

Appendix A

UNITED STATES COURT OF APPEALS FOR THE 7TH CIRCUIT

In Re: Krieg

Motion For Writ of Mandamus

The defendant, Eric Krieg, pro se, files this writ of mandamus and moves the 7th Circuit Court of Appeals to direct the District Court of Northern Indiana Hammond Division to rule on his pending Motion for Summary Judgement in Case No. 2:17-CR-00146-JV

Background

- 1) The defendant is currently incarcerated by the Federal Bureau of Prisons at the Berlin Federal Correctional Institute in Berlin, New Hampshire. He is serving a 29 year sentence in the above case number, sentenced on April 4th, 2019.
- 2) The defendant filed a §2255 petition in July of 2019.
- 3) The prosecution replied to the defendant's reply in March of 2020.

4) The defendant replied to the prosecution's reply in April of 2020. The prosecution did not reply to this reply.

5) The defendant filed a Motion for Summary Judgement per Rule 56 of the Federal Rules of Civil Procedure. He placed it for delivery with proper postage into the FCI Berlin mail system on May 25th, 2021.

Argument

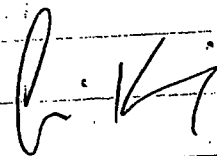
The 7th Circuit Court of Appeals should grant this writ of mandamus and direct the district court to rule on the defendant's motion for summary judgement. The defendant has a clear and indisputable right to expeditious treatment of his motion because there are no alternate remedies available to him. See Allied Chem. Corp v. Daihlon, Inc., 449 U.S. 33, 35, 66 L. Ed. 2d 193 101 S. Ct. 188 (1980); In re: Special March 1974 Grand Jury etc., 541 F. 2d 166 (7th Cir. 1976).

Conclusion

The defendant respectfully submits that the interests of justice weigh in favor of granting his writ of mandamus and there is no other adequate remedy available for the expeditious treatment of his motion for summary judgement.

Certificate of Service

I hereby certify under penalty of perjury that a copy of the foregoing motion has been mailed via first class postage pre-paid U.S. Mail by placing the same in the institutional mail box on this 6th day of July, 2021, addressed to the Hammond Division of the U.S. District Court for the Northern District of Indiana in Hammond, Indiana.



Eric Krieg, pro se
July 13, 2021

Appendix B

- 1 -

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF INDIANA HAMMOND DIVISION

U.S. of America)

v.)

Eric Krieg)

Case No.: 1:17-cr-00146

Motion for Summary Judgement

The defendant, Eric Krieg, pro se, files this motion for summary judgement in the above case number, and states the following:

- 1) The defendant is currently incarcerated by the Federal Bureau of Prisons at the Berlin Federal Correctional Institute in Berlin, New Hampshire.
- 2) The defendant has a § 2255 motion to vacate sentence currently before this court.
- 3) The prosecution has replied to the defendant's § 2255 motion.
- 4) The defendant has replied to the prosecution's reply.
- 5) According to Rule 12, 18 U.S.C. § 2255,

7/14/2022

the Federal Rules of Civil Procedure may be applied to §2255 proceedings.

6) According to Rule 56(a) of the Federal Rules of Civil Procedure, this defendant may move for summary judgement for any claim if he shows that there is no general dispute as to any material fact and he is entitled to judgement as a matter of law.

7) According to Rule 56(b), this defendant can move for summary judgement 30 days after the close of discovery. The defendant believes that this milestone has been reached with regards to the forthcoming claims, and asks the court to agree.

8) In the prosecution's reply to the defendant's §2255 motion, they do not argue that §844(i) (arson) is in fact a crime of violence, thereby defaulting to the defendant's argument in his §2255 motion that it is not a crime of violence for the purposes of 18 U.S.C. §924(c). And, of course, it is now acknowledged by all that §844(i) is not a crime of violence. For example, see U.S. v. Polchan, 2020 U.S. Dist. LEXIS 96743 (N.D. Ill. 2020) at 2:

"Thus, the only remaining way [that 844(i)]

can qualify as a crime of violence is if [it] has the element of the use, attempted use, or threatened use of physical force against the person or property of another. The parties agree that § 844(i) includes arson against one's own property, and not [just] that of another, so

does not qualify as a crime of violence under the elements clause."

9) As the prosecution has defaulted on the question of if § 844(i) is a crime of violence, the defendant respectfully requests this court to find that the parties are in agreement that § 844(i) is not a crime of violence.

10) In the prosecution's reply to the § 2255 motion, they disagree that § 1716(j)(2) is also not a crime of violence. They are clearly mistaken. Note that the path through the case law for U.S. v. Polchan to reach the conclusion that § 844(i) is not a crime of violence runs through U.S. v. Sweeney, 2018 U.S. App LEXIS 33073 (7th Cir. 2018) which refers to

U.S. v. Salas, 889 F.3d 681, 684 (10th Cir. 2018), which actually cites Torres v. Lynch, 136 S. Ct. 1619, 1629-30 (2016). In discussing crimes of violence in general, at 25-25 the Supreme Court notes in Torres that:

"The 'crime of violence' provision would not pick up demanding a ransom for Kidnapping. See § 875(a) (defining the crime without any reference to physical force) [and thus invalidating § 875(a) as a crime of violence]...

And indeed, it would not reach arson in many states [as well as § 844(i), (d), (e), or (f)] defining that crime to include the destruction of one's own property. See Jordan v. Keisler, 501 F.3d 1134, 1135 (CA9 2007) (holding that a violation of California's arson statute does not constitute a crime of violence for that very reason); Tr. of Oral Arg. 28-29 (Solicitor General Agreeing with this interpretation).¹⁰

¹⁰ In all those states [as well as § 844(i)] arsons of every sort (whether against

one's own property or another's) would fall outside of the 'crime of violence' provision."

11) Torres' discussion of crimes of violence uses arson merely as an example of a statute that is not a crime of violence because it can be committed against one's own property. Torres is equally applicable to §844(d), (e), or (f), other federal arson statutes that reference "other property". It is also applicable to other non-arson statutes referencing "other property", not just §1716(j)(2) which we are concerned with here, but 18 U.S.C. §1363 (criminal mischief) as well.

12) Torres is applicable to §1716(j)(2) because it defined that "other property" includes one's own property. The plain language of §1716(j)(2) states that it applies to someone intending to injure "other property". And we know from Hughley v. U.S., 495 U.S. 11, 415, 110 S.Ct. 1979 (1990) that:

"As with all questions of statutory construction, we start with the text of the statute to ascertain its plain meaning."

Thus, the combination of the plain meaning of §1716(j)(2)'s use of the phrase "other property" with Torres' defining of "other property" to include "one's own property" results in §1716(j)(2) also not being a crime of violence, just like §844(i), and did so in 2016.

13) In the prosecution's reply they suggest that Count 5, §876(c), could be the crime of violence for Count 4, §924(c). Clearly, this is not the case. Count 5 was a different course of conduct with a different victim, unrelated to any destructive device or firearm. Count 5 cannot be the predicate crime of violence for Count 4.

14) In Counsel Kevin Milner's affidavit, item 3, he says that he discussed with the defendant crimes of violence and that he advised the defendant that counts 2, 3, and 5 could all be predicate crimes of violence for Count 4. As explained previously, this was and is incorrect. As early as 2016 it was clear, via Torres, that neither §844(i) nor §1716(j)(2) are crimes of violence, and it is intuitively obvious that Count 5 cannot be the predicate for Count 4.

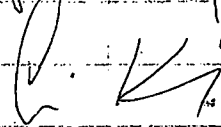
U.S. v. Cardena, 842 F. 3d (7th Cir. 2015) made Johnson v. U.S., 135 S. Ct. 2551 (2015) (invalidating the so-called "residual clause") applicable to §924(c) in the 7th Circuit. Therefore, even at the time the defendant was charged, §924(c) could not be supported. Therefore, by counsel's own sworn affidavit, he provided the defendant ineffective assistance, in violation of the defendant's constitutional right to effective counsel. Any plea for a sentence in excess of the 8 to 10 years guidelines sentence calculated in the PSR (which noted that there were no aggravating factors not captured in the calculations) offered no benefit to the defendant. Thus, the actual plea the defendant signed, for 29 years, prejudiced the defendant.

15) Because the defendant was prejudiced by this ineffective assistance of counsel, and because he is not now nor never was subject to §924(c), the 29 year sentence the defendant received must be vacated.

Therefore, the defendant respectfully requests the court grant this summary

judgement and vacate the defendant's
Sentence.

Respectfully submitted,



Eric Krieg, pro se

May 24, 2021

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

NO.: 2:17-CR-146 (Van Bokkelen, J.)

ERIC KRIEG,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.

MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE PURSUANT
28 U.S.C. § 2255

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STATUS OF CONFINEMENT

Eric Krieg is imprisoned for 29 years pursuant a Fed. R. Crim. P. 11 (c) (1) (C) plea agreement requiring him to plead guilty to Making an Unregistered Destructive Device (Dkt. No. 9, Count 1), Mailing a Destructive Device (Dkt. No. 9, Count 2), Malicious Use of Explosive Materials (Dkt. No. 9, Count 3), and Mailing a Threatening Communication (Dkt. No. 9, Count 5).

In consideration for Krieg waiving his rights and pleading guilty, the government dismissed Count 4 of the indictment alleging violation of 18 U.S.C. § 924 (c) (1) (A), (B) (ii). (Krieg Dec., ¶ 1)

THE OPERATIVE FACTS

Eric Krieg had zero criminal history until he confessed to FBI agents that he crafted a small-charge explosive out of a firecracker and deposited it in the mail. (Krieg Dec., ¶ 2) Following that confession, Krieg retained Attorney Kevin E. Milner and was charged as set forth above. Milner advised Krieg Count 3 of the indictment, alleging violation of 18 U.S.C. § 844 (i), required the 7 year mandatory-minimum provided therein be served consecutive to any sentence imposed on Counts 1, 2, and 5. Milner's advice to this end meant Krieg faced 17 years on these counts alone. (Krieg Dec., ¶ 3) Milner further advised Krieg Count 4 of the indictment, alleging violation of 18 U.S.C. § 924 (c) (1) (A), (B) (ii), required the mandatory-minimum provided therein be served consecutive to the sentences imposed on Counts 1, 2, 3, and 5. Thus, according to Milner, Krieg was confronted with 47 years imprisonment, 37 of which, claimed Milner, had to be imposed consecutive to the sentences

imposed on Counts 1, 2, and 5. (Krieg Dec., ¶ 4) Milner's advice was flatly wrong; 18 U.S.C. § 844 (i) does not require a consecutive sentence. Even so, the error is memorialized in the Fed. R. Crim. P. 11 (c) (1) (C) plea agreement Milner confronted Krieg with. Krieg entered into the plea agreement on this error and believing the 29 years he was bargaining for saved him from the 47 years Milner told him he was exposed to. (Krieg Dec., ¶ 5) One day prior Krieg's sentencing hearing, Milner provided him with the Pre-Sentence Report (PSR). Milner did not review the PSR with Krieg. Rather, he gave it to Krieg and left. Upon reviewing the PSR himself, Krieg discovered 18 U.S.C. § 844 (i) did not require a consecutive sentence -- the PSR noted same in emphasis, making clear Milner and the written plea agreement were wrong. (Krieg Dec., ¶ 6) The PSR calculated Krieg's Base Offense Level (BOL) at 30 and his Criminal History Category (CHC) at I, resulting in an advisory guidelines range of 97-121 months. However, the PSR notes that despite the 29 year plea agreement imposing a sentence 19 years above the high-end of the advisory range, "it appears [Krieg] received a significant benefit as a result" of the dismissal of Count 4 alleging violation of 18 U.S.C. § 924 (c) (1) (A), (B) (ii). (Krieg Dec., ¶ 7) After reading the PSR, Krieg instructed Milner to make a motion to withdraw the guilty plea. Milner told him it was too late. (Krieg Dec., ¶ 8) Krieg instructed Milner file notice of appeal and Milner did not file notice of appeal. (Krieg Dec., ¶ 9)

Milner never even discussed challenging the Count 4 § 924 (c) allegation. Had Milner properly advised Krieg vis-a-vis the Count 4 and Count 3 legalities, he would not have entered into the plea agreement. (Krieg Dec., ¶ 10)

1st GROUND FOR RELIEF

18 U.S.C. §§ 844 (i), 1716 (j) (2) ARE NOT PREDICATE OFFENSES UNDER 18 U.S.C. § 924 (c) (1) (A), (B) (ii). THEREFORE, KRIEG RECEIVED NO BENEFIT IN CONSIDERATION FOR HIS GUILTY PLEA. THE 29 YEAR FED. R. CRIM. P. 11 (c) (1) (C) AGREEMENT DOOMED KRIEG TO 19 YEARS MORE IMPRISONMENT THAN THE HIGH-END OF HIS ADVISORY RANGE. THE PLEA AGREEMENT AND CONSEQUENT CONVICTION ARE VOID AND MUST BE VACATED BECAUSE ATTORNEY MILNER'S ERRONEOUS ADVICE DEPRIVED KRIEG HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL. BUT FOR MILNER'S MISADVICE KRIEG WOULD NOT HAVE ENTERED INTO THE MISTAKEN AGREEMENT.

But for Milner's misadvice, Krieg would not have entered into the 29 year plea agreement. This is because had Milner properly advised him (1) that 18 U.S.C. §§ 844 (i), 1716 (j) (2) will not support a conviction under 18 U.S.C. § 924 (c) (1) (A), (B) (ii), and (2) § 844 (i) does not require a consecutive sentence, Krieg would have known he faced an advisory sentencing guidelines range of 97-121 months only. Consider, hardly any other principle of criminal law has been litigated more vigorously in recent years than what defines a crime of violence under § 924 (c) (3). See, just for example Sweeney v. United States, 2018 U.S. App. LEXIS 33073 (7th Cir. Oct. 23, 2018) (Remarkably granting leave to file a successive § 2255 motion to determine whether 18 U.S.C. § 844 (i) is a qualifying § 924 (c) predicate and noting "regardless of whether Sweeney's underlying conduct is violent, our circuit currently applies an abstract categorical approach, focused on statutory elements rather than on case-specific facts, to decide whether a given conviction is for a crime of violence.") (at 4-5)

Milner had a Sixth Amendment duty to know this and to advise Krieg accordingly. Brock-Miller v. United States, 887 F.3d 298, 308-310 (7th Cir. Jan. 5, 2018), citing and quoting Hinton v. Alabama, 571 U.S. 263,

134 S. Ct. 1081, 1089 (2014) ("An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under Strickland."")

Milner is without excuse for failing to advise Krieg on the law. As the Sweeney Court made crystal clear, these very questions were squarely before the Supreme Court at the time Milner misadvised Krieg -- and have since been decided favorably once and for all. See United States v. Davis, S. Ct. No. 18-431 (Decided June 24, 2019) (Striking § 924 (c) (3) (B)'s so-called residual clause as unconstitutionally vague and instructing use of straightforward categorical analysis to determine if an offense supports conviction under § 924 (c) (3) (A).)

The Count 4 § 924 (c) (1) (A), (B) (ii) allegation is thus baseless. After all, Sweeney makes clear that § 844 (i) cannot carry Count 4 because its plain text proscribes "malicious damage 'by means of fire or an explosive' to 'any' building, vehicle, or other property -- perhaps suggesting that the damaged property might be one's own." 2018 U.S. App. LEXIS 33073, at 4

Indeed, the Tenth Circuit holds § 844 (i) is not a qualifying predicate offense on which a § 924 (c) conviction may lie, even under the now-stricken residual clause. Id. citing to United States v. Salas, 889 F.3d 681, 684 (10th Cir. 2018)

Of course, this clearly operates to preclude use of 18 U.S.C. § 1716 (j) (2) as a § 924 (c) predicate too. This is because § 1716 (j) (2) proscribes mailing, inter alia, explosive materials "with intent to...injure the mails or other property." Ibid. Thus, any § 924 (c)

2nd GROUND FOR RELIEF

ATTORNEY MILNER'S FAILURE TO FILE KRIEG'S REQUESTED NOTICE OF APPEAL IS A PER SE VIOLATION OF KRIEG'S SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL. PREJUDICE IS PRESUMED. THE CONVICTION MUST BE VACATED TO THE END OF RESTORING KRIEG'S APPELLATE RIGHTS.

Prejudice is presumed when a lawyer fails to file a requested notice of appeal on behalf of his client. An appeal waiver will not preclude such prejudice and a defendant has no obligation to demonstrate what he will raise on appeal. Garza v. Idaho, 139 S. Ct. 738, 744 (2019)

Here, Milner failed to file notice of appeal despite Krieg's specific instruction he do so. Even before Garza, the Seventh Circuit held defendants are entitled to vacatur of the judgment to the end of filing a counseled appeal in such circumstances. Ryan v. United States, 657 F.3d 604, 606 (7th Cir. 2011); United States v. Hirsch, 207 F.3d 928, 931 (7th Cir. 2000); Castellanos v. United States, 26 F.3d 717, 720 (7th Cir. 1994).

Accordingly, the judgment must be vacated and Krieg must be appointed counsel to the end of filing notice of appeal. Id.

CONCLUSION

Eric Krieg is imprisoned far longer than he otherwise would have been absent his lawyer's inexcusable negligence. The plea agreement and conviction are void. Krieg should be restored to the position he was in prior the harms caused by violation of his Sixth Amendment right to effective assistance of counsel. "[T]he remedy 'should be tailored to the injury suffered from the constitutional violation[.]'" Julian v.

Bartley, 495 F.3d 487, 500 (7th Cir. 2006), citing and quoting United States v. Morrison, 449 U.S. 361, 364 (1981)

Date:

Respectfully submitted,

E. Krieg 7/17/2019
Eric Krieg, pro se
Prisoner No.: 17161-027
FCI-Berlin, P.O. Box 9000
Berlin, NH 03570-9000

PERSONAL VERIFICATION AND DECLARATION OF FILING

I, Eric Krieg, declare, pursuant 28 U.S.C. § 1746, that the foregoing is true and accurate and further sworn to in my supporting declaration. And I further declare that I have this day placed both this motion and my supporting declaration in the Prison Mailbox addressed to the Clerk of the United States District Court for the Northern District of Indiana, Hammond Division, United States Courthouse, 5400 Federal Plaza, Suite 2300, Hammond, IN 46320 thereby also causing same to be served upon the United States per Rule 3 (b) of the Rules Governing Section 2255 Proceedings, and I affixed the parcel with First Class U.S. Postage, pre-paid.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY July 17th, 2019.

X:

E. Krieg
Eric Krieg

Appendix G

United States Court of Appeals

For the Seventh Circuit

Office of the Clerk

219 South Dearborn Street, Room 2722

Chicago, Illinois 60604

312-435-5850

November 8, 2021

Dear Sir,

This letter is in regards to your most recent correspondence to the U.S. Court of Appeals. You have 2 cases in our court so when you asked about 20-2542 that is the docket sheet/correspondence our office sent back to you. But your mandamus appeal is, 21-2339. I have attached that docket sheet for your reference. Currently, your motion for IFP is still pending in our court and there is nothing due at this time.

Sincerely,

Pro Se Clerk #1

12/1/2021 7/14/2022

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

ORDER

July 26, 2022

Before

DIANE S. SYKES, *Chief Judge*

DAVID F. HAMILTON, *Circuit Judge*

MICHAEL B. BRENNAN, *Circuit Judge*

No. 21-2339	IN RE: ERIC KRIEG, Petitioner
Petition for Writ of Mandamus	
District Court No: 2:17-cr-00146-JVB-JEM-1 District Judge Joseph S. Van Bokkelen Clerk/Agency Rep Gary T. Bell	
No. 21-3366	IN RE: ERIC KRIEG, Petitioner
Petition for Writ of Mandamus	
District Court No: 2:17-cr-00146-JVB-JEM-1 District Judge Joseph S. Van Bokkelen	

1. **MOTION FOR WRIT OF MANDAMUS**, filed on July 21, 2022, in 21-2339, by the pro se petitioner.
2. **AFFIDAVIT ACCOMPANYING MOTION FOR PERMISSION TO APPEAL IN FORMA PAUPERIS**, filed on August 18, 2021, in 21-2339, by the pro se petitioner.
3. **MOTION TO SUPPLEMENT MOTION FOR PERMISSION TO APPEAL IN FORMA PAUPERIS**, filed on December 23, 2021, in 21-2339, by the pro se petitioner.
4. **SECOND MOTION FOR WRIT OF MANDAMUS**, filed on December 22, 2021, in 21-3366, by the pro se petitioner.

Nos. 21-2339 & 21-3366

Page 2

5. AFFIDAVIT ACCOMPANYING MOTION FOR PERMISSION TO APPEAL IN FORMA PAUPERIS, filed on December 22, 2021, in 21-3366, by the pro se petitioner.

On July 22, 2022, the district court issued an order resolving all of the pending motions filed by Eric Krieg and denying all claims in Krieg's § 2255 motion except whether his attorney provided ineffective assistance by failing to file a notice of appeal. Because the district court's July 22 order has provided the relief Krieg sought in his mandamus petitions, **IT IS ORDERED** that the petitions for writ of mandamus are **DENIED** as unnecessary.

IT IS FURTHER ORDERED that Krieg's motions to proceed in forma pauperis are **GRANTED**.

Appendix F

21-2339

<https://ca7-ecf.sso.dcn/cmecf/servlet/DktRpt?caseNum=21-2339&dat...>

General Docket Seventh Circuit Court of Appeals

Court of Appeals Docket #: 21-2339 Eric Krieg v. USA Appeal From: Northern District of Indiana, Hammond Division Fee Status: IFP pending in A.C.	Docketed: 07/21/2021
Case Type Information: 1) originalProceeding 2) nonPaidMandamus 3) -	
Originating Court Information: District: 0755-2 : 2:17-cr-00146-JVB-JEM-1 Trial Judge: Joseph S. Van Bokkelen, District Court Judge	
Prior Cases: <u>20-2542</u> Date Filed: 08/17/2020 Date Disposed: 09/17/2020 Disposition: AFFIRMED	
Current Cases: None	

ERIC KRIEG (Federal Prisoner: #17161-027) Petitioner	Eric Krieg [NTC Pro Se] FEDERAL CORRECTIONAL INSTITUTION P.O. Box 9000 Berlin, NH 03570
v.	
UNITED STATES OF AMERICA Respondent	David E. Hollar, Attorney Direct: 219-937-5500 [COR LD NTC US Attorney] OFFICE OF THE UNITED STATES ATTORNEY Suite 1500 5400 Federal Plaza Hammond, IN 46320-0000

IN RE:
ERIC KRIEG,
Petitioner

07/21/2021 1 Petition for Writ of Mandamus filed. Fee due. Fee or IFP forms due on 08/04/2021 for
Petitioner Eric Krieg. [1] [7174521] [21-2339] (AD) [Entered: 07/22/2021 12:11 PM]

7/14/2022

12/10/2021

08/18/2021 2 Prose motion filed by Petitioner Eric Krieg to proceed on appeal in forma pauperis. [2].
[7179907] [21-2339] (MAN) [Entered: 08/18/2021 11:44 AM]