

Appendix A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

---

No. 21-12444-F

---

DANIEL CASAMAYOR,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

---

Appeal from the United States District Court  
for the Southern District of Florida

---

ORDER:

Daniel Casamayor moves for a certificate of appealability to appeal the district court's denial of his 28 U.S.C. § 2255 habeas corpus motion. To merit a certificate of appealability, Casamayor must show that reasonable jurists would find debatable both (1) the merits of an underlying claim, and (2) the procedural issues that he seeks to raise. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 478 (2000). Casamayor's motion for a certificate of appealability is DENIED because he failed to make the requisite showing.

/s/ Robert J. Luck  
UNITED STATES CIRCUIT JUDGE

## Casamayor v. United States

United States District Court for the Southern District of Florida

June 17, 2021, Decided; June 17, 2021, Entered

Civil Action No. 20-20780-Scola; Crim. Action No. 13-20879-Ungaro

### Reporter

2021 U.S. Dist. LEXIS 114421 \*

Daniel Casamayor, Movant v. United States of America, Respondent.

**Prior History:** United States v. Casamayor, 643 Fed. Appx. 905, 2016 U.S. App. LEXIS 3173 (11th Cir. Fla., Feb. 24, 2016)

**Counsel:** [\*1] Daniel Casamayor, Plaintiff, Pro se, Beaumont, TX.

For United States of America, Defendant:  
Noticing 2255 US Attorney, LEAD ATTORNEY; Ignacio Jesus Vazquez, Jr., United States Attorney's Office, Miami Special Prosecutions Section, Miami, FL.

**Judges:** Robert N. Scola, Jr., United States District Judge.

**Opinion by:** Robert N. Scola, Jr.

### Opinion

---

#### Order Denying Amended Motion to Vacate

The Movant has filed an amended motion to vacate under 28 U.S.C. § 2255 ("Amended Motion"). (ECF No. 7). As discussed below, the Court denies the Amended Motion.

#### 1. Background

##### (1) Factual Background

"In September 2013, as part of an undercover sting operation, federal law enforcement officers approached Anthony Cremades about an opportunity to rob several 'greenhouses' operated by a (fictitious) narcotics organization." *United States v. Casamayor*, 643 F. App'x 905, 906 (11th Cir. 2016) (per curiam) ("*Casamayor I*"). The Movant "and Cremades expressed interest and, during several meetings with the undercover officers, indicated that they would need firearms and additional associates to accomplish the armed robbery." *Id.* "Cremades was unwilling to be physically present during the robbery" and "thus recruited co-defendant Maria Perez to assist in the robbery." *Id.* The Movant "asked Perez to find a third gunman." *Id.* "Perez subsequently [\*2] recruited co-defendant Guillermo Ferro." *Id.* Cremades "expected to receive proceeds secured by his co-conspirators." (Cr-ECF No. 177 at 2).

On November 8, 2013, the Movant "met Perez and Ferro at a gas station, where they discussed their roles in, and strategy for, the armed robbery." *Casamayor I*, 643 F. App'x at 907. "The conspirators then drove to meet another individual and to get directions to the robbery target." *Id.* The Movant, "who is a convicted felon, drove in a car that contained a loaded shotgun, a bulletproof vest, gloves, a baseball bat, a black shirt with a security logo, and a security officer's badge." *Id.*

"Law enforcement arrested the conspirators while they were in route to the meeting." *Id.* "In post-arrest statements, the conspirators

admitted their involvement in the armed robbery scheme." *Id.* The Movant "admitted helping to coordinate the conspiracy, including recruiting Perez to participate in the robbery and to find another gunman." *Id.*

## **(2) Procedural Background in Underlying Criminal Case**

A grand jury indicted the Movant for: Count 1—conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a); Count 2—conspiracy to possess with intent to distribute marijuana, in violation of 21 U.S.C. §§ 841(a)(1) and 846; Count 3—possession [\*3] of a firearm by a convicted felon, in violation of 18 U.S.C. §§ 922(g) and 924(e); Count 5—conspiracy to carry or possess a firearm during a crime of violence and in furtherance of a drug-trafficking crime, in violation of 18 U.S.C. § 924(o); and Count 6—carrying or possession of a firearm during a crime of violence and in furtherance of a drug-trafficking crime, in violation of 18 U.S.C. § 924(c). (Cr-ECF No. 21). Both Counts 1 and 2 were the predicates for both Counts 5 and 6. (*Id.* at 3-4).

The Movant plead guilty to the indictment. (Cr-ECF No. 212 at 4). At the change-of-plea hearing, the Movant "agree[d] with each and every fact contained in the proffer and [that is] why [he] signed it[.]" (*Id.* at 20; see also Cr-ECF No. 177).

At sentencing, the Court found that the Movant "qualified as a career offender under the Sentencing Guidelines and as an armed career criminal under the Armed Career Criminal Act ("ACCA")." *United States v. Casamayor*, 721 F. App'x 890, 892 (11th Cir. 2018) (per curiam) ("*Casamayor II*"). The "district court's total 262-month sentence was composed of: (1) concurrent 202-month sentences on Counts 1, 3 and 5; (2) a 60-month sentence on Count 2, to run concurrent with Counts 1, 3, and 5; and (3) a 60-month

sentence on Count 6 to run consecutive to all the other counts." *Id.* at 893. This sentence was at the very low end of the 262-to-327 [\*4] guideline range. *Id.* at 892.

On direct appeal, in *Casamayor I*, the Eleventh Circuit affirmed the Movant's career offender designation and his sentences on Counts 1, 2, 5, and 6. *Casamayor II*, 721 F. App'x at 893. However, because the Court did not identify which of the Movant's prior felony convictions it used to enhance his conviction on Count 3 under the ACCA, the Eleventh Circuit vacated the Movant's sentence on Count 3. *Id.*

At resentencing, the Court found that, "in addition to [a] 2012 armed robbery conviction, [the Movant's] 2001 conviction for aggravated assault with a deadly weapon, his two separate January 2012 convictions for strong-arm robbery, and his January 2012 conviction for aggravated battery with great bodily harm also qualified as violent felonies under the ACCA's elements clause." *Id.* at 894. The Court "resentenced [the Movant] to the same 262-month total sentence." *Id.*

The Movant appealed. The Eleventh Circuit rejected his argument that his "guilty plea to all five counts was invalid," partly because "there was a sufficient factual basis to support [his] guilty plea to each count." *Id.* at 895. Furthermore, the Eleventh Circuit found that, in accepting the Movant's guilty plea, the Court "complied with the three core concerns [\*5] of Rule 11[] and [the Movant's] guilty plea was knowing and voluntar[y]." *Id.* at 896 (citation omitted). In short, the Movant "[could not] show error . . . with regard to his guilty plea." *Id.*

The Eleventh Circuit rejected the Movant's challenge to the propriety of the ACCA enhancement on Count 3 because he had at least four qualifying predicates. *Id.* at 896-98 & n.5. Likewise, the Eleventh Circuit rejected the Movant's challenge to his career offender

status, partly because he had at least four qualifying predicates. *Id.* at 898 & n.5.

### **(3) Procedural Background in this Case**

The Movant filed his Amended Motion. (ECF No. 7). In claim 1, he alleges that his conviction on Count 3 is invalid after *Rehaif v. United States*, 139 S. Ct. 2191, 204 L. Ed. 2d 594 (2019). *Rehaif* held that, "in a prosecution under 18 U.S.C. § 922(g) . . . , 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. *Rehaif* allegedly invalidates his conviction because: (1) the indictment did not allege the knowledge-of-status element; and (2) his guilty plea was unknowing and involuntary. (ECF No. 7 at 4). The Movant adds, due to the *Rehaif* error, his conviction violated the "Fifth Amendment's indictment clause" and his "Sixth Amendment right to be informed of the nature and cause [\*6] of the accusation." (*Id.*)

The Movant's second claim is that his § 924(c) and § 924(o) convictions are invalid after *United States v. Davis*, 139 S. Ct. 2319, 204 L. Ed. 2d 757 (2019). (*Id.* at 5). *Davis* held that the "residual clause" in "§ 924(c)(3)(B) [was] unconstitutionally vague." 139 S. Ct. at 2336. His reasoning is not fully clear. (ECF No. 8 at 5-6). He suggests that Hobbs Act conspiracy is the "sole underlying" predicate of his § 924(c) and (o) convictions. (See *id.* at 5). Further, he alleges that, because the indictment charged both Hobbs Act conspiracy and possession with intent to distribute as the predicates for the § 924(c) and (o) charges, his § 924(c) and (o) convictions cannot stand under *In re Navarro*, 931 F.3d 1298 (11th Cir. 2019). (*Id.*) He also alleges that "there was ambiguity as to the factual basis to support the plea on either of the charges," as well as to "the factual basis

that supported the drug trafficking offense." (*Id.* at 5-6).<sup>1</sup>

The Government responded. (ECF No. 10). The Government argues that the *Rehaif* claim is procedurally defaulted. (*Id.* at 7-9). It also argues that the *Rehaif* claim is meritless; the Movant must have known of his status as a felon considering "his prior felony convictions for which he served several years in prison." (*Id.* at 10).

Similarly, the Government argues that his *Davis* claim is procedurally defaulted. (*Id.* at 12). [\*7] Further, it argues that the *Davis* claim is meritless because his "actions documented through his factual proffer and memorialized in the PSI show he was unequivocally immersed in a plot that sought to utilize robbery as a means of acquiring marijuana from a growhouse operation." (*Id.*) The Movant's "plan was thus concurrently [] a robbery and narcotics distribution conspiracy." (*Id.*)

In his reply, the Movant alleges that *Rehaif* error is jurisdictional and, therefore, it cannot be procedurally defaulted. (ECF No. 15 at 1-2). This is because the indictment's alleged "failure to charge [a] federal crime [was] a jurisdictional defect that requires dismissal of the charge." (*Id.* at 2 (citation omitted)). Regarding his *Davis* claim, he reiterates that "[t]here [was] too much confusion" as to which conviction underlay his § 924(c) and (o) convictions for them to stand. (*Id.* at 4).

## **2. Discussion**

### **(1) Claim 1—*Rehaif***

"A claim not raised on direct appeal is procedurally defaulted unless the petitioner

---

<sup>1</sup> Because claims 3 and 4 duplicate claims 1 and 2, the Court will not consider them separately. (See ECF No. 7 at 7-8).

can establish cause and prejudice for his failure to assert his claims on direct appeal." *McCoy v. United States*, 266 F.3d 1245, 1258 (11th Cir. 2001) (citation omitted). "This rule generally applies to all claims," *Lynn v. United States*, 365 F.3d 1225, 1234 (11th Cir. 2004) (per curiam) (citations omitted), including challenges [\*8] to the "voluntariness and intelligence of a guilty plea," *Bousley v. United States*, 523 U.S. 614, 622, 118 S. Ct. 1604, 140 L. Ed. 2d 828 (1998).

"A defendant can avoid a procedural bar only by establishing one of the two exceptions to the procedural default rule." *Lynn*, 365 F.3d at 1234. "Under the first exception, a defendant must show cause for not raising the claim of error on direct appeal and actual prejudice from the alleged error." *Id.* (citing *Bousley*, 523 U.S. at 622. Under the second exception, the defendant must show that he is "actually innocent." *Id.* at 1234-35 (citing cases).

"The 'cause' excusing the procedural default must result from some objective factor external to the defense that prevented the prisoner from raising the claim and which cannot be fairly attributable to his own conduct." *McCoy v. Newsome*, 953 F.2d 1252, 1258 (11th Cir. 1992) (citation omitted). A movant may show cause "where a [] claim is so novel that its legal basis is not reasonably available to counsel[.]" *Reed v. Ross*, 468 U.S. 1, 16, 104 S. Ct. 2901, 82 L. Ed. 2d 1 (1984). "In contrast, a claim is not novel when counsel made a conscious choice not to pursue the claim on direct appeal because of perceived futility, or when the building blocks of the claim were available to counsel." *United States v. Bane*, 948 F.3d 1290, 1297 (11th Cir. 2020) (citations omitted). Furthermore, "[a]ttorney error [during an appeal on direct review] that constitutes ineffective assistance of counsel is cause [to excuse a procedural default]." [\*9] *Coleman v. Thompson*, 501 U.S. 722, 753-54, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991); see also

*Martinez v. Ryan*, 566 U.S. 1, 11, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012) (citations omitted).

None of these exceptions is present here. "*Rehaif* was not truly novel in the sense necessary to excuse procedural default." *United States v. Innocent*, 977 F.3d 1077, 1084 (11th Cir. 2020) (citation and quotation marks omitted). Indeed, the issue that the Movant's *Rehaif* claim presents was repeatedly and thoroughly litigated in the courts of appeals for decades. See, e.g., *United States v. Jackson*, 120 F.3d 1226, 1229 (11th Cir. 1997) (per curiam), *abrogated by Rehaif*, 139 S. Ct. 2191; *United States v. Bryant*, No. 11 CR 765 (RJD), 2020 U.S. Dist. LEXIS 9860, 2020 WL 353424, at \*3 (E.D.N.Y. Jan. 21, 2020) (citing cases); see also *Bousley*, 523 U.S. at 622 (claim not novel because, "at the time of petitioner's plea, the Federal Reporters were replete with cases involving [the same] challenge[]" (citation omitted)).

Furthermore, while an attorney's errors on direct review may provide cause to excuse a procedural default, the Movant has not alleged any such error. (See generally ECF Nos. 7-8, 10); see also *Bousley*, 523 U.S. at 622 (movants have burden of showing cause); *Beeman v. United States*, 871 F.3d 1215, 1222 (11th Cir. 2017) (collecting cases) (movants bear burden of proof under § 2255); *Holsey v. Warden*, 694 F.3d 1230, 1256 (11th Cir. 2012) (movants bear the burden of proof on ineffectiveness claims).

Nor has the Movant shown actual innocence. "To establish actual innocence, [the Movant] must demonstrate that, in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him." *Bousley*, 523 U.S. at 623 (citation omitted). "[A]ctual innocence means factual innocence, [\*10] not mere legal insufficiency."

*Id.* (citation omitted). Thus, "[t]he habeas court must make its determination concerning the [Movant's] innocence in light of all the evidence." *Schlup v. Delo*, 513 U.S. 298, 328, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995).

Here, the Movant "can point to no convincing reason to think he did not know of his prohibited status despite being convicted of [seven] felonies" and serving "many [terms] in prison for his previous convictions." See *Innocent*, 977 F.3d at 1083-84.

The Movant's contention that the procedural default rule does not apply because the indictment did not allege of the knowledge-of-status element fails. *United States v. McLellan*, 958 F.3d 1110, 1118 (11th Cir. 2020) ("[A] district court has jurisdiction over a felon-in-possession indictment that was filed before *Rehaif* even if it did not charge the knowledge-of-status element." (citation omitted)).

The Movant also alleges that, due to the indictment's failure to allege the knowledge-of-status element, his conviction violated the "Fifth Amendment's indictment clause" and his "Sixth Amendment right to be informed of the nature and cause of the accusation." (ECF No. 7 at 4). These conclusory contentions are procedurally defaulted for the same reasons. In short, the Movant could have, but did not, raise these contentions in his direct appeals. And, because he bases these contentions exclusively on the alleged [\*11] *Rehaif* error, he cannot show cause and prejudice or actual innocence as discussed above.

In sum, claim 1 is procedurally defaulted.

## **(2) Claim 2—Davis**

As noted, the Movant's *Davis* claim is not entirely clear. He suggests that Hobbs Act conspiracy was the sole predicate underlying his § 924(c) and (o) convictions. If this were

true, he would be entitled to relief because: (1) *Davis* invalidated § 924(c)'s residual clause; and (2) Hobbs Act conspiracy is not a crime of violence under § 924(c)'s elements clause. *Brown v. United States*, 942 F.3d 1069, 1075 (11th Cir. 2019).

However, the indictment based both the § 924(c) and (o) charges on both Counts 1 (Hobbs Act conspiracy) and 2 (conspiracy to possess with intent to distribute marijuana). (Cr-ECF No. 21 at 3-4). Furthermore, the Movant pleaded guilty to the indictment. (Cr-ECF No. 212 at 4).

The Movant contends that his conviction for drug trafficking was not factually supported. Yet he "agree[d] with each and every fact contained in the proffer and [that is] why [he] signed it[.]" (*Id.* at 20; see also Cr-ECF No. 177). Indeed, the Eleventh Circuit found that "there was a sufficient factual basis to support [the Movant's] guilty plea to each count." *Casamayor II*, 721 F. App'x at 895. Additionally, the Movant's drug-trafficking conviction qualifies as a "drug trafficking [\*12] crime" under § 924(c)'s elements clause. *In re Cannon*, 931 F.3d 1236, 1239, 1242-43 (11th Cir. 2019).

The Movant claims an entitlement to relief under *Navarro*, 931 F.3d 1298. But *Navarro* illustrates why he is not entitled to relief under *Davis*. There, "it [was] apparent from the record that [the Movant's] § 924(c) conviction [was] fully supported by his drug-trafficking crimes, and it therefore [was] outside the scope of *Davis*, which invalidated only § 924(c)(3)(B)'s residual clause relating to crimes of violence." 931 F.3d at 1302.

Here, as explained, the indictment, factual proffer, and plea colloquy conclusively show that the Court based the Movant's § 924(c) and (o) convictions partly on his drug-trafficking conviction, which remains a valid predicate. Consequently, his *Davis* claim lacks

merit. See *United States v. Duhart*, 803 F. App'x 267, 271 (11th Cir. 2020) (per curiam) ("[W]hen determining which predicate offenses underlie a defendant's § 924(c) conviction, [courts] may refer to a defendant's indictment, plea agreement, plea colloquy, and attendant factual proffer." (citing *Navarro*, 931 F.3d at 1302)).<sup>2 3</sup>

Robert N. Scola, Jr.

United States District Judge

---

End of Document

### 3. Conclusion

Accordingly, the Court **denies** the Amended Motion (ECF No. 7), **denies** a certificate of appealability, and **denies** the motion to hold the Amended Motion in abeyance (ECF No. 17). The Clerk is directed to **close** this case.

**Done and ordered**, in chambers, in Miami, Florida, on June 17, [\*13] 2021.

Robert N. Scola, Jr.

United States District Judge

### Final Judgment

Pursuant to Fed. R. Civ. P. 58 and the Court's Order Denying Amended Motion to Vacate, final judgment is **entered** in favor of the Respondent.

**Done and ordered**, in chambers, in Miami, Florida, on June 17, 2021.

/s/ Robert N. Scola, Jr.

---

<sup>2</sup>No evidentiary hearing is warranted because "the files and records of the case conclusively show that the [Movant] is entitled to no relief." 28 U.S.C. § 2255(b).

<sup>3</sup>The Court denies the Movant's request to hold the Amended Motion in abeyance pending the U.S. Supreme Court's decision in *Greer v. United States*, No. 19-8709, 141 S. Ct. 2090, 210 L. Ed. 2d 121, 2021 U.S. LEXIS 3118, 2021 WL 2405146 (U.S. June 14, 2021). *Greer* does not change the procedural default of his *Rehaif* claim and undermines any actual innocence argument. See *id.* at \*4 ("If a person is a felon, he ordinarily knows he is a felon.").