviction, the Seventh Circuit summarized the facts and posture of the case as follows:

> Over a period of months in 2015, Ricardo Burgos sold small amounts of drugs to undercover officers six times, handing over a total of 4.02 grams of crack and 1.4 grams of heroin. A few weeks after the last of these transactions, Burgos recorded a music video at a hotel in Deerfield, Illinois in which he brandished a .45 caliber pistol at the camera—a pistol that he later admitted was stolen and that his past felony convictions barred him from possessing. Burgos was charged with and pleaded guilty to one count of distribution of a controlled substance and one count of unlawfully possessing a firearm. *See* 21 U.S.C. § 841(a)(1); 18 U.S.C. § 922(g)(1). After receiving concurrent 188-month and 120-month sentences, he filed a notice of appeal. His appointed counsel asserts that the appeal is frivolous and moves to withdraw, *see Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396,

> 18 L.Ed.2d 493 (1967); Burgos opposes the motion, *see* CIR. R. 51(b). We grant counsel's motion and dismiss the appeal.

United States v. Burgos, 745 Fed. App'x 636 (7th Cir. 2018). The Court notes that Defendant's sentence was enhanced for being a career offender under Chapter Four of the Sentencing Guidelines, U.S.S.G. §§ 4B1.1(a) and (b)(3), and Defendant's counsel at sentencing did not object to the enhancement. Defendant's § 2255 motion seeks relief for ineffective assistance of trial and appellate counsel.

To prevail on a claim that trial counsel was ineffective, Defendant must meet the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 688 (1984), establishing that (1) his lawyer's performance fell below an objective standard of reasonableness and (2) that he was prejudiced, i.e., there is a reasonable probability that the result of the proceedings would have been different, but for his counsel's unprofessional errors. *Id.* at 694. Defendant first argues that trial counsel was ineffective at sentencing for failing to challenge as qualifiers for career-offender status his prior convictions for aggravated battery of a peace officer, attempted aggravated robbery, and possession of a controlled substance. "An attorney's failure to object to an error in the court's guidelines calculation that results in a longer sentence for the defendant can demonstrate constitutionally ineffective performance." *Ramirez v. United States*, 799 F.3d 845, 855 (7th Cir. 2015). As an initial matter, on direct appeal, the Seventh Circuit agreed with appellate counsel's "assessment that there are no non-frivolous arguments to be made about [Defendant's] career-offender status." *Burgos*, 745 Fed. App'x at 636. The Court agrees that any challenge to Defendant's career-offender status is meritless; thus, his assertion that counsel's performance regarding the relevant enhancement was deficient also fails.

Under the modified categorical approach to determining career-offender status for a crime of violence, the Court "look[s] to the underlying documentation to determine if [Defendant] was charged with aggravated battery because he 'caused bodily harm,' in which case the crime qualifies as a crime of violence, or because he 'made physical contact of an insulting or provoking nature,' in which case the crime would fall outside [the] definition of a crime of violence." *United States v. Lynn*, 851 F.3d 786, 797 (7th Cir. 2017) (citation omitted). Attached to the government's version of the offense in this case was a copy of the state-court indictment to which Defendant pleaded guilty, charging him with striking a peace officer "about the body" and "knocking him to the ground," thus committing an aggravated battery by "intentionally or knowingly caus[ing] bodily harm." (*United States v. Burgos*, No. 16 CR 165, Dkt. # 29, at 52.) Because this offense was properly used to support a career-offender enhancement, counsel was not ineffective for failing to challenge its use at sentencing.

With respect to Defendant's attempted aggravated robbery, "any Illinois conviction for attempted armed robbery . . . would qualify as a crime of violence . . . ." *United States v. Andrews*, 419 Fed. App'x 673, 676 (7th Cir. 2011). Thus, this conviction was properly used to enhance Defendant's sentence for being a career offender and counsel was not ineffective for failing to argue otherwise, either at sentencing or on appeal.

Defendant also contends that sentencing counsel was ineffective for failing to argue that his prior conviction for possession of a controlled substance should not have been used to support career-offender status. But according to the presentence investigation report, which was adopted by the Court, Defendant's career-offender status was based on the two crimes of violence discussed above, not the possession of a controlled substance. Accordingly, counsel was not ineffective for failing to raise this issue.

Defendant also challenges appellate counsel's performance. To succeed on an ineffective assistance of appellate counsel claim, Defendant must show that appellate counsel failed to argue "an issue that is both obvious and clearly stronger than the issues actually raised." *Makiel v. Butler*, 782 F.3d 882, 898 (7th Cir. 2015) (internal quotation marks omitted).

Defendant first asserts that appellate counsel was ineffective for failing to challenge the career-offender predicate offense of attempted aggravated robbery. Because, as discussed above, the argument is meritless, counsel could not have been ineffective for failing to raise it on appeal. Defendant next contends that appellate counsel was ineffective by not arguing that because his civil rights had been restored by the state of Illinois, he could not be charged with being a felon in possession of a firearm pursuant to 18 U.S.C. § 922(g). But Defendant fails to point to any evidence, such as a letter from the state of Illinois, that his civil rights had been restored. *See Musgraves v. United States*, No. 15 C 347, 2018 WL 1366616, at *4 (S.D. Ill. Mar. 16, 2018) (denying § 2255 claim on the same ground because the defendant "[did] not present[] any letter indicating that his civil rights had been restored, nor d[id] he indicate that he took any steps to restore his right to possess a firearm"). In fact, Defendant does not even "allege facts that, if proven, would . . . entitle[] him to relief." *Hicks v. United States*, 886 F.3d 648, 652 (7th Cir. 2018). Therefore, the Court denies this basis for relief.[1]

In a supplement to his § 2255 motion, Defendant contends that a recent Supreme Court case, *Rehaif v. United States*, 139 S. Ct. 2191 (2019), supports his claim that counsel was ineffective when she did not challenge on appeal Defendant's conviction for being a felon in possession of a firearm under § 922(g). In *Rehaif*, the Supreme Court held that "in a prosecution under 18 U.S.C. § 922(g) and § 924(a)(2), the Government must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm." *Id.* at 2200. The government argues that the claim is procedurally defaulted. "In general, habeas corpus petitioners may not raise any issue that they might have presented on direct appeal." *Cross v. United States*, 892 F.3d 288, 294 (7th Cir. 2018). "A petitioner may, however, overcome procedural default by showing cause for the default and actual prejudice, or that failure to consider the defaulted claim will result in a fundamental miscarriage of justice." *Id.* at 294-95 (internal citations and quotation marks omitted). "Absent a showing of both cause and prejudice, procedural default will only be

[1] In addition, in order to challenge his conviction, Defendant would have had to withdraw his guilty plea. Appellate counsel indicated in her brief that she discussed withdrawing Defendant's plea with him, but he stated that he did not want to do so. (*United States v. Burgos*, No. 18-1284 (7th Cir.), Dkt. # 15, at 17.) ("[C]ounsel consulted [Defendant] as to whether he wished to seek a withdrawal of his guilty plea. He indicated to counsel that he did not wish to do so.")

excused if the prisoner can demonstrate that he is 'actually innocent' of the crimes of which he was convicted." *McCoy v. United States*, 815 F.3d 292, 295 (7th Cir. 2016). The Court agrees that the claim is procedurally defaulted because even if *Rehaif*, which applies retroactively on collateral review, allows Defendant to satisfy the cause prong of procedural default, he fails to establish prejudice. *See Floyd v. United States*, No. 19 C 6578, 2020 WL 374695, at *3 (N.D. Ill. Jan. 23, 2020) (finding defendant had failed to show prejudice and thus had procedurally defaulted claim based on *Rehaif*, stating that "[i]t is inconceivable that [the defendant], at the time he possessed the firearm, was unaware of [his prior] felony conviction and sentence. Given this, there is no reasonable probability that [the defendant] would have declined to plead guilty had he known that a § 922(g)(1) conviction required that he know at the relevant time that he had been convicted of such a crime."). Likewise, in *Floyd*, the court rejected actual innocence (i.e., a fundamental miscarriage of justice) as a basis for excusing procedural default:

> Because the record indisputably shows that [the defendant] had been convicted of a felony and sentenced to four years' imprisonment, and because [the defendant] does not and could not plausibly argue that he did not know of that conviction and its sentence at the time he possessed the firearm, a jury properly instructed under *Rehaif* surely would have convicted him under § 922(g)(1).

Id. Here, as discussed below, Defendant's guilty plea dictates the same result, and accordingly, he cannot establish prejudice or actual innocence. The Court thus finds that Defendant's *Rehaif* claim is procedurally defaulted.

Even if the claim is not procedurally defaulted, it fails on the merits. According to Defendant, he did not know he was forbidden from possessing a firearm. He again refers generally to having one's civil rights restored and contends that his appellate counsel should have so argued. As already discussed, however, Defendant does not point to any evidence, or even allege, that his civil rights have been restored. Moreover, Defendant pleaded guilty to the § 922(g) count, acknowledging in his plea declaration that "at the time he possessed the gun, he had previously been convicted of a crime punishable by a term of imprisonment exceeding one year." (*United States v. Burgos*, No. 16 CR 165 (N.D. Ill.), Plea Decl., Dkt. # 25, at 3.) "*Rehaif* does not require the [g]overnment [to] prove [that] a criminal defendant knew he was prohibited from possessing firearms, only that he was included in a group generally excluded from possessing firearms." *Alexander v. Entzel*, No. 19 C 1301, 2020 WL 1068060, at *3 (C.D. Ill. Mar. 5, 2020). In this case, Defendant's guilty plea, along with his failure to point to any evidence that his civil rights had been restored precludes his claim that he did not know that he belonged to the category of persons barred from possessing a firearm. Accordingly, because a claim under *Rehaif* fails on the merits, Defendant's argument that appellate counsel was ineffective for failing to make such an argument is also unavailing.

Finally, Defendant asks for relief under the First Step Act of 2018, apparently seeking relief from a purported 5-year statutory minimum sentence on Count One for distributing crack cocaine. Defendant's argument is meritless because he was not subject to a statutory-minimum sentence on Count One. (*United States v. Burgos*, No. 16 CR 165, Presentence Investigation Report, Dkt. # 29, at 36.)

Under § 2255 Rule 11(a), "[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." A petitioner is entitled to a certificate of appealability only if he can make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c); *White v. United States*, 745 F.3d 834, 835 (7th Cir. 2014). "[I]n cases where a district court denies a habeas claim on procedural grounds, the habeas court should issue a certificate of appealability only if the petitioner shows that (1) jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and (2) jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *United States v. Singleton*, 03 CR 175, 2014 WL 3558771, at *4 (N.D. Ill. July 17, 2014). Defendant has failed to make such a showing so a certificate of appealability on the procedural ground for the Court's ruling is denied. To the extent that the Court's denial of Defendant's § 2255 motion is on the merits, Defendant must demonstrate that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (internal quotation marks omitted); *Lavin v. Rednour*, 641 F.3d 830, 832 (7th Cir. 2011) (similar). Again, Defendant has failed to make that showing, so a certificate of appealability is denied.

Date: May 1, 2020

Ronald A. Guzmán
United States District Judge

IN THE
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN-DIVISION

United States of America,
Plaintiff,

v.

Civ.No.19Cv-7305

Ricardo Burgos,
Petitioner,

PETITIONER'S TRAVERSE TO THE GOVERNMENT'S RESPONSE TO HIS 28 U.S.C SECTION 2255 MOTION

Comes now Ricardo Burgos(hereinafter) referred to as Petitioner moves this Honorable Court to grant his 28 USC § 2255 motion to vacate, set aside the conviction or correct the sentence. Section 2255 provides four grounds that justify relief for a federal prisoner who challenges the facts or length of his or her detention: (1) "that the sentence was imposed in violation of the Constitution or laws of the United States;(2) "that the court was without jurisdiction to impose such sentence; (3) "that the sentence was in excess of the maximum authorized by law"; or (4) that the sentence is 'otherwise subject to collateral attack".

ISSUE I

TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO CHALLENGE THE PREDICATE OFFENSE OF BATTERY OF A PEACE OFFICER, IN VIOLATION OF PETITIONER'S SIXTH AMENDMENT U.S. CONSTITUTION

Petitioner asserts his trial counsel Mr.Krejci (hereinafter) referred to as counsel rendered ineffective assistance of counsel for failing to bring a 'challenge' to the 'aggravated battery' of a peace officer used as a predicate offense in order to enhance him under the United States Sentencing Guidelines (hereinafter) referred to as "USSG" section 4B1. and 2.

Petitioner asserts the Sixth Amendment guarantees the right to effective assistance of counsel in criminal prosecutions. See McMann v. Richardson, 397 US 759 (1970). In Strickland v. Washington, 466 US 668 (1984), the Supreme Court established a two-prong test to evaluate ineffective assistance claims. To obtain reversal of a conviction under the Strickland standard, the defendant must prove that counsel's performance fell below an objective standard of reasonableness and that counsel's performance prejudice the defendant resulting in an unreliable or fundamenally unfair outcome in the proceeding.

In response to Petitioner's contention regarding counsel rendering ineffective for not challenging the aggravate battery of a peace officer, the government asserts in pertinent part as follows:

> "During the sentencing hearing, Burgos attorney conceded that Burgos was a career offender. R.57 at 2-3.Any error related to this concession was harmless because

> the government raised the issue of whether Burgos's aggravated battery of a peace officer conviction qualified as a violent crime for purposes of a being a career offender and the court properly determined that Burgos was a career offender . . . Because there is more than one way of committing battery,the mere fact that a defendant as convicted of aggravated battery is insufficient to establish that he committed a crime involving force,"when the same criminal statute punishes conduct that is and is not a crime of violence for purposes of federal sentencing the federal court is not permitted to determine which kind of conduct the defendant engaged in if the determination would require resolving a factual dispute". United States v. Aviles-Solarzano, 623 F.3d 470, 473 (7th Cir.2010) . . . Since the government produced appropriate documentation showing that Burgos was convicted under the first prong of the Illinois statute ,and since his conviction therefore was properly used as a career offender qualifier, Burgos's argument lacks merits'. His attorney did not perform ineffectively regarding this issue.
> See(Gov.R.at page(s) 6-8)

Petitioner asserts that contrary to what the government may contest the Seventh Circuit precedent states otherwise and had counsel used his knowledge and skills the outcome of the proceeding would have been different. This is so due to the fact when a State statute defines an offense various different ways to convict a defendant as in the case of Petitioner's predicates offense used to enhance him,the court can not use the state predicate offense to enhance under.See United States v. Evans, 576 F.3d 766 (7th Cir.2009)("Thus, the same statute form of words, embrass two crimes:offense battery and forcible battery. If the two crimes were in separate sections of the battery statute (or within the same section but listed separately Nyhawan v. v. Attorney General, 557 US 29,129 S.Ct 2294,174 L.Ed2d 22 (2009) . . . But in United States v. Woods, supra another panel of this Court has held that when a statute fails to place the crime that is

not a crime of violence,in separate sections (or in a list of separate crimes in the same section), the defendant cannot be given the crime-of-violence enhancement").at 768-769

The government does admit that "counsel failed to investigate", this issue and "conceded" to it, which established 'deficient performance'. The prejudice incurred by such failure to investigate as pointed out in Evans, supra,-that the statutory terms insulting or provoking' covers a range of kind or concepts of battery, some of which created a serious risk of injury and some of which do not.

As the Supreme Court have said 'merely careless (even though criminal and dangerous) conduct will not suffice,however,. See Begay v. United States, 553 US 137, 128 S.Ct 1581, 170 L.Ed 2d 490 (2008).

Petitioner receive more time due to counsel's failure to investigate which resulted in Petitioner receiving more that 152 months more since his proper USSG range is 36 months. This denied Petitioner's right to effective assistance of counsel as guaranteed by the Sixth Amendment.See Glover v.United States, 531 US 198, 203 (2001)("assuming counsel erred in failing to press grouping arguments in sentencing phase of defendant's trial and upon appeal, increase of sentence from 6 to 21 months was prejudicial").;see Hall v. Washington, 106 F.3d 742, 749 (7th Cir. 1997)("Counsel's failure to investigate for mitigating sentence rendered ineffective and formed prejudice"); See also Hinton v. Alabama,134 S.Ct 1081 (2014)("An attorney's ignorance of a part of law that is fundamentally to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under Strickland").at 1089

Petitioner first would move this Honorable Court to have counsel submit an affidavit agreeing or disagreeing to the claim of ineffective assistance of counsel lodged against him by Petitioner instead of this Court accepting the government's theory of the case. See Sneed v. Smith, 670 F.2d 1348,1354-55 (4th Cir.1982);See Clay v. Director Juvenile Div. Dep't of Corrections, 631 F.2d 516 (7th Cir. 1980)("...We think that Petitioner's allegation that her counsel failed to advise her of the defenses in question raise some question as to the adequacy of representation, particularly as the allegations were not contradicted by counsel's affidavit".at 522 ;See also Stitts v. Wilson, 713 F.3d 887 (7th Cit.2013)("On the other hand, trial counsel's affidavit is entirely silent about the extent of his investigation.").at 895

Moreover, Petitioner asserts the government hasn't present any precedent that the Seventh Circuit had an intervening en banc ruling that changed the legal landscape of Evans,supra, and although the government cited United States v. Aviles-Solarzano, 623 F.3d 470 (7th Cir.2010), and United States v. Lynn,851 F.3d 786 (7th Cir.2017) -neither case trumps Evans.See Wilson v. Cook,937 F.3d 1028 (7th Cir. 2019)("Principles of stare decisis require that we give considerable weight to prior decisions unless and until they have been overruled or undermined by the decision of a higher court, or other supervening develops...").at 1035

Petitioner would like to be resentenced to time served since he is not a career offender and he has completed his 36 months for the crime, which is the only sentence he can receive on the offense.

ISSUE II

APPELLANT COUNSEL RENDERED INEFFECTIVE ASSISTANT OF COUNSEL BY FOR FAILING TO CHALLENGE/RAISE PETITIONER WAS NOT A FELON IN POSSESSION OF A FIREARM PURSUANT TO 18 USC § 922(g),WHICH DENIED HIM TO COUNSEL GUARANTEED BY THE SIXTH AMENDMENT U.S CONSTITUTION

Petitioner asserts that Appellant counsel rendered ineffective assistance of counsel as guaranteed under the Sixth Amendment.See McMan v. Richardson, 397 US 759 (1970) when he/counsel failed to use his knowledge and skills to investigate Title 18 USC § 921(a)(20)-(B) ,which states in pertinent part as follows:

> "The terms "crime" punishable by imprisonment for a term exceeding one year 'does not include. . . Any conviction which has been expunged or set aside or for which a person has been pardoned or has had "civil rights restored" shall be considered a conviction for purposes this chapter unless such pardon, expungement,or restoration of civil rights expressly provides that the person may not ship transport, possess or receive firearms".

Appellant counsel at no time investigated Congress's Title 18 USC § 921(a)(20)(B), which was in effect during all of Petitioner's prior conviction where Federal Reporters were replete with cases that had been reversed because district court had rule that a gun under 18 USC § 922(g) had taken place when in fact § 921(a)(20)(B) had establish it did not.See Buchmeir v. United State,581 F.3d 561 (7th Cir.2009).

The government asserts that in order for Petitioner to prevail on this issue he/Petitioner must (1) seek withdraw his guilty plea; (2)provide evidence that his civil rights were restored. These are all legal performances that appellate counsel not the Petitioner did not raised,by using his knowledge and skills, since Appellate

counsel was appointed pursuant to 19 USC § 3006A "Criminal Justice Act".See Mason v. Hanks, 97 F.3d 887 (7th Cir.1996)

Moreover, the government has stated that Appellate counsel broke the attorney-client privilege by stating in pertinent part as follows:

> ...Appellate counsel had no ability to challenge Burgos convictions for being a felon in possession. Appellant counsel considered the challenge and consulted with Burgos who ultimately rejected this path on appeal". See(Gov.R.at page(s) 10-11)

In United States v. Burnett, 641 F.3d 894 (7th Cir.2011), the Seventh Circuit held(Nothing in the statutory language asks what a person believes . . . Buchmeir used the anti-mouse-trapping language to summerize the reason why Congress wrote ¶ 921(a)(20) to require the firearm restoration to be in the communication- rather than, say requiring the felon to search the whole of State law to discover what rights he enjoyed . . . Buchmier held that the effect also does not depends on whether the recipient reads or understands the communication").at 896

Moreover, the government researched the prior convictions Petitioner had/have and claims "without pointed out for the court," which one is considered a felon for purposes of applying 18 USC § 922(g).See Gov.R.at page 11 ("Defendant's first adult, felony conviction occurred March 25, 2004 (R.57.at 11) and he had subsequent felony conviction in 2007 (R.57.at 12) and 2012 (R.57.at 15),therefore he would not have receive this letter in connection with at least one felony conviction").

However, no adult conviction occurred in the State of Illinois can be considered as a felon to invoke a conviction under § 922(g)

as held by the Seventh Circuit.See Burnett,641 F.3d 894 (7th.Cir 2011)("Illinois makes the restoration of (some) civil rights automatic when a sentence has been fully served").at 896

Counsel performance was both deficient and prejudicial since Petitioner would have received dismissal on count 7 due to the fact he is not a felon and his 'civil rights' were automatically restored upon his release from Illinois State prison. See Cates v. United States, 882 F.3d 731 (7th Cir.2018)("In closing its worth repeating that the errors by trial and appellate counsel meant the difference between a sentence capped at one year and a maximum penalty of life in prison. We have little difficulty concluding that the errors by Cates counsel prejudiced his case. Relief under § 2255 is warranted. We reversed and remand for further proceeding consistent with the opinion").at 738

Petitioner move the Court to hold a hearing on this issue with the government's AUSA Jordan M.Matthews and counsels on Appellant to determine what attorney cliet privileges were breach by defense counsel and when. Moreover, to dismiss count 7 and to order appellant counsel to submit an affidavit agreeing or disagreeing to the privilege the goverment attorney alleged he breached.

TRIAL AND APPELLANT COUNSEL FAILURE TO BRING A CHALLENGE TO THE PREDICATE OFFENSE OF "ATTEMPT AGGRAVATED ROBBERY,RENDER HIM INEFFECTIVE AS COUNSEL,IN VIOLATTON OF THE SIXTH AMENDMENT U.S CONSTITUTION

Petitioner asserts his trial and Appeals counsel(s) failure to bring a challenge to the "predicate" State Of Illinois offense "Attempt Aggravated Robbery",denied him effective assistance of

counsel as guaranteed by the Sixth Amendment U.S Constitution. See Strickland v. Washington, 466 U.S 668 (1984).

In Strickland, supra, the Supreme Court established a two prong test to evaluate ineffective assistance claims. To obtain reversal of a conviction under the Strickland standard,the defendant must prove that counsel's performance fell below an objective standard of reasonableness and that counsel's deficient performance prejudiced the defendant resulting in an unreliable or fundmentally unfair outcome in the proceeding.

The Government in its response to this claim cites United States v. Andrews 419 Fed.Appx 673 (7th Cir. 2011) an unpublish opinion which does not hold and precedenial value. See United States v. Townsend, 762 F.3d 641 (7th Cir.2014)("But unpublished decisions are not binding on subsequent panels. See 7th Cir.R. 32.1(b) . . . We disavow anything in our unpublished decisions suggesting that district courts retain common-law authority to reconsider a sentence").at 646-647.

Petitioner asserts that he did not perform any actions of threat or intimidation to the alleged victim during his attmept aggravated robbery that was used as a predicate offense in order to enhance him under § 4B1.2(a) and his counsel rendered ineffective for failing to make this challenge and use the Seventh Circuit precedent in Jett, infra, and Thoroton,infra.

As the government points out-'at the time petitioner committed the state offense Illinois defined "attempt" as 'when with intent' . . .a substantial step toward the commission of that offense". 720 ILCS 5/8-4(a) (2006).

However, as initially asserted in Petitioner's memorandum of law

in support of his § 2255 motion, the Supreme Court has dramatically altered the federal sentencing guidelines from mandatory to advisory. See United States v. Booker, 543 U.S 220 (2005). Two recent developments also changed the way "attempt to commit crimes should be considered under the 'residual clause' language, which involves 'conduct' that presents a serious potential risk of physical injury to another in Johnson v. United States,135 S.Ct 2551 (2015) and Session v. Dimaya, 200 L.Ed 2d 549 (2018).

The Seventh Circuit in numerous published decisions define "attempt' to rob with the "intent' state of mindset as set out by the Supreme Court in Rosemond v. United States,572 U.S 65 (2013).See United State v. Jett, 908 F.3d 252 (7th Cir.2018)("Here however, the reason for setting aside the attempt conviction (a lack of force or intimidation) do not speak to the sufficiency of the conspiracy conviction. In the Second case United States v. Thoronton, 539 F.3d 741,751 (7th Cir.2008) we reversed a conviction for attempted robbery based on a lack of proof of intimidation (like here). In so doing, we necessarily had to reverse the attendant 18 USC § 924(c)(1)(A) conviction for lack of the statutorily required predicate crime of violence"). at 274

Had counsel done his duty and found the case cited in this motion during his sentencing and appeal the outcome would have been different since federal reporters were repleted with cases of 'attempt' intent interpretation that were published. See United States v. Smith, 250 F.3d 1073 (7th Cir.2001)("Indeed, at the time Petitioner 'plea, the Federal Reporters were replete with cases involving challenges to the notion ...").at 1057;see also Brock-Miller v.United States,887 F.3d 298 (7th Cir.2018)("A lawyer's failure to learn the relevant facts and make

an estimate of the likely sentence constitute deficient performance") . at 310.

It is worth mentioning that had counsel(s) done their duty the Petitionr's USSG level would have been 24 to 36 months on count 1 not 188 months,which is more than five times more than what the sentence would yield.rendered deficient as well as prejudice.See Cates v. United States, 822 F.3d 731 (7th Cir.2018)("in closing, its worth repeating that the error by trial and appellate counsel meant the difference between a sentence capped at one year and a maximum penalty of life in prison. We have little difficulty concluding that the error by Cates counsel prejudiced his case. Relief under § 2255 is warranted").at 738

Petitioner moves this court to grant his §2255 and re-sentence him to time served since both counsel(s) rendered prejudice that result in an overly excesses sentence.

UNDER REHAIF THE PETITIONER'S 18 USC § 922(g) SHOULD BE DISMISSED SINCE HE DID NOT KNOWINGLY PLEAD TO SOMETHING NEITHER THE COURT, COUNSEL OR THE GOVERNMENT ANTICIPATED

Petitioner asserts that he is actual innocent of the offense 18 USC § 922(g) solely due to the fact he did not plead "knowingly" and intelligently to the § 922(g) as not even the court, counsel nor the government understood the essential element of the offense the "knowingly" language must be met.See Rehaif v. United States, 139 S.Ct 2191, 204 L.Ed 2d 594 (2019)("Applying the word "knowingly" to the defendant's status in § 922(g) helps advance the purpose of scieter, for it helps tp separate wrongful from innocent acts. Assumm-

ing compliance with ordinary licensing requirements, the possession of a gun can be entirely innocent. See Staples, 511 US., at 611, 114 S.Ct 1793, 128 L.Ed 2d 608. It is therefore the defendant's status and not his conduct alone, that makes his behavior wrongful. His behavior may instead be an innocent mistake to which criminal sanctions normally attach. Cf. O. Holmes, The Common Law 3 (1881)("even a dog distinguishes between being stumbled over and being kicked"). at 2197

In response to this issue the government first states-"Burgos waived this issues due to procedural default". See (Gov.at 12-15)

The Seventh Circuit have held in Cross v. United States, 892 F.3d 288 (7th Cir.2018)("The government next raised the ubiquitious specter of procedurally default. Because neither Cross nor Davis challenged the constitutionality of the residual clause at trial or on direct appeal, the government argues they are barred from doing so now. . . We have no doubt -that an extended prison term-which was imposed on both men as a result of their designation as career offenders-constitute prejudice.See Glover v.United States, 531 U.S 198, 203, 121 S.Ct 696, 148 L.Ed 2d 604 (2001). That narrow our inquiry to whether they have shown cause for not objecting at trial. A change in the law may constitute cause for a procedural default if it creates 'a claim that "is so noval that its legal basis is not reasonably available to counsel", Bousley, 523 US.at 622 (quoting Reed v.Ross, 468 US 1,16, 104 S.Ct 2901, 82 L.Ed 2d 1 (1984). In Reed, the Court identified three nonexclusive situations in which an attorney may lack a 'reasonable basis' 'to raise a novel claim'. First, a decision of this court may explicitly overrule one of our precedents. Second,

a decision may 'overturn a longstanding and wide spread practice to which this court has not spoken, but which a nearunanimous body of lower court authority has expressly approved". And finally, a decision may 'disapprove a practice this court arguably has sanctioned in prior cases", Reed, 468 U.S.at 17 (quoting United States v. Johnson, 457 US 537, 551, 102 S.Ct 2579, 73 L.Ed 2d 202 (1982)").at 295

Therefore, although the Petitioner did not raise this issues he still can raise it and be granted the sufficient release which is dismissal of the charge of §922(g).See Cross,supra,(" Nonetheless, when the Supreme Court reverse courses the change generally indicates an abrupt shift in law").The Petitioner represented the type of abrupt shift in the Supreme Court's Rehaif decision and the governement does acknowledge this.See Rehaif, supra,("In contrast, the maxim does not normally apply where a defendant 'has a mistaken impression concerning the legal effect of some collateral matter and that mistake results in his misunderstanding the full significance of his conduct," thereby negating an element of the offense.Ibid.; See also Model Penal Code § 2.04, at 27 (a mistake of law is a defense if the mistake negates the "knowledge. . . required to establish a material element of the offense").".at 2198

The Government can not prove that the Petitioner 'knew he belonged to the relevant category of persons barred from possessing a firearm as 18 USC § 921(a)(20)(B) exempt those who 'civil rights were/are restored can't be charged as a felon in possesion of a firearm as well.See United States v. Burnett, 641 F.3d 894 (7th Cir.2011).

Petitioner would move to have the § 922(g) dismissed and resentenced without it to time served after this court consider and grant the § 2255 motion.

PETITIONER MOVE THIS COURT TO DISMISS COUNT ONE OF HIS PLEA UPON THE FACT HE PLEAD TO FOUR GRAMS OF COCAINE BASE CRACK AND HE IS ELIGIBLE FOR A REDUCE SENTENCE UNDER SECTION 404 OF THE FIRST STEP ACT.

Petitioner asserts that he should have his case dismissed on on count one because he only plead to four grams of cocaine base and the First Step Act of 2018 clearly does not make criminal crimes of less than 5 grams of cocaine base a crime. Petitioner's circumstance, the offense was committed after the Fair Sentencing Act of 2010, but before the First Step Act was signed into law of 2018 756, 115th Cong.(2018). And had he been sentence today after the "Act" became effective, he would not receive any prison time on count one of the indictment. See United States v. Davis,2019 U.S Dist.Lexis 36348 (W.D.N.C 2019)("Section 3 of the Fair Sentencing eliminated the 5 year mandatory minimum sentence for simple possession of crack cocaine.See United States v. Flagler, 2019 U.S. Dist. Lexis 32913 (M.D Fla. 2019)("In October 2008 Mr.Flagler was sentenced to 120 months imprisonment for distributing five or more grams of cocaine base (count Five of the Superseding Indictment) . . . Retroactive application of the Fair Sentencing Act has no impact on Mr.Flagler's sentence for count six. However, retroactively applying the Fair Sentencing Act to count Five reduces Mr.Flagler's guidelines to eighteen to twenty-four months and his term of supervised release is appropriate").

In response to this argument the government contested by stating in pertinent part as follows(Therefore the First Step Act is not retroactive. United States v. Jackson, 940 F.3d 347 (7th Cir. 2019)

Petitioner asserts that Congress made the First Step Act retro-

active and it applies to him.

The Seventh Circuit's ruling in Jackson, supra,clearly did not address a challenge to the the statutory interpretation of retroactivity as outlined in Lindh v. Murphy, 138 L.Ed 2d 481 (1997).

The First Step Act was made retroactive as expressed by Congress and the Section 404 pursuant to a cover offense of 21 USC § 841(c)-(1)(C) and anything less then 5 grams is no longer a crime to be charged and punish under. See Flagler,supra,(" . . .Retroactive application of the Fair Sentencing Act has no impact on Mr.Flagler's for count six. However, retroactive applying the Fair Sentencing Act to count Five reduces Mr.Flagler's guidelines to eighteen to twenty-four months and his term of supervised release to maximum of six years. The United States and Flagler agree that a new sentence for count Five of Eighteen months imprisonment and six years of supervise release is appropriate"). In Lindh, supra, the Supreme Court held("When a case implicates a federal statute enacted after the events insuit,the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so , of course, there is no need to resort to judicial default"). at 487

The Jackson, supra, court did not say the less than 5 grams that was held retroactive in the First Step Act was not retroacitve because it address a different subsection. See Jackson,("Taking his prior conviction, a mandatory minimum sentence of ten years on count 3 and life imprisonment on count 4").at 349

Petitioner asserts in sum that Jackson solely addressed "Section 401 of that Act, titled 'Reduce and Retricted Enhanced Sentencing of Prior Drug Felonies", . . ., Pub.L.No. 115-391. § 401(a)(2)(A)(ii).

Moreover,the Seventh Circuit Jackson,supra defendant was charged in a six count superseding indictment with methamphetamine not crack cocaine as in the case of Petitioner. Nor is Petitioner bringing a challenge under that part of the First Step Act.

Therefore, Petitioner asserts this Court should dismissed his count 1 on the drug since it is clearly legal that he is in prison for a crime that the law does not make criminal any more. See United States v. Efrain, 342 F.S.2d 781 (N.D Ins 2004)("In any event, consiging that a statute can have only one meaning from the date of its effectiveness onward (unless of course, the language of the statute has actually been changed by Congress), then where a court narrows the scope of a statute under which a federal prisoner was previously convicted, there exists the possibility that the prisoner now stands convicted of an act that the law never made criminal,Bousley, 523 US .at 620. This as it would be wholly contrary to our notion of justice and fairness to allow a defendant to serve a prison term for an act that is not, nor ever was a crime, defendants collateral attacking their conviction are therefore entitled to the benefit of decisions which give a federal criminal statute a more narrow reading than had previously been applied to their own conviction Lanier, 220 F.3d.at 838; Ryan, 277 F.3d.at 1063-63; Barnhardt, 93 F.3d.at 708.See Gates v. United States, 515 F.2d 75")

Petitioner finaly states that no one the government, counsel nor the court could have reasonably have anticipated the First Step Act would eliminate the 5-year statutory minimum sentence of less than 5 grams or simple possession of 4 grams as was pleaded to to be no longer a crime to be penalized on.

Petitioner would move this honorable court to dismiss the

count one.

Petitioner would like to be held to less stringent standards than formal pleadings drafted by attorneys.See Hainse v.Kerner,404 U.S. 519 (1972), this be his prayer.

Ricardo Burgos
Ricardo Burgos
I.D#51022-424
P.O Box 1000
U.S.P Leavenworth
Leavenworth,KS 66048

Dated 3,20,2020

CERTIFICATE OF SERVICE

I,Ricardo Burgos, certify that I have served a true and complete copy of:"Petitioner's Traverse To The Government's Response To His 28 USC § 2255 Motion,which was sent to the below parties and his deemed timely filed when placed in the legal mail box at USP Leavenworth.See Houston v.Lack,101 L.Ed 2d 245 (1988).

C/O Clerk- U.S District Court
United States District Court
219 S. Dearborn street
Chicago,Ill 60604

C/O Jordan M.Matthews
Assistant U.S Attorney
219 S Dearborn Street
Chicago,Ill 60604

dated 3,20,2020

Ricardo Burgos
Ricardo Burgos
I.D#51022-424
P.O Box 1000
USP Leavenworth
Leavenworth, KS 66048

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

April 22, 2021

Before

MICHAEL Y. SCUDDER, *Circuit Judge*

AMY J. ST. EVE, *Circuit Judge*

THOMAS L. KIRSCH II, *Circuit Judge*

No. 20-3382

RICARDO BURGOS,
Petitioner-Appellant,
v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 1:19-cv-07305

Ronald A. Guzman,
Judge.

ORDER

Upon consideration of Petitioner-Appellant's petition for rehearing filed on April 12, 2021, all members of the original panel have voted to deny the petition.

Accordingly, the petition for rehearing is hereby DENIED.

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen United States Courthouse
Room 2722 - 219 S. Dearborn Street
Chicago, Illinois 60604

Office of the Clerk
Phone: (312) 435-5850
www.ca7.uscourts.gov

NOTICE OF ISSUANCE OF MANDATE

April 30, 2021

To: Thomas G. Bruton
UNITED STATES DISTRICT COURT
Northern District of Illinois
Chicago , IL 60604-0000

No. 20-3382	RICARDO BURGOS, Petitioner - Appellant v. UNITED STATES OF AMERICA, Respondent - Appellee
Originating Case Information:	
District Court No: 1:19-cv-07305 Northern District of Illinois, Eastern Division District Judge Ronald A. Guzman	

Herewith is the mandate of this court in this appeal, along with the Bill of Costs, if any. A certified copy of the opinion/order of the court and judgment, if any, and any direction as to costs shall constitute the mandate.

RECORD ON APPEAL STATUS: No record to be returned

NOTE TO COUNSEL:
If any physical and large documentary exhibits have been filed in the above-entitled cause, they are to be withdrawn ten (10) days from the date of this notice. Exhibits not withdrawn during this period

will be disposed of.

Please acknowledge receipt of these documents on the enclosed copy of this notice.

Received above mandate and record, if any, from the Clerk, U.S. Court of Appeals for the Seventh Circuit.

Date: **Received by:**

_____ _____

form name: **c7_Mandate**(form ID: **135**)