NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 21-2497

RICARDO M. SUGGS, JR,
Appellant

v.

WARDEN LORETTO FCI

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civil Action No. 3-20-cv-00052)
District Judge: Honorable Stephanie L. Haines

Submitted Pursuant to Third Circuit LAR 34.1(a)
May 11, 2022

Before: McKEE, SHWARTZ and MATEY, Circuit Judges

(Opinion filed May 16, 2022)

OPINION*

PER CURIAM

Pro se appellant Ricardo Suggs appeals the District Court's order relying on the concurrent-sentence doctrine to deny his petition under 28 U.S.C. § 2241. Suggs was

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*.This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

convicted in the United States District Court for the Northern District of West Virginia of three offenses: (1) felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1); (2) witness tampering—intent to kill; and (3) witness tampering—use of force. In determining Suggs's sentence, the Court calculated a Guidelines range of 324 to 405 months in prison.[1] The Court sentenced Suggs to 324 months in prison, imposing a term "of 120 months as to Count One; 240 months as to Count Two, consecutively to Count One; and 240 months as to Count Three, consecutively to Counts One and Two, to the extent necessary to achieve a total sentence of 324 months." ECF No. 13-6 at 3.[2] Suggs obtained no relief on direct appeal or via 28 U.S.C. § 2255.

In his § 2241 petition, Suggs argued that he is actually innocent of the § 922(g) offense (Count One) based on Rehaif v. United States, 139 S. Ct. 2191 (2019), in which 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

[1] Suggs's § 922(g) conviction played no role in the Guidelines range. In calculating Suggs's offense level, the Court used the base offense level of 33 applicable for the witness-tampering charges and then added four points because a victim sustained a serious bodily injury and Suggs committed perjury at trial, for a total offense level of 37. Combining that offense level with Suggs's criminal history yielded the Guidelines range noted above.

[2] Those terms represent the statutory maximums for each offense. It appears that, in imposing the sentence, the District Court relied on U.S.S.G. § 5G1.2(d), which states that "[i]f the sentence imposed on the count carrying the highest statutory maximum is less than the total punishment, then the sentence imposed on one or more of the other counts shall run consecutively, but only to the extent necessary to produce a combined sentence equal to the total punishment."

firearm." Id. at 2200. The District Court concluded that Suggs's claim might be legitimately asserted via § 2241. See In re Dorsainvil, 119 F.3d 245, 251–52 (3d Cir. 1997).[3] However, the Court declined to address the claim on the merits based on the concurrent-sentence doctrine, explaining that "[e]ven if [Suggs] prevailed on a claim challenging his conviction at Count One, his term of imprisonment would not be shortened." ECF No. 20 at 6. Suggs appealed.

We have appellate jurisdiction pursuant to 28 U.S.C. § 1291. We exercise plenary review over the District Court's legal conclusions and review its factual findings for clear error. See Cradle v. United States ex rel. Miner, 290 F.3d 536, 538 (3d Cir. 2002) (per curiam). "We review a trial judge's application of the concurrent sentence doctrine for abuse of discretion." Duka v. United States, 27 F.4th 189, 194 (3d Cir. 2022).

The District Court did not abuse its discretion here. As we have recently explained, the concurrent-sentence doctrine is appropriately applied whenever complete vacatur of the challenged sentence would not reduce "the time Appellant[] must serve in prison," notwithstanding "any semantic distinction" about whether the sentences are termed "concurrent." Id. at 194–95. As the District Court here explained (and in light of the specific way that the sentencing Court calculated Suggs's sentence), even if Suggs's § 922(g) conviction were vacated, he would still be subject to 240 month sentences for the other two counts that would run consecutively "to the extent necessary to achieve a

[3] Suggs is confined within the Western District of Pennsylvania. See Anariba v. Dir. Hudson Cty. Corr. Ctr., 17 F.4th 434, 444 (3d Cir. 2021) (explaining that a § 2241 petition must be filed in the district of confinement).

total sentence of 324 months." ECF No. 13-6 at 3. Because even success on his Rehaif claim would not reduce his time in prison, "it was not an abuse of discretion for the trial judge to preserve judicial resources by declining to consider the substance of [Suggs's] . . . challenge under the logic of the concurrent sentence doctrine." Duka, 27 F.4th at 195.[4]

Accordingly, we will affirm the District Court's judgment.

[4] Suggs also argued that his § 922(g) conviction subjected him to collateral consequences, but we rejected a similar argument in Duka. See 27 F. 4th at 195–96.

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Submitted Pursuant to Third Circuit LAR 34.1(a)
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Before: McKEE, SHWARTZ and MATEY, Circuit Judges

JUDGMENT

This cause came to be considered on the record from the United States District Court for the Western District of Pennsylvania and was submitted pursuant to Third Circuit LAR 34.1(a) on May 11, 2022. On consideration whereof, it is now hereby

ORDERED and ADJUDGED by this Court that the judgment of the District Court entered July 29, 2021, be and the same is hereby affirmed. Costs shall not be taxed. All of the above in accordance with the opinion of this Court.

ATTEST:

s/ Patricia S. Dodszuweit
Clerk

Dated: May 16, 2022

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

RICARDO M. SUGGS, JR.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Civil Action No. 3:20-cv-52
	)	Judge Stephanie L. Haines
WARDEN, FCI LORETTO,	)	Magistrate Judge Keith A. Pesto
	)	
Respondent.	)	
	)	

MEMORANDUM ORDER

Pending before the Court is the petition for a writ of habeas corpus filed by prisoner Ricardo M. Suggs, Jr. ("Petitioner") pursuant to 28 U.S.C. § 2241 (ECF No. 4). On December 7, 2020, Respondent Warden, F.C.I. Loretto ("Respondent") filed a response to the petition (ECF No. 13). On January 14, 2021, Petitioner then filed a reply to the response to the petition (ECF No. 16). This matter was referred to United States Magistrate Judge Keith A. Pesto in accordance with the Federal Magistrates Act, 28 U.S. C. § 636, and Local Civil Rule 72.D.

By way of background, Petitioner is currently an inmate at F.C.I. Loretto where he is serving a 324-month sentence pursuant to his conviction in the United States District Court for the Northern District of West Virginia in *United States v. Suggs*, Case No. 5:06-cr-27 (N.D.W.Va.). In that case, Petitioner was charged in a superseding indictment with the following counts: possession of a firearm by a convicted felon, 18 U.S.C. §§922(g)(1) and 924(a)(2) (Count One); tampering with a witness with intent to kill, 18 U.S.C. § 1512(a)(1)(A) (Count Two); tampering with a witness by use of force, 18 U.S.C. § 1512(a)(2)(A) (Count Three); and tampering with a witness by corrupt persuasion, 18 U.S.C. § 1512(b)(1) (Count Four) (ECF No. 13-6). Petitioner

APPENDIX B

was convicted on Counts One, Two, and Three, and he was not convicted on Count Four (ECF No. 13-5 at Docket Entries 115 and 150, *USA v. Suggs*, No. 06-27 (N.D.W.Va.)). On April 16, 2007, Petitioner was sentenced to 120 months as to Count One, 240 months as to Count Two, consecutively to Count One, and 240 months as to Count Three, consecutively to Counts One and Two, to the extent necessary to achieve a total sentence of 324 months (ECF No. 13-6). There does not appear to be a dispute between the parties on the facts of the case.

In his petition and brief filed in support of that petition (ECF Nos. 4 and 5), Petitioner asserts that he is actually innocent of his felon in possession of a firearm charge as alleged in Count One, and is therefore entitled to file a petition challenging his sentence under 28 U.S.C. § 2241, relying on the case *Rehaif v. United States*, 139 S. Ct. 2191 (2019). Respondent's response (ECF No. 13) contends that that this Court lacks subject matter jurisdiction over Petitioner's claims because his claims are not the type that can be litigated in a §2241 habeas petition, arguing Petitioner has failed to provide any proof of his claimed "actual innocence." In his reply (ECF No. 16), as well as in his petition and brief, Petitioner contends that this is the rare case in which a federal prisoner may attack the validity of his conviction in a §2241 habeas petition (ECF No. 16).

On January 15, 2021, Magistrate Judge Pesto filed a Report and Recommendation (ECF No. 17). In the Report and Recommendation, Magistrate Judge Pesto held that the Court need not reach Petitioner's claim for relief under *Rehaif v. United States*, 139 S. Ct. 2191 (2019), because, under the collateral sentence doctrine, Petitioner's custody would not be affected even if the Court were to vacate the sentence for Count One. The Report and Recommendation (ECF No. 17) was mailed to the Petitioner at his listed address at F.C.I. Loretto, and he was advised that he had fourteen (14) days to file any objections to the Report and Recommendation.

On January 29, 2021, Petitioner filed objections to the Report and Recommendation (ECF No. 18). In his objections, Petitioner contends that Magistrate Judge Pesto inappropriately applied the concurrent sentence doctrine to deny his petition. Respondent filed a reply to Petitioner's objections (ECF No. 19) essentially agreeing with Magistrate Judge Pesto's application of the concurrent sentence doctrine to deny the petition.

When a party objects timely to a magistrate judge's report and recommendation, the district court must "make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made." *EEOC v. City of Long Branch*, 866 F.3d 93, 100 (3d Cir. 2017) (quoting 28 U.S.C. § 636(b)(1)); *see also* Local Civil Rule 72.D.2. Local Civil Rule 72.D.2 provides further that the district judge may accept, reject or modify in whole or in part, the findings and recommendations made by the magistrate judge. As provided herein, the Court will adopt Magistrate Judge Pesto's denial of the petition and overrule Petitioner's objections (ECF No. 18).

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." *Rehaif*, 139 S. Ct. at 2200. In this case, Petitioner was barred from possessing a firearm because of his prior conviction of a crime punishable by more than one year in prison (ECF No. 13 at p. 3). The Court notes that Petitioner stipulated at his trial to having been convicted of a crime punishable for a term of imprisonment exceeding one year, and that he was therefore prohibited from possessing a firearm or ammunition. *Id.* Nonetheless, Petitioner argues in the instant petition that the superseding indictment did not include a knowledge-of-status element and asserts his actual innocence of the possession charge.

Although the Petitioner seeks relief via a §2241 habeas petition, typically, a challenge to the validity of a conviction or sentence is brought pursuant to 28 U.S.C. §2255. "The exact interplay between §2241 and 2255 is complicated ...." *Cardona v. Bledsoe*, 681 F.3d 533, 535 (3d Cir. 2012). After a conviction becomes final, "a federal prisoner generally may challenge the legality of his conviction of sentence only through a motion filed pursuant to §2255." *Jackman v. Shartle*, 535 Fed. Appx. 87, 88-89 (3d Cir. 2013) (*citations omitted*). Petitioner has already pursued relief, unsuccessfully, by filing a motion to vacate under §2255. *See United States v. Suggs*, 447 Fed. Appx. 511 (4th Cir. 2011). Significantly, §2255 expressly prohibits a court from entertaining a §2241 petition filed by a prisoner who is raising the types of claims that must be raised in a §2255 motion, unless it appears that the remedy by §2255 motion is inadequate or ineffective to test the legality of his detention." *Horton v. Warden, FCI McKean*, Crim. No. 18-151, 2020 U.S. Dist. LEXIS 55679, 2020 WL 1532289, at * 6 (W.D. Pa. March 31, 2020) (citations and quotations omitted). It is this "safety valve" clause of §2255 that allows a petitioner to seek a writ of habeas corpus under §2241 in the "rare case" in which a §2255 motion would be "inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255(e); *In re Dorsainvil*, 119 F.3d 245, 249-50 (3d Cir. 1997).

The Third Circuit "permits access to §2241 when two conditions are satisfied: First, a prisoner must assert a claim of actual innocence on the theory that he is being detained for conduct that has subsequently been rendered non-criminal by an intervening Supreme Court decision and our own precedent construing an intervening Supreme Court decision - in other words, when there is a change in statutory case law that applies retroactively in cases on collateral review... And second, the prisoner must be otherwise barred from challenging the legality of the conviction

under § 2255." *Bruce v. Warden Lewisburg USP*, 868 F.3d 170, 180 (3d Cir. 2017) (internal quotation marks and citations omitted).

Based on the claims in the petition, it appears that the Petitioner can avail himself of the "safety valve" and the Court has jurisdiction over the claims raised in the petition. *See United States v. Howard*, No. CR 13-135, 2021 U.S. Dist. LEXIS 109642, at *8 (W.D. Pa. June 11, 2021); *Guerrero v. Quay*, Crim. No. 20-39, 2020 U.S. Dist. LEXIS 49418, 2020 WL 1330667, at * 3 (M.D. Pa. March 23, 2020); *Oscar v. Warden, USP- Allenwood*, Crim. No., 2020 U.S. Dist. LEXIS 79525, 2020 WL 2193447, at * 2 (M.D. Pa. May 6, 2020). Petitioner asserts he is "actually innocent of his felon in possession of a firearm charge" (ECF No. 4 at p. 6), and the Third Circuit has determined that "[t]he latter half of [the *Rehaif*] holding - that the government must prove that the defendant knew of his status a person prohibited from having a gun - announced a newly found element of the crime." *United States v. Nasir*, 982 F.3d 144, 160 (3d Cir. 2020).

Additionally, Petitioner satisfies the second requirement as he is otherwise barred from challenging the legality of the conviction under §2255 as he had no opportunity to raise his challenge in his initial §2255 motion that predated *Rehaif*. Moreover, as *Rehaif* addressed an issue of statutory interpretation, the Government correctly concedes that it would not be a basis for a successive §2255 motion. *See Boatwright v. Warden Fairton FCI*, 742 Fed. Appx. 701, 702-703 (3d Cir. 2018) (successive §2255 motions based on new law must be based on new rules of constitutional law); *In re Sampson*, 954 F.3d 159 (3d Cir. 2020) (a second or successive §2255 motion is not permitted based on *Rehaif*, as it involves statutory interpretation and did not announce a new rule of constitutional law).

However, though the Court may exercise jurisdiction over the petition, the Court finds that Magistrate Judge Pesto correctly determined that the petition should be denied pursuant to the

concurrent sentence doctrine. Even if Petitioner prevailed on a claim challenging his conviction at Count One, his term of imprisonment would not be shortened. *See Gardner v. Warden Lewisburg USP*, 845 F.3d 99, 103-04 (3d Cir. 2017) (Third Circuit applied the concurrent sentence doctrine to decline review of certain claims asserted in §2241 petition as, even if the prisoner prevailed on such claims as to Counts 5-7, his term of imprisonment would not be altered). Disregarding his conviction at Count One, Petitioner was sentenced at Count Two and Three to 240 months each, to be served consecutively, to the extent necessary to achieve a total sentence of 324 months. Magistrate Judge Pesto correctly states that vacating Petitioner's conviction of possession of a firearm at Count One would still leave two 240-month terms consecutive to each other, which totals 480 months. As these two consecutive terms are more than the 324-month total sentence, vacating Count One would not affect Petitioner's custody. Petitioner's objections (ECF No. 18) fail to identify a valid reason why the concurrent sentence doctrine should not apply and the Court finds that Petitioner's objections (ECF No. 18) to Magistrate Judge Pesto's application of the concurrent sentence doctrine are unavailing.[1]

After review of the Report and Recommendation (ECF No. 17) and all other documents filed in this case and of record, the following order is entered:

[1] Petitioner appears to raise in his objections a challenge to his sentence under *Alleyne v. United States*, 570 U.S. 99 (2013), but the Third Circuit has held that Petitioner's *Alleyne* challenge cannot be raised in a § 2241 petition because § 2255 is neither inadequate nor ineffective for a prisoner to raise an *Alleyne* argument. *Gardner v. Warden Lewisburg USP*, 845 F.3d 99, 103 (3d Cir. 2017).

ORDER

AND NOW, this 27th day of July, 2021, **IT IS HEREBY ORDERED** that the Petition for Writ of Habeas Corpus (ECF No. 4) is **DENIED. IT IS FURTHER ORDERED** that the Report and Recommendation (ECF No. 17) is **ADOPTED** as the opinion of the Court. Petitioner's objections (ECF No. 18) are **OVERRULED.**

IT IS FURTHER ORDERED that the Clerk of Court shall mark this case **CLOSED.**

Stephanie L. Haines
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

RICARDO SUGGS, Petitioner, v. VICKIE MOSER, *Warden*, F.C.I. LORETTO, Respondent	:	Case No. 3:20-cv-52-SLH-KAP

Report and Recommendation

Recommendation

Having considered the petition for a writ of habeas corpus and brief in support, ECF no. 4, ECF no. 5, the Response, ECF no. 13, and the reply to the Response, ECF no. 16, I recommend that the petition be denied.

Report

Petitioner Ricardo Suggs is an inmate at F.C.I. Loretto, serving a 324-month sentence imposed by the Honorable Frederick Stamp, Jr., of the United States District Court for the Northern District of West Virginia in United States v. Suggs, Case No. 5:06-cr-27 (N.D. W.Va.), after juries in two separate trials convicted Suggs of possession of a firearm by a convicted felon, 18 U.S.C.§ 922(g)(1)(Count 1, trial 1); witness tampering with intent to kill, 18 U.S.C.§ 1512(a)(1)(A) (Count 2, trial 2); and witness tampering by use of force, 18 U.S.C. § 1512(a)(2)(A)(Count 3, trial 2). The facts of the case are discussed in the Response, which account petitioner agrees is accurate, *see* ECF no. 16 at 2, and are also set out in the appellate opinion affirming the conviction and sentence. United States v. Suggs, 266 Fed.Appx. 258 (4th Cir.), *cert. denied*, 553 U.S. 1073 (2008).

After an unsuccessful motion to vacate under 28 U.S.C.§ 2255, see United States v. Suggs, 447 Fed.Appx. 511 (4th Cir. 2011)(denying a certificate of appealability), petitioner pursued a habeas corpus petition under 28 U.S.C.§ 2241(c)(3), attacking his conviction and sentence on Counts 2 and 3. The Honorable John Preston Bailey denied that petition in 2017. Suggs v. Saad, 2017 WL 1862468 (N.D.W.Va. May 9, 2017).

In this petition, petitioner attacks his conviction on Count 1, arguing that in light of Rehaif v. United States, 139 S.Ct. 2191 (2019) (conviction for violating 18 U.S.C. § 922(g)(1) requires proof that defendant knowingly possessed a firearm or ammunition and knew that his criminal record made that possession illegal), he is actually innocent of being a felon in

possession. He also argues that this claim is one properly brought in a habeas petition because a motion to vacate under 28 U.S.C.§ 2255 is an inadequate or ineffective remedy. The government argues the contrary of those points.

It is not necessary to address either of the parties' arguments because of the concurrent sentence doctrine. A special assessment is imposed for each separate count of conviction, and therefore on direct appellate it would be necessary to review the record as to each count for which petitioner was convicted. On collateral review, however, any financial obligation imposed by the special assessment on Count 1 does not constitute "custody," United States v. Ross, 801 F.3d 374, 382 (3d Cir. 2015), and the concurrent sentence doctrine allows a court to decline review of challenges to a judgment of conviction that will not affect a petitioner's custody or result in collateral consequences. See e.g. Champagne v. Warden Lewisburg USP, 794 Fed.Appx. 143, 146 (3d Cir. 2019), citing Gardner v. Warden Lewisburg USP, 845 F.3d 99 (3d Cir.2017). Petitioner does not assert any collateral consequences, and review of the sentence shows that even if the petitioner's sentence on Count 1 were vacated it would not affect his custody.

The docket sheet in United States v. Suggs, Case No. 5:06-cr-27 (N.D. W.Va.) is Exhibit 5 to the Response; the Judgment and Commitment Order is Exhibit 6. Judge Stamp imposed three consecutive terms of imprisonment: a term of 120 months imprisonment for Count One, a consecutive term of 240 months imprisonment on Count 2, and a consecutive term of 240 months imprisonment on Count 3 "consecutive[] to Counts One and Two, to the extent necessary to achieve a total sentence of 324 months." Since the sentences on Count 1 and Count 2 already amounted to 360 months, the manner of Judge Stamp's phrasing indicates that 1) he did not want to get bogged down in arithmetic, and 2) wanted to ensure that the sentence imposed was understood to be an aggregate term of 324 months imprisonment. (The Court of Appeals for the Fourth Circuit noted that the advisory Sentencing Guideline range for petitioner was 324-405 months.) Vacating the sentence for Count 1 would still leave two terms of 240 months consecutive to each other "to the extent necessary to achieve a total sentence of 324 months." Because 324 months is less than 480 months, petitioner's custody would not be affected at all.

Let me anticipate an objection by observing that it is black letter law that the power to issue a writ of habeas corpus does not allow a habeas court to resentence petitioner *de novo*. Just as surely, even if the government's arguments that this court has no jurisdiction and the conviction on Count 1 is lawful are wrong, the power of this court to vacate the sentence on Count 1 through a writ of habeas corpus does not permit this court to rewrite the sentencing court's sentence. That is, the concurrent sentence doctrine cannot be evaded by claiming this court can impose a sentence lower than 324 months if it were to vacate Count 1 because this court has the power to imagine what different sentence Judge Stamp might have imposed or

what different phrasing Judge Stamp might have used if he had known that a decade and a half after the sentence was imposed Count 1 might be vacated. With a decade and a half of hindsight, petitioner might wish that his counsel had asked Judge Stamp to impose a 324-month sentence in three consecutive terms of 108 months. Maybe Judge Stamp would have done that. The government might wish that Judge Stamp had placed the sentences on Count 2 and Count 3 first in the Judgment and Commitment Order, and then imposed sentence on Count 1, or even expressly declared the sentence on Count 1 to be concurrent. Maybe Judge Stamp would have done that.

However, the vehicle to challenge the sentence that Judge Stamp did impose was the direct appeal, and the forum to make any claim that counsel should have asked Judge Stamp to structure the sentence differently was the sentencing court, in a claim of ineffectiveness of counsel made in a motion to vacate. Habeas gives this court the power to vacate a sentence that imposes custody that violates the Constitution or laws of the United States. It is not a license to tinker based on guesswork. The concurrent sentence doctrine declares that where custody would not be affected, federal courts are not "in the business of pronouncing that past actions which have no demonstrable continuing effect were right or wrong." Spencer v. Kemna, 523 U.S. 1, 18 (1998)(Scalia, J., discussing mootness). Because reviewing the Rehaif claim would be no more than issuing an advisory opinion, the petition should be denied.

Pursuant to 28 U.S.C.§ 636(b)(1), the parties can within fourteen days file written objections to this Report and Recommendation. The parties are advised that in the absence of timely and specific objections, any appeal would be severely hampered or entirely defaulted. See EEOC v. City of Long Branch, 866 F.3d 93, 100 (3d Cir.2017) (describing standard of appellate review when no timely and specific objections are filed as limited to review for plain error).

DATE: 14 January 2021

Keith A. Pesto,
United States Magistrate Judge

Notice to counsel of record by ECF and by U.S. Mail to:

Ricardo Suggs, Reg. No. 05414-087
F.C.I. Loretto
P.O. Box 1000
Cresson, PA 16630

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 21-2497

RICARDO M. SUGGS, JR.,
Appellant

v.

WARDEN LORETTO FCI

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civil Action No. 3-20-cv-00052)
District Judge: Honorable Stephanie L. Haines

SUR PETITION FOR REHEARING

Present: CHAGARES, *Chief Judge*, McKEE, AMBRO, JORDAN, HARDIMAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, and PHIPPS, *Circuit Judges*

The petition for rehearing filed by Appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the

APPENDIX C

circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/ Cheryl Ann Krause
Circuit Judge

Date: July 1, 2022
Lmr/cc: Ricardo M. Suggs, Jr.
Laura S. Irwin
Matthew S. McHale