# APPENDIX (A)

# UNITED STATES COURT OF APPEALS
# FOR THE EIGHTH CIRCUIT

No: 23-1938

Gilberto Arreola Chavez

Appellant

v.

United States of America

Appellee

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Appeal from U.S. District Court for the Southern District of Iowa - Central
(4:21-cv-00146-RGE)

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**ORDER**

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

October 20, 2023

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

23-1938 Gilberto Chavez v. United States

**Eighth Circuit Court of Appeals**

**PRO SE Notice of Docket Activity**

The following was filed on 09/27/2023

**Case Name:** Gilberto Chavez v. United States
**Case Number:** 23-1938

**Docket Text:**
PETITION for enbanc rehearing and also for rehearing by panel filed by Appellant Mr. Gilberto Arreola Chavez w/service by USCA8 09/27/2023 [5321068] [23-1938]

**The following document(s) are associated with this transaction:**
Document Description: Petition for Rehearing

**Notice will be mailed to:**

Mr. Gilberto Arreola Chavez
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# APPENDIX (B)

# UNITED STATES COURT OF APPEALS
# FOR THE EIGHTH CIRCUIT

No: 23-1938

Gilberto Arreola Chavez

Petitioner - Appellant

v.

United States of America

Respondent - Appellee

Appeal from U.S. District Court for the Southern District of Iowa - Central
(4:21-cv-00146-RGE)

## JUDGMENT

Before COLLOTON, KELLY, and STRAS, Circuit Judges.

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The appeal is dismissed.

September 12, 2023

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

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|---|---|
| GILBERTO ARREOLA CHAVEZ,<br><br>Petitioner,<br><br>v.<br><br>UNITED STATES OF AMERICA,<br><br>Respondent. | **No. 4:21-cv-00146-RGE**<br><br>**ORDER DENYING PETITIONER'S MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE UNDER 28 U.S.C. § 2255** |

Petitioner Gilberto Arreola Chavez seeks relief under 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence. ECF No. 1; Am. Mot. Vacate, Set Aside, or Correct Sentence, ECF No. 7-1. Arreola Chavez argues he is entitled to relief due to ineffective assistance of counsel and changes in the law. ECF No. 1 at 4–8; ECF No. 7-1 at 4; *see also* Pet'r's Letter 2, ECF No. 3; Pet'r's Suppl. Mot. Vacate, Set Aside, or Correct Sentence, ECF No. 6; Pet'r's Mot. Suppl. Authority to Am. Memo. of Law for § 2255, ECF No. 10; Pet'r's Mot. to Suppl. Am. § 2255 Application with Memo. of Law and Facts, ECF No. 14; Pet'r's Suppl. Mot. Vacate, Set Aside, or Correct Sentence, ECF No. 16; Pet'r's Letter, ECF No. 17; Pet'r's Suppl. Mot. Vacate, Set Aside, or Correct Sentence, ECF No. 18.

After conducting the following initial review, the Court finds no merit to Arreola Chavez's claims. Consequently, the Court summarily dismisses the motion and denies a certificate of appealability.

## I. PROCEDURAL HISTORY

In 2019, a grand jury in the Southern District of Iowa returned a one-count indictment charging Arreola Chavez with possessing a firearm as a felon. Redacted Indictment, *United States v. Arreola Chavez*, No. 4:19-cr-00064-RGE-HCA (S.D. Iowa April 17, 2019), ECF No. 2. Arreola

Chavez pleaded guilty, without a plea agreement, to possessing a firearm as a felon in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). Plea Hr'g Mins., *id.*, ECF No. 22. Arreola Chavez had at least three prior convictions for a violent felony or serious drug offense which subjected him to the enhanced sentencing provisions of the Armed Career Criminal Act. Sent. Hr'g Mins., *id.*, ECF No. 48. The Court sentenced Arreola Chavez to 180 months of imprisonment, the mandatory-minimum sentence. Sealed J. Crim. Case 2, 8, *id.*, ECF No. 50. The Court of Appeals affirmed. Op. 1–2, *id.*, ECF No. 62-1 (holding Arreola Chavez's three qualifying offenses were appropriately considered qualifying felonies to classify him as armed career criminal).

Arreola Chavez now moves to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. ECF Nos. 1, 7-1.

## II. LEGAL STANDARD

Title 28 of the United States Code, section 2255(a), provides:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Section 2255 does not provide a remedy for "all claimed errors in conviction and sentencing." *United States v. Addonizio*, 442 U.S. 178, 185 (1979). Rather, § 2255 is intended to redress only "fundamental defect[s] which inherently result[ ] in a complete miscarriage of justice" and "omission[s] inconsistent with the rudimentary demands of fair procedure." *Hill v. United States*, 368 U.S. 424, 428 (1962); *see also United States v. Apfel*, 97 F.3d 1074, 1076 (8th Cir. 1996) ("Relief under 28 U.S.C. § 2255 is reserved for transgressions of constitutional rights and for a narrow range of injuries that could not have been raised on direct appeal and, if uncorrected, would result in a complete miscarriage of justice.").

Section 2255 motions are subject to an initial review by the district court. Rule 4, Rules Governing § 2255 Proceedings. "If it plainly appears from the motion, any attached exhibits, and the record of prior proceedings that the moving party is not entitled to relief, the [court] must dismiss the motion and direct the clerk to notify the moving party." *Id.* Conversely, if the movant's claims have arguable merit, "the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto." 28 U.S.C. § 2255(b). Finally, pro se documents must be liberally construed. *See United States v. Sellner*, 773 F.3d 927, 932 (8th Cir. 2014) (citing *Erickson v. Pardus*, 551 U.S. 89, 94 (2007)).

## III. DISCUSSION

In support of his § 2255 motion, Arreola Chavez argues he no longer qualifies as an armed career criminal based on changes in the law. ECF No. 1 at 4–5 (Grounds One and Two). He also alleges defense counsel were ineffective. *Id.* at 7–8 (Grounds Three and Four). Third, Arreola Chavez seeks to withdraw his guilty plea based on changes in the law. ECF No. 3 at 2 (Ground Five). Finally, in his amended motion[1], Arreola Chavez argues he no longer qualifies as an armed career criminal based on newer and different changes in the law. ECF No. 7-1 at 4.

For the reasons set forth below, the Court concludes all of Arreola Chavez's arguments fail. Because "the motion, files and records of the case establish conclusively that [Arreola Chavez] is not entitled to relief," the Court determines an evidentiary hearing is unnecessary. *Kingsberry v. United States*, 202 F.3d 1030, 1032 (8th Cir. 2000).

[1] In his amended motion, Arreola Chavez does not reassert any claims made in his previous pleadings. *See* ECF No. 7-1. In general, an amended motion must not "incorporate any prior pleading by reference, but must reproduce the entire new pleading." LR 15. It is not clear whether Arreola Chavez intended to abandon his earlier claims. Construing his pleadings broadly however, *Sellner*, 773 F.3d at 932, the Court will address all claims raised by Arreola Chavez even if they were not reasserted in his amended motion.

### A. Armed Career Criminal Enhancement

Prior to his conviction for the underlying federal offense, Arreola Chavez was convicted in Iowa for possession of methamphetamine with intent to deliver in 2014, possession with intent to deliver methamphetamine in 2013, and intimidation with a dangerous weapon in 2014. Final Presentence Investigation Report ¶¶ 38–40, No. 4:19-cr-0064, ECF No. 41. Based on these convictions, the Court found Arreola Chavez was an armed career criminal subject to the enhanced sentencing provisions of 18 U.S.C. § 924(e). Sentencing Hr'g Tr. 20:20–22:7, *id.*, ECF No. 56. Arreola Chavez argues changes in the law demonstrate these convictions no longer qualify as predicate convictions to enhance his sentence. ECF No. 1 at 4; ECF No. 7-1 at 4.

#### *1. Havis/Cordero*

In *United States v. Havis*, 927 F.3d 382 (6th Cir. 2019) (en banc), the United States Court of Appeal for the Sixth Circuit held *attempted* crimes are not included within the sentencing guidelines career offender definition of controlled substance. *Id.* at 386–87 (emphasis added); *see also United States v. Cordero*, 973 F.3d 603, 626 (6th Cir. 2020) ("[I]n light of *Havis*, conspiracy to distribute controlled substances is not a 'controlled substances offense' under § 4B1.2(b)."). Arreola Chavez argues his two convictions for possession with intent to deliver do not qualify as serious drug offenses under the Armed Career Criminal Act because they include attempts to transfer drugs and were not completed controlled substance offenses. *See* ECF No. 1 at 4.

Arreola Chavez made similar arguments at sentencing. Def.'s Sentencing Br. 5–16, No. 4:19-cr-00064, ECF No. 47. He argued his previous substance abuse convictions should not count because they were for "simulated" or "imitation" controlled substances, and therefore, his convictions for those should not "count as controlled substance offenses categorically." *Id.* at 11–14. He also argued Iowa's aiding and abetting statute is broader than the generic definition of aiding and abetting, requiring a specific mens rea of intent. *Id.* at 14–16.

The law previously established in this case bars Arreola Chavez's argument. *See Thompson v. Comm'r*, 821 F.3d 1008, 1011 (8th Cir. 2016) (reaffirming law-of-the-case doctrine which requires courts to follow decisions made in earlier). The Eighth Circuit concluded the armed career criminal enhancement applied to Arreola Chavez and found no merit in any of his arguments. Op. 1–2, No. 4:19-cr-0064, ECF No. 62-1 (holding all three predicate felonies were not overly broad and qualified as either serious drug offense or violent felony under ACCA). "Issues raised and decided on direct appeal cannot ordinarily be relitigated in a collateral proceeding based on 28 U.S.C. § 2255." *United States v. Wiley*, 245 F.3d 750, 752 (8th Cir. 2001). Nothing about the Sixth Circuit's holdings in *Havis* and *Cordero* affect the Eighth Circuit's holding in this case.

The allegations in Grounds One and Two of Arreola Chavez's § 2255 motion demonstrate no reason for ignoring "this well-established principle." *Id.*

***2. Borden/Frazier***

Arreola Chavez also argues his conviction for intimidation with a dangerous weapon no longer qualifies as a predicate violent felony under the Armed Career Criminal Act. ECF No. 7-1 at 4. To meet the definition of a "violent felony" under § 924(e)(1), the offense must use physical force against the person of another. *Borden v. United States*, 141 S. Ct. 1817, 1825 (2021) (plurality opinion). Under *Borden,* the use of physical force against another requires the perpetrator to "direct his action at, or target, another individual," and it is not enough that the conduct be merely reckless. *Id.*

In light of the reasoning in *Borden*, the Eighth Circuit held Iowa's class D felony version of intimidation with a dangerous weapon did not qualify as a crime of violence because it could be committed with the *mens rea* for recklessness. *United States v. Frazier*, 48 F.4th 884, 887 (8th Cir. 2022). Under the Iowa statute,

> A person commits a class "D" felony when the person shoots, throws, launches, or discharges a dangerous weapon at, into, or in a building, vehicle, airplane, railroad engine, railroad car, or boat, occupied by another person, or within an assembly of people, and thereby places the occupants or people in reasonable apprehension of serious injury or threatens to commit such an act under circumstances raising a reasonable expectation that the threat will be carried out.

*Id.* at 885 (quoting Iowa Code § 708.6(2)). The defendant in *Frazier* was convicted under the "threatens" language of this statute, and as such, no requirement existed for the defendant to "knowingly or intentionally targeted the person of another with force or threatened force." *Id.* at 886–887.

Arreola Chavez also was convicted in Iowa for intimidation with a dangerous weapon in violation of Iowa Code § 708.6. Final Presentence Investigation Report ¶ 40, No. 4:19-cr-00064, ECF No. 41. However, unlike *Frazier*, Arreola Chavez's conviction, was based on the Class C not Class D version of § 708.6. *Id.* ¶ 40 ("Count One is a violation of Iowa Code § 708.6 (2014), a Class C Felony.").

Under the language of the Class C statute,

> A person commits a class "C" felony when the person, *with the intent to injure or provoke fear or anger in another,* shoots, throws, launches, or discharges a dangerous weapon at, into, or in a building, vehicle, airplane, railroad engine, railroad car, or boat, occupied by another person, or within an assembly of people, and thereby places the occupants or people in reasonable apprehension of serious injury or threatens to commit such an act under circumstances raising a reasonable expectation that the threat will be carried out.

Iowa Code § 708.6(1) (emphasis added). This Class C language requires knowing or intentional targeting of the victim with the required intent to injure or provoke fear or anger in another. *Id.* A conviction under this version of the statute qualifies as a violent felony because it contains the precise language *Frazier* found was missing from the Class D version of the statute in order to be a crime of violence.

For this reason, the Court denies Arreola Chavez relief based on his argument under *Borden*

or *Frazier*. Arreola Chavez's petition is denied as to Grounds One and Two.

**B. *Rehaif* Argument**

Arreola Chavez pleaded guilty to being a felon in possession of a firearm under 18 U.S.C. § 922(g)(1). Sealed J. Crim. Case 1, No. 4:19-cr-00064, ECF No. 50. In order to be convicted under 18 U.S.C. § 922(g), the government must prove the defendant knew both of his possession of the firearm and of his status as a prohibited person. *Rehaif v. United States*, 139 S. Ct. 2191, 2194 (2019). Chavez seeks to withdraw his plea based on *Rehaif* and other similar cases. *See* ECF No. 3 at 2 (citing *United States v. Qazi*, 975 F.3d 989, 994 (9th Cir. 2020) (dismissing indictment for failure to allege defendant "had knowledge of his felon status" as required by *Rehaif)); United States v. Gary*, 954 F.3d 194, 198 (4th Cir. 2020) (vacating guilty plea where defendant "did not understand essential elements of the offense to which he pled guilty" in light of *Rehaif), reversed by Greer v. United States*, 141 S. Ct. 2090, 2100 (2021) (holding "*Rehaif* error is not a basis for plain-error relief unless the defendant first makes a sufficient argument or representation on appeal that he would have presented evidence at trial that he did not in fact know he was a felon")).

In order to withdraw his plea, Arreola Chavez must show the Court committed plain error in failing to apply *Rehaif* to his proceedings. A plain error is one that "affected his substantial rights," and the defendant must again, "'demonstrate a reasonable probability that, but for the error, he would not have entered the plea.'" *United States v. Caudle*, 968 F.3d 916, 921–22 (8th Cir. 2020) (quoting *United States v. Coleman*, 961 F.3d 1024, 1030 (8th Cir. 2020)).

Arreola Chavez asserts he would have withdrawn his plea based on *Rehaif*, but he does not specific in what way *Rehaif* would have affected his decision to plead guilty. ECF No. 3 at 2. Witnesses reported Arreola Chavez was pointing a firearm at people in a parking garage. Final Presentence Investigation Report ¶ 6, No. 4:19-cr-00064, ECF No. 41. At the time of his arrest,

Arreola Chavez admitted to possessing the loaded .22 caliber pistol found between the vehicle's center console and the front passenger seat. *Id.* ¶¶ 9–10. Thus, there is no dispute Arreola Chavez possessed the firearm.

Neither does Arreola Chavez allege he was unaware he was previously sentenced to a term of imprisonment of greater than one year. *See* 18 U.S.C. § 922(g)(1) ("[i]t shall be unlawful for any person . . . who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year" to possess a prohibited firearm). Arreola Chavez does not dispute the factual accuracy of his convictions which were subject to terms of imprisonment of more than one year. *See* Final Presentence Investigation Report ¶ 35, No. 4:19-cr-00064, ECF No. 41 (sentenced to 5 years' imprisonment for third degree burglary); *id.* ¶ 37 (sentenced to 5 years' imprisonment for interference with official acts, dangerous weapon); *id.* ¶ 38 (sentenced to 10 years' imprisonment for possession of methamphetamine with intent to deliver); *id.* ¶ 39 (sentenced to 25 years' imprisonment for possession with intent to deliver methamphetamine); *id.* ¶ 40 (sentenced to 10 years' imprisonment for intimidation with dangerous weapon). "[A]ny § 922(g) defendant who served more than a year in prison on a single count of conviction will face an uphill battle to show that a *Rehaif* error in a guilty plea affected his substantial rights.'" *United States v. Caudle*, 968 F.3d 916, 922 (8th Cir. 2020) (quoting *United States v. Williams*, 946 F.3d 968, 974 (7th Cir. 2020)).

Without any indication of what argument he might have raised in light of *Rehaif*, Arreola Chavez's conclusory assertion that he would have withdrawn his plea based on that case is not reasonable. *See Padilla v. Kentucky*, 559 U.S. 356, 372 (2010) ("to obtain relief on this type of claim, a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances."). This claim is dismissed.

Arreola Chavez's petition is denied as to Ground Five.

### C. Ineffective Assistance of Counsel

Arreola Chavez claims he received ineffective assistance of counsel from his two defense attorneys, Benjamin Bergmann and Andrew Graeve. ECF No. 1 at 7–8. For the reasons explained below, Arreola Chavez fails to show he received ineffective assistance of counsel, and the Court denies the motion without a hearing. *See* 28 U.S.C. § 2255(b) (requiring a hearing "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief").

The Sixth Amendment to the United States Constitution provides, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel." U.S. Const. amend. VI. The Supreme Court has made clear "the right to counsel is the right to the effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (internal quotation marks omitted) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)). A defendant must demonstrate both deficient performance and prejudice to show he or she has been denied the effective assistance of counsel. *Id.* at 687. A court does not need to analyze both *Strickland* prongs when "the defendant makes an insufficient showing on one." *Id.* at 697; *accord United States v. Lee*, 715 F.3d 215, 221 (8th Cir. 2013).

To establish deficient performance, a defendant must show "counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. The Court indulges in "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689.

To establish prejudice a defendant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. Where the movant alleges counsel's actions or inactions caused him to plead guilty, prejudice is established by demonstrating "a reasonable probability that, but for counsel's errors, he would

not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

**1. Andrew Graeve**

Arreola Chavez was initially represented in his criminal proceedings by Assistant Federal Public Defender Andrew Graeve. Notice of Attorney Appearance, No. 4:19-cr-00064, ECF No. 17. At the onset, Graeve believed Arreola Chavez was facing up to ten years in prison. Pet'r's Aff. Supp. Suppl. Mot. Vacate, Set Aside, or Correct Sentence 1, *id.*, ECF No. 6-1. Based on this information, Arreola Chavez agreed to plead guilty. *Id.* After the United States Probation Office prepared Arreola Chavez's Presentence Investigation Report, Graeve realized Arreola Chavez would qualify as an armed career criminal, increasing Arreola Chavez's sentencing exposure to 15 years to life in prison. *Id.* Graeve told Arreola Chavez he could either continue to have Graeve represent him or proceed with new counsel. *Id.* Arreola Chavez chose to change counsel. *Id.* Graeve withdrew, and Benjamin Bergmann assumed representation. Mot. to Withdraw, *id.*, ECF No. 30; Notice of Appearance, *id.*, ECF No. 33. Arreola Chavez states he would not have pleaded guilty if had known he would be facing longer imprisonment penalties. *Id.* at 2.

At the sentencing hearing, the Court specifically addressed whether Arreola Chavez understood the minimum and maximum penalty he was facing. Sentencing Hr'g Tr. 3:8–7:2, id., ECF No. 56. Chavez indicated he understood he could withdraw his plea, *id.* at 6:1–18; and understood the mandatory minimum sentence and maximum potential penalty associated with the offense, *id.* at 6:19–23. After advising Arreola Chavez of the maximum potential penalty, Arreola Chavez elected to maintain his guilty plea and proceed to sentencing. *Id.* at 6:20–7:2. The Court found Arreola Chavez understood the minimum and maximum potential penalties, and that he knowingly and voluntarily maintained the plea because he believed it was in his own best interest to do so. *Id.* at 7:15–19.

Thus, even if Graeve had provided erroneous information about the potential penalties, the record demonstrates Arreola Chavez was fully informed of the minimum and maximum penalties and still wanted to proceed with his guilty plea. As such, Arreola Chavez cannot demonstrate prejudice here, that is, that he would have proceeded to trial if he had known this information. The Court dismisses the claim of ineffective assistance regarding Andrew Graeve.[2]

Arreola Chavez's petition is denied as to Ground Four.

**2. Benjamin Bergmann**

After Graeve withdrew as counsel, Benjamin Bergmann represented Arreola Chavez through sentencing and on appeal. Notice of Appearance, No. 4:19-cr-00064, ECF No. 33. Arreola Chavez alleges Bergmann's representation was ineffective in multiple ways. ECF No. 1 at 7.

First, he alleges Bergmann advised him not to withdraw his plea but to continue with sentencing, and Bergmann would "come back and appeal it and win." ECF No. 6-1 at 2. Arreola Chavez specifically reaffirmed his plea at sentencing after the Court advised him of the correct sentencing penalties he was facing. Sentencing Hr'g Tr. 6:20–7:2, No. 4:19-cr-00064, ECF No. 56. In light of his colloquy with the Court discussed above, Arreola Chavez cannot demonstrate he would have chosen to proceed to trial even if Bergmann previously promised to win on appeal.

Nor can Arreola Chavez demonstrate any of Bergmann's other alleged deficiencies would have resulted in a different outcome at sentencing. *See Strickland*, 466 U.S. at 694 (holding

[2] Arreola Chavez also argues the Government induced him to plead guilty by representing imprisonment was limited to zero to ten years. ECF No. 6 at 6. He asserts the Government breached its agreement by not standing by these penalties. *Id.* In this case, there was no written plea agreement. Plea Hr'g Mins., No. 4:19-cr-00064, ECF No. 22 (noting no plea agreement to be filed). Arreola Chavez does not describe any communication with the Government offering to limit his sentencing exposure in exchange for his guilty plea. As such, the Court finds this conclusory allegation to be wholly without merit.

prejudice demonstrated by showing reasonable probability that but for the alleged deficiencies, the result of the proceeding would have been different).

Arreola Chavez wanted to serve his state and federal sentences concurrently. ECF No. 6-1 at 2. Nothing about concurrent sentences was discussed at sentencing because Bergmann allegedly "forgot" to raise the issue. *Id.* He allegedly told Arreola Chavez not to worry because Bergmann would make a motion to the Court. *Id.* Arreola Chavez even wrote to Bergmann to remind him of this request. Pet'r's Ex. A Supp. Suppl. Mot. Vacate, Set Aside, or Correct Sentence 1, ECF No. 6-2 (November 27, 2019 Letter from Arreola Chavez to Bergmann). Arreola Chavez, however, does not specify which state sentence he still had to serve, how much time remained, or why the possibility of serving the sentences consecutively would have been an essential factor in his decision to proceed to trial.

The Presentence Investigation Report shows that at the time of sentencing Arreola Chavez was paroled for the three convictions used to qualify him as an armed career criminal. Final Presentence Investigation Report 12–13, No. 4:19-cr-00064, ECF No. 41. There was no indication at sentencing, however, as to whether Iowa intended to revoke his parole in any of those cases. He was not serving an undischarged term of imprisonment. There was only a potential term if Iowa chose to revoke his parole. The Court would not have speculated whether the state would revoke his parole. Nor would it have imposed a concurrent sentence to any potential yet-to-be-imposed term of imprisonment. For these reasons, Arreola Chavez cannot show his sentence would have been different if Bergmann had raised the issue.

Next, Arreola Chavez states he continued to try to contact Bergmann "numerous times" and sent "numerous legal cases" he found about the Armed Career Criminal Act. *Id.* at 2–3. For the reasons discussed above, these cases are not helpful to Arreola Chavez. Arreola Chavez does not identify any other specific issues he wanted Bergmann to appeal. Failure "to specify what

kind of statements or promises were made or how he was prejudiced" and relying on "vague and conclusory allegations are not sufficient to state a ground for relief under 28 U.S.C. § 2255." *Hollis v. United States*, 796 F.2d 1043, 1046 (8th Cir. 1986).

Arreola Chavez also alleges Bergmann failed to file a petition for certiorari in the Supreme Court on his behalf. ECF No. 1 at 7. Bergmann wrote to Arreola Chavez informing him the direct appeals were unsuccessful, and that while filing a petition for writ of certiorari in the United States Supreme Court was a possibility, success there would be "extremely unlikely." Pro Se (Ex Parte) Letter 3, No. 4:19-cr-00064, ECF No. 64. Arreola Chavez does not allege he specifically directed Bergmann to seek certiorari from the Supreme Court. Further, "[d]ue process does not [ ] guarantee a constitutional right to counsel for a litigant seeking to file a certiorari petition in the United States Supreme Court." *Steele v. United States*, 518 F.3d 986, 988 (8th Cir. 2008); *see also Ahumada v. United States*, 994 F.3d 958, 960 (8th Cir. 2021) (reaffirming no right to effective assistance of counsel when defendant has no constitutional right to counsel for discretionary appeals).

Finally, Arreola Chavez suggests Bergmann did not adequately represent him because Bergmann was not paid his usual fee for legal services. ECF No. 6-1 at 3; *see also* ECF No. 6-2 at 5 (November 21, 2020 letter from Bergmann to Court of Appeals regarding fee claim). Arreola Chavez provides no support for this claim whatsoever.

Under the terms of the statute, Arreola Chavez was subject to fifteen years to life in prison. 18 U.S.C. § 924(e)(1). The Court imposed the mandatory minimum sentence allowed of 180 months, or fifteen years in prison. Sentencing Hr'g Mins., No. 4:19-cr-00064, ECF No. 48. For the reasons given above, even if Bergmann had proceeded differently with respect to any of the above allegations, Arreola Chavez has failed to demonstrate the Court would have imposed a sentence below the mandatory minimum sentence. Because Arreola Chavez cannot demonstrate the necessary prejudice here, the Court dismisses the claims of ineffective assistance as to

Benjamin Bergmann.

Arreola Chavez's petition is denied as to Ground Three.

## IV. CERTIFICATE OF APPEALABILITY

Before a movant can appeal a final order in a proceeding under § 2255 to the court of appeals, the district court judge must issue a certificate of appealability. 28 U.S.C. § 2253(c)(1)(B). Such certificate may be issued if "the applicant has made a substantial showing of the denial of a constitutional right." *Id.* § 2253(c)(2). The certificate must indicate "which specific issue or issues satisfy the [substantial] showing." *Id.* § 2253(c)(3). To meet the "substantial showing" standard, the petitioner must demonstrate "that 'a reasonable jurist' would find the district court ruling on the constitutional claim 'debatable or wrong.'" *Winfield v. Roper*, 460 F.3d 1026, 1040 (8th Cir. 2006) (quoting *Tennard v. Dretke*, 542 U.S. 274, 276 (2004)); *see also Randolph v. Kemna*, 276 F.3d 401, 403 n.1 (8th Cir. 2002) ("[T]he petitioner 'must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further.'") (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)) (second alteration in original)).

Arreola Chavez cannot show reasonable jurists would disagree or debate whether the issues presented should have had a different outcome. The Court denies a certificate of appealability.

## V. CONCLUSION

The Court finds Arreola Chavez is not entitled to relief under 28 U.S.C. § 2255.

**IT IS ORDERED** that Petitioner Gilberto Arreola Chavez's Motion to Vacate, Set Aside, or Correct Sentence Under 28 U.S.C. § 2255, ECF No. 1, is **DENIED**. The Clerk of Court shall enter judgment in favor of Respondent United States of America.

**IT IS FURTHER ORDERED** that a Certificate of Appealability is **DENIED**.

**IT IS FURTHER ORDERED** that Petitioner Gilberto Arreola Chavez's Motion to

Supplement his § 2255 Motion, Motion to Amend, ECF No. 7, and Motions to Provide Supplemental Material, ECF Nos. 10, 14, are **GRANTED**.

**IT IS FURTHER ORDERED** that Petitioner Gilberto Arreola Chavez's requests for documents without cost, ECF No. 5; for copy of the docket sheet, ECF No. 9; for briefing, ECF Nos. 11, 15; for status hearing, ECF Nos. 12, 15; for copy of Government's response and extension of time to reply, ECF No. 13; for counsel, ECF Nos. 2–3, are **DENIED** as moot.

**IT IS SO ORDERED.**

Dated this 27th day of March, 2023.

REBECCA GOODGAME EBINGER
UNITED STATES DISTRICT JUDGE