LIST OF APPENDICES

A•P•P•E•N•D•I•X A

United States Court of Appeals for the Fifth Circuit

No. 21-50767
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

RUBEN AGUILERA,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 7:21-CR-62-1

Before HIGGINBOTHAM, HIGGINSON, and DUNCAN, *Circuit Judges*.

PER CURIAM:*

Ruben Aguilera was sentenced to 180 months of imprisonment following his guilty plea conviction for being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e)(1). On appeal, he contends that his three Texas Penal Code § 30.02(a) convictions for burglary do not

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

qualify as violent felonies under the Armed Career Criminal Act (ACCA) and that two of the convictions should have counted as one conviction for purposes of determining whether he was an armed career criminal. The Government has filed a motion for summary affirmance or, in the alternative, for an extension of time to file a merits brief, asserting that Aguilera's arguments are foreclosed by circuit precedent. Aguilera opposes the motion for summary affirmance and does not concede foreclosure.

As acknowledged by Aguilera, we have held that Texas burglary is a generic burglary and is therefore a violent felony under the ACCA. *United States v. Herrold*, 941 F.3d 173, 176-82 (5th Cir. 2019) (en banc). Although he claims that *Herrold* was wrongly decided, "'in the absence of an intervening contrary or superseding decision by this court sitting en banc or by the United States Supreme Court,'" we are bound by our precedent. *United States v. Montgomery*, 974 F.3d 587, 590 n.4 (5th Cir. 2020) (quoting *United States v. Setser*, 607 F.3d 128, 131 (5th Cir. 2010)), *cert. denied*, 141 S. Ct. 2823 (2021).

Moreover, Aguilera's three prior burglary convictions were for offenses that were committed sequentially, not simultaneously, and therefore were offenses that occurred on "'occasions different from one another.'" *United States v. Fuller*, 453 F.3d 274, 278 (5th Cir. 2006) (quoting *United States v. Ressler*, 54 F.3d 257, 260 (5th Cir. 1995)). The mere fact that Aguilera was sentenced to two of these offenses on the same day does not change this conclusion. *See United States v. White*, 465 F.3d 250, 253 (5th Cir. 2006).

In light of the foregoing, the Government's opposed motion for summary affirmance is DENIED, *see Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969), the alternative motion for an extension of

time in which to file a brief is DENIED, and the judgment of the district court is AFFIRMED.

A•P•P•E•N•D•I•X B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
MIDLAND/ODESSA DIVISION

UNITED STATES OF AMERICA	§	
	§	
vs.	§	NO: MO:21-CR-00062(1)-DC
	§	MO:22-CV-00171
(1) RUBEN AGUILERA	§	

ORDER DENYING 28 U.S.C. §2255 AFTER EVIDENTIARY HEARING, AND DENYING A CERTIFICATE OF APPEALABILITY

Before the Court are Movant Ruben Aguilera's 28 U.S.C. §2255 (§2255), the Government's Response, Movant's Motion to Supplement, the Government's Response to Movant's Supplement, followed by Movant's three Replies to the Government's Responses. After having considered all of Movant's arguments, and after holding an evidentiary hearing on ineffective assistance of counsel, the Court finds Movant is not entitled to the relief he seeks.

I. Procedural history

On March 24, 2021, Movant was indicted for one count of being a felon in possession of a firearm. [docket number 17]. On May 10, 2021, Movant pleaded guilty, without a plea agreement but with a written factual basis. [docket numbers 27 & 28, respectively]. On August 11, 2021, Movant was sentenced by this Court to 180 months' imprisonment, to be followed by five years of supervised release, no fine, and a $100 special assessment. [docket number 36]. The very next day, trial counsel Brent Morgan filed a Motion to Withdraw and a Notice of Appeal. [docket numbers 37 & 38, respectively]. On August 13, 2021, trial counsel Brent Morgan was allowed to withdraw, and appellate counsel John Kuchera was appointed to Movant's direct appeal. [*See generally* docket]. On August 25, 2021, Movant's Judgment in a Criminal Case was entered. [docket number 41]. On direct appeal, appellate counsel John Kuchera argued that Movant's three Texas Penal Code §30.02(a) convictions for burglary did not qualify as violent

felonies under the Armed Career Criminal Act (ACCA) and that two of his prior convictions should have counted as one conviction for purposes of determining whether he was an armed career criminal. [docket number 46]. On February 15, 2022, the Fifth Circuit Court of Appeals affirmed the judgment of this Court. [*Id.*]. On July 31, 2022, Movant mail-filed his *pro se* 28 U.S.C. §2255 with the Clerk of the Court. [docket number 47]. Therein, he raised the following issues:

1. Movant's guilty plea was unknowing and involuntary because it was allegedly "based upon promise for non-Armed Career Criminal Act prosecution in exchange for guilty plea";
2. Movant received ineffective assistance of counsel because he was allegedly assured that he would not be prosecuted under the Armed Career Criminal Act; and,
3. Movant received ineffective assistance of counsel because his attorney allegedly failed to advise him of "the Government's burden to prove he knew he had belonged to a class for which gun possession was prohibited."

[*Id.*].

On August 9, 2022, this Court entered an Order for Service and Advisory. [docket number 48]. On November 9, 2022, the Government filed their first Response. [docket number 50]. On November 14, 2022, Movant filed a Motion to Supplement his §2255. [docket number 51]. Therein, Movant raised two more claims:

4. The Supreme Court's *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S.Ct. 2111 (June 23, 2022) decision renders 18 U.S.C. §922(g)(1) unconstitutional; and,
5. Following the Supreme Court's *United States v. Wooden*, 142 S.Ct. 1063 (2022) decision, he should be resentenced without the Armed Career Criminal enhancement.

[*Id.*].

On December 21, 2022, the Government filed their second Response, addressing claims 4 & 5, specifically. [docket number 53]. On December 22, 2022, Movant filed his Reply to the Government's Response to claims 1–3. [docket number 54]. On January 24, 2023, Movant filed another Reply to the Government's Response to claims 1–3. [docket number 56]. On February 3,

2023, Movant filed his Reply to the Government's Response to claims 4 & 5. [docket number 57]. On February 7, 2023, this Court issued an order setting this case for an Evidentiary Hearing and appointing Raymond Fivecoat as post-conviction counsel. [docket number 59].

After being reset several times, on August 30, 2023, the evidentiary hearing was held at the federal courthouse in Midland, Texas. [docket number 68]. There, Movant raised another claim, this one of actual innocence. Both Movant and his former trial counsel testified. [docket number 69]. The Court found former trial counsel's testimony utterly believable, and Movant's testimony significantly less so. After consideration of all the filings in this case, as well as the testimony from the evidentiary hearing, and post-evidentiary hearing supplementary filings by both sides,[1] the Court finds Movant's §2255 must be denied.

II. §2255 in general

In this collateral attack on a judgment of conviction, Movant has the burden of proving that his constitutional rights have been violated. *Hawk v. Olsen*, 326 U.S. 271, 279 (1945); *Johnson v. Zerbst*, 304 U.S. 458, 468 (1938); *Rimanich v. United States*, 357 F.2d 537, 538 (5th Cir. 1966); *United States v. Atkins*, 834 F.2d 426, 435 (5th Cir. 1987). Under §2255, a federal prisoner can get relief if he can establish that either: (1) his sentence was imposed in violation of the Constitution or laws of the United States; (2) the sentencing court was without jurisdiction to impose the sentence; (3) the sentence was in excess of the maximum authorized by law; or (4) the sentence is otherwise subject to a collateral attack. 28 U.S.C. §2255; *United States v. Placente*, 81 F.3d 555, 558 (5th Cir. 1996); *United States v. Seyfert*, 67 F.3d 544, 546 (5th Cir. 1995). In other words, §2255 relief is reserved for errors of constitutional dimension and other injuries that could not have been raised on direct appeal. *United States v. Payne*, 99 F.3d 1273, 1281 (5th Cir. 1996); *United States v. Gaudet*, 81 F.3d 585, 589 (5th Cir. 1996).

[1] [docket numbers 70 & 71].

A habeas petitioner has the burden of proving facts in support of his claims. Unsupported conclusory allegations do not warrant habeas relief. *Uresti v. Lynaugh*, 821 F.2d 1099, 1103 (5th Cir. 1987); *Wilson v. Butler*, 813 F.2d 664, 671 (5th Cir.), *on rehearing*, 825 F.2d 879, 881 (5th Cir. 1987), *cert. denied*, 484 U.S. 1079, 108 S.Ct. 1059, 89 L.Ed.2d 1021 (1988); *United States v. Cockrell*, 720 F.2d 1423, 1427 (5th Cir. 1983); *United States v. Jones*, 614 F.2d 80, 82 (5th Cir. 1980). Additionally, conclusory allegations of ineffective assistance of counsel do not raise a constitutional question in a federal habeas petition. *Miller v. Johnson*, 200 F.3d 274, 281 (5th Cir. 2000) (citing *Barnard v. Collins*, 958 F.2d 634, 642 (5th Cir. 1992); *Ross v. Estelle*, 694 F.2d 1008, 1012 (5th Cir. 1983)).

III. Offense conduct

According to the Presentence Investigation Report, these are the facts underlying this case:

> On February 13, 2021, the Midland Police Department observed the driver of a vehicle commit several traffic violations, including speeding, failing to signal, and making a wide turn. A traffic stop was conducted, and the driver was identified as Ruben Aguilera, and the passenger was identified as Felix Rodriguez. While speaking to Aguilera, officers could smell a pungent odor of alcohol emitting from inside the vehicle, and they observed his eyes to be bloodshot and glossy and his speech to be slurred. An alcoholic beverage, Twisted Tea, was seen in the vehicle. Officers determined he was possibility intoxicated and while speaking to him, in plain view, they observed a Savage Arms MSR .223 caliber rifle (Serial No. 01-005938) in the backseat, manufactured in Austria, with a 30-round magazine inserted. Additionally, officers observed several handgun magazines in the vehicle.
>
> Officers instructed Aguilera to exit the vehicle to perform a field sobriety test, but he refused to comply with the test. The defendant was arrested for Driving While Intoxicated and his vehicle was impounded. A criminal history was queried and found he had several felonies. During impound inventory, officers located a Springfield XDE9 9mm handgun (Serial No. HE941220), manufactured in Croatia, with a magazine inserted and the hammer pulled back, and a Glock 23 .40 caliber handgun (Serial No.

> SUB783), manufactured in Austria, under the front right passenger seat. Furthermore, officers observed spent .223/5.56 caliber ammunition casings throughout the vehicle.
>
> Aguilera and his passenger, Rodriguez, were transported to the Midland Police Department for further questioning. Aguilera was read his *Miranda* warning, and he verbally stated he understood. During his interview, he told the agents he did not know why he had been pulled over and why he was asked to do a sobriety test if he was sober. To confirm his identity, the agent asked for his date of birth and he informed officers he was born July 21, 1984. He stated he was not the person on the criminal history check officers conducted on the scene. Aguilera stated he was in the process of "fixing" his identity. When asked if he has gone to prison, he stated no. When asked if he had any felonies, he stated his paperwork states he does, and he began to argue with the agents and once again they asked if he had been convicted of any felonies and he repeated no. The agent showed him pictures of the 4 firearms located in the vehicle he was driving, specifically, the one between the driver's side and center console and asked if he knew they were in his vehicle. He replied no. Aguilera continued to antagonize the agents and stated he had the right to own a firearm after five years in the state of Texas and has knowledge of the law. The interview was terminated.
>
> Agents then spoke to Rodriguez, after he was Mirandized, he confirmed they left a bar and were going to get something to eat. He knew Aguilera through his uncle's business, and he had permission to drive the company vehicle they were in at the time of the traffic stop. He stated Aguilera sold him two firearms, a Savage Arms Rifle and Glock 23, in exchange for allowing him to use his credit to purchase a vehicle earlier that same day.
>
> A criminal check revealed Ruben Aguilera was convicted of a Burglary of a Habitation, a felony, in the 366th Judicial District Court of Collin County, in McKinney, Texas, in Docket No.: 366-81981-06.

[docket number 34 at ¶¶ 3–7].

IV. Ineffective assistance of counsel standard

As Movant raises distinct claims of ineffective assistance of counsel in his §2255, the Court must first discuss the applicable standard. A movant seeking relief under §2255 bears the burden of sustaining his contentions by a preponderance of the evidence. *Wright v. United States*, 624 F.2d 557, 558 (5th Cir. 1980). When judging any claim of ineffectiveness, the benchmark

standard must be whether the counsel's conduct so undermined the proper functioning of the adversarial process such that the trial court cannot be relied upon as having produced a just result. U.S.C.A. Const. Amend. VI. A movant must demonstrate that (1) his counsel's performance was deficient, and (2) that the deficiency prejudiced him to the extent a fair trial could not be achieved. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Deficiency is judged by an objective reasonable standard, with great deference given to counsel and a presumption that the disputed conduct is reasonable. *Id.* at 687–88. The prejudice element requires a movant to prove that absent the disputed conduct of counsel, the outcome would have been both different and more favorable. *Id.* at 694–95. Under *Strickland*, a movant must establish both deficiency and prejudice prongs to be entitled to habeas relief. The failure to establish either deficient performance or prejudice makes it unnecessary to examine the other prong. *Seyfert*, 67 F.3d at 547.

All that is required before the Court can deny a §2255 motion is conclusive evidence—and not necessarily direct evidence—that a movant is entitled to no relief. *United States v. Drummond*, 910 F.2d 284, 285 (5th Cir. 1990). The Court can deny a §2255 motion without holding an evidentiary hearing when it affirmatively appears from the papers on file with the Court that the claims asserted in such a motion are without merit. *Smith v. United States*, 431 F.2d 565, 566 (5th Cir. 1970); *see also United States v. McGill*, 11 F.3d 223, 225 (1st Cir. 1993) ("Moreover, when, as in this case, a petition for federal habeas relief is presented to the judge who presided at the petitioner's trial, the judge is at liberty to employ the knowledge gleaned during previous proceedings and make findings based thereon without convening an additional hearing."). In this connection, "the courts in post-conviction relief applications may exercise a sound judicial discretion to decline to re-try issues fully and finally litigated in the proceedings

leading to judgement of conviction and direct appeal therefrom." *Bearden v. United States*, 403 F.2d 782, 784 (5th Cir. 1968).

Having extensively reviewed both sides' filings in this §2255, the record itself, the applicable law, as well as the results of the Evidentiary Hearing, the Court finds Movant is not entitled to the relief he seeks. In order to support his claims of ineffective assistance of counsel, Movant would have to present evidence that would overcome two presumptions weighing against him: (1) that he stands fairly and finally convicted, *United States v. Frady*, 456 U.S. 152, 164 (1982), and (2) that his counsel's conduct fell within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 687. Movant has not adduced facts that overcome such presumptions. He has provided only conclusory allegations that speculate that the outcome would have changed had his counsel taken a different approach than the strategy in which trial counsel confronted the case. Such conclusory allegations are insufficient to raise a constitutional issue. *See United States v. Woods*, 870 F.2d 285, 288 n. 3 (5th Cir. 1989).

Under the deficiency prong of *Strickland*, judicial scrutiny of counsel's performance is "highly deferential" and "a strong presumption" is made that "trial counsel rendered adequate assistance and that the challenged conduct was the product of reasoned trial strategy." *Wilkerson v. Collins*, 950 F.2d 1054, 1064–65 (5th Cir. 1992) (citing *Strickland*). To overcome the presumption of competence, the movant "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." *Strickland*, 466 U.S. at 690. Under the prejudice prong of *Strickland*, a movant must be able to establish that absent his counsel's deficient performance, the result of his trial could have been different. "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Id.* at 691.

Constitutionally effective assistance of counsel under *Strickland* is not errorless counsel. The determination of whether counsel has rendered reasonably effective assistance turns on the totality of the facts in the entire record. Each case is judged in light of the number, nature, and seriousness of the charges against a defendant, the strength of the case against him and the strength and complexity of his possible defense. *Baldwin v. Maggio*, 704 F.2d 1325, 1329 (5th Cir. 1983). The reasonableness of the challenged conduct is determined by viewing the circumstances at the time of that conduct. *Strickland*, 466 U.S. at 690. "We will not find inadequate representation merely because, with the benefit of hindsight, we disagree with counsel's strategic choices." *Kitchens v. Johnson*, 190 F.3d 698, 701 (5th Cir. 1999) (quoting *Green v. Johnson*, 116 F.3d 1115, 1122 (5th Cir. 1997)). Movant's §2255 fails to demonstrate either deficient performance or prejudice on any of his ineffective assistance of counsel claims.

V. Discussion of claims raised in filings

1. Movant's guilty plea was unknowing and involuntary because it was allegedly "based upon promise for non-Armed Career Criminal Act prosecution in exchange for guilty plea."

While not technically raised as an ineffective assistance of counsel claim, this claim clearly attempts to blame counsel for allegedly promising Movant he would not be found to be an Armed Career Criminal.

"A plea of guilty must, as a matter of due process, be a voluntary, knowing, and intelligent act." *United States v. Guerra*, 94 F.3d 989, 995 (5th Cir. 1996). "A plea may be involuntary either because the accused does not understand the nature of the constitutional protections that he is waiving, ... or because he has such an incomplete understanding of the charge that his plea cannot stand as an adequate admission of guilt." *Henderson v. Morgan*, 426 U.S. 637, 645 n. 13 (1976). "To be knowing and intelligent, the defendant must have a 'full

understanding of what the plea connotes and of its consequences.'" *United States v. Hernandez*, 234 F.3d 242, 255 (5th Cir. 2000) (quoting *Boykin v. Alabama*, 395 U.S. 238, 244 (1969)). "The defendant need only understand the direct consequences of the plea; he need not be made aware of every consequence that, absent a plea of guilty, would not otherwise occur." *Id.* Thus, "[a] plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper ...." *United States v. Amaya*, 111 F.3d 386, 389 (5th Cir. 1997) (quoting *Brady v. United States*, 397 U.S. 742, 755 (1970) (quoting *Shelton v. United States*, 246 F.2d 571, 572 n. 2 (5th Cir. 1957) (en banc), *rev'd on other grounds*, 356 U.S. 26, 78 S.Ct. 563, 2 L.Ed.2d 579, (1958))) (emphasis omitted).

According to the U.S. Supreme Court in *Tollett v. Henderson*, 411 U.S. 258, 267–68 (1973):

> [A] guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in *McMann*.
>
> A guilty plea, voluntarily and intelligently entered, may not be vacated because the defendant was not advised of every conceivable constitutional plea in abatement he might have to the charge, no matter how peripheral such a plea might be to the normal focus of counsel's inquiry. And just as it is not sufficient for the criminal defendant seeking to set aside such a plea to show that his counsel in retrospect may not have correctly appraised the constitutional significance of certain historical facts, *McMann*, *supra*, it is likewise not sufficient that he show that if counsel had

> pursued a certain factual inquiry such a pursuit would have uncovered a possible constitutional infirmity in the proceedings.
>
> The principal value of counsel to the accused in a criminal prosecution often does not lie in counsel's ability to recite a list of possible defenses in the abstract, nor in his ability, if time permitted, to amass a large quantum of factual data and inform the defendant of it. Counsel's concern is the faithful representation of the interest of his client and such representation frequently involves highly practical considerations as well as specialized knowledge of the law. Often the interests of the accused are not advanced by challenges that would only delay the inevitable date of prosecution, *see Brady v. United States*, *supra*, 397 U.S. at 751–752, 90 S.Ct. at 1470–1471, or by contesting all guilt, *see Santobello v. New York*, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971).

Having reviewed the transcript of his Rearraignment/plea hearing, it appears that Movant stated under oath in open court that he understood the range of punishment that could be imposed, he understood that no one could predict what sentence would be imposed because it was solely in the sentencing court's discretion, and he was pleading guilty voluntarily. [docket number 45]. *See also United States v. Scott*, 857 F.3d 241, 245 (5th Cir. 2017) ("If the defendant is aware of the potential maximum prison term and fine for the offense charged, but nevertheless pleads guilty, his plea is knowingly and intelligently entered.").

A movant may not ordinarily refute his testimony given under oath at a plea hearing because "[s]olemn declarations in open court carry a strong presumption of 'verity,' forming a 'formidable barrier in any subsequent collateral proceedings,'" *United States v. Cervantes*, 132 F.3d 1106, 1110 (5th Cir. 1998) (quoting *Blackledge v. Allison*, 431 U.S. 63, 73–74 (1977)); *see also De Ville v. Whitley*, 21 F.3d 654, 659 (5th Cir. 1994) (holding that attestations as to voluntariness at a plea colloquy in open court carry "a strong presumption of verity"). For a petitioner to contradict his statements made in open court at the guilty plea, "there must be independent indicia of the likely merit of the petitioner's contentions, and mere contradiction of

his statements at the guilty plea hearing will not carry his burden." *Davis v. Butler*, 825 F.2d 892, 894 (5th Cir. 1987) (quoting *United States v. Raetzsch*, 781 F.2d 1149, 1151 (5th Cir. 1986)); *see United States v. Cothran*, 302 F.3d 279, 284 (5th Cir. 2002) (holding that statements made at the plea colloquy are entitled to "greater weight" than "unsupported, after-the-fact, self-serving revisions").

Movant has failed to provide any support for his claims of an involuntary or unintelligent plea other than his own conclusory allegations; therefore, his claim to an involuntary or unintelligent plea fails. *See Lee v. United States*, 137 S. Ct. 1958, 1967 (2017) ("Courts should not upset a plea solely because of *post hoc* assertions from a defendant about how he would have pleaded but for his attorney's deficiencies. Judges should instead look to contemporaneous evidence to substantiate a defendant's expressed preferences."); *United States v. Crain*, 877 F.3d 637, 650 (5th Cir. 2017) (explaining that "self-serving *post hoc* assertions about how [the defendant] would have pled" do not negate the contemporaneous comments at the plea hearing). At his Rearraignment/plea hearing, the Magistrate Court found that Movant was fully competent and capable of entering an informed plea, that he was aware of the nature and the charges, as well as the consequence of his plea, and that his plea of guilty had been knowingly and voluntarily entered and was supported by an independent factual basis containing each of the essential elements of the offense of indictment. [docket number 45].

To demonstrate that ineffective assistance of counsel rendered his guilty plea involuntary, Movant must show that (1) counsel's performance was objectively deficient and (2) the deficient performance prejudiced his defense. *Strickland*, 466 U.S. at 668; *Seyfert*, 67 F.3d at 547. "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." *Strickland*, 466 U.S. at 700. Moreover, "[p]roving an allegation of

ineffective assistance of counsel requires a very strong showing by the defendant." *United States v. Samuels*, 59 F.3d 526, 529 (5th Cir. 1995).

An attorney's performance falls below the constitutional minimum when it is unreasonable in light of all the circumstances. *United States v. Haese*, 162 F.3d 359, 364 (5th Cir. 1998). Because of the inherent difficulties in determining whether an attorney has performed in a reasonably objective manner, this Court "must indulge a strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance." *Id.* at 364 (quoting *Strickland*, 466 U.S. at 689). An attorney renders effective assistance to a defendant pleading guilty when he ensures that the defendant intelligently and voluntarily agrees to plead guilty. *Randle v. Scott*, 43 F.3d 221, 225 (5th Cir. 1995). "That a guilty plea must be intelligently made is not a requirement that all advice offered by the defendant's lawyer withstand retrospective examination in a post-conviction hearing." *McMann v. Richardson*, 397 U.S. 759, 770 (1970). Indeed, it is part of counsel's role to "predict how the facts, as he understands them, would be viewed by a court." *Id.* at 769.

To demonstrate that he was prejudiced by counsel's allegedly deficient performance, Movant must show 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); *United States v. Glinsey*, 209 F.3d 386, 392 (5th Cir. 2000). In regard to the prejudice requirement, the Fifth Circuit Court of Appeals has determined that:

> [s]imply alleging prejudice will not suffice. Whether the [movant] is able to persuade us that he was prejudiced depends partly on his chances for success at trial. If the [movant] claims that counsel erred by failing to investigate or discover certain exculpatory evidence, the prejudice determination will depend upon whether the discovery of such evidence would have influenced counsel to change his advice regarding the guilty plea.

Mangum v. Hargett, 67 F.3d 80, 84 (5th Cir. 1995); *see Deville v. Whitley*, 21 F.3d 654, 659 (5th Cir. 1994) (holding that a petitioner must "affirmatively prove, and not merely allege, prejudice"). For a movant to contradict his own statements made in open court at the guilty plea, "there must be independent indicia of the likely merit of the [movant's] contentions, and mere contradiction of his statements at the guilty plea hearing will not carry his burden." *Davis v. Butler*, 825 F.2d 892, 894 (5th Cir. 1987) (quoting *Raetzsch*, 781 F.2d at 1151); *see Cothran*, 302 F.3d at 284 ("[A] defendant's after-the-fact testimony that he did not read the plea is irrelevant where the colloquy demonstrates that he understood the plea."); *United States v. Henderson*, 72 F.3d 463, 465 (5th Cir. 1995) (holding that a defendant's claim that his attorney advised him to plead guilty without informing him of the contents of the plea agreement was without merit where the record indicated that he had answered the court affirmatively when asked if his attorney had reviewed the contents of the agreement with him and his responses to the court's questions regarding the agreement indicated that he understood the agreement when the court accepted his guilty plea).

As stated previously, the record clearly demonstrates that Movant was advised of the maximum sentence that could be imposed; he was advised that no one could predict his sentence with any accuracy under the guidelines; he was advised that his sentence was in the District Court's discretion; and he stated under oath in open court that he was pleading guilty freely and voluntarily, with full knowledge of the consequences and that no one had made him any promises. [docket number 45]. Additionally, because Movant does not dispute that the factual basis underlying his guilty plea was true, he does not otherwise establish that, but for any deficiency on his counsel's part, there was a reasonable probability that he would not have pleaded guilty and would have insisted on going to trial. *Hill*, 474 U.S. at 59; *see also Lee*, 137

S. Ct. at 1966 (observing as a general matter that "a defendant who has no realistic defense to a charge supported by sufficient evidence will be unable to carry his burden of showing prejudice from accepting a guilty plea").

The Court has reviewed Movant's pleadings, as well as the transcript of the Rearraignment/plea hearing and finds that his allegations of coercion and involuntariness are conclusory and wholly unsupported by the record. "Conclusory allegations of ineffective assistance of counsel do not raise a constitutional issue in a federal habeas proceeding." *Miller v. Johnson*, 200 F.3d 274, 282 (5th Cir. 2000) (citing *Ross v. Estelle*, 694 F.2d 1008, 1013 (5th Cir. 1983)). Therefore, Movant's claim of ineffective assistance of counsel for failure to make sure his guilty plea was made knowingly and voluntarily must fail, as the Court finds that his plea was both knowing and voluntary, and Movant was subjected to no prejudice therefrom. This claim is, therefore, denied.

2. Movant received ineffective assistance of counsel because he was allegedly assured that he would not be prosecuted under the Armed Career Criminal Act.

According to Movant, it was the improper guideline advice he received from counsel that caused him to plead guilty in this case.[2] However, that assertion is completely negated by what he swore to under oath at his Rearraignment/plea hearing.

> THE COURT: Uh-huh. You're under oath, so I need you to be truthful with me. If you tell me something that's not true, you can be prosecuted for a separate crime, a crime of perjury.
> Do you understand?
> THE DEFENDANT: Yes, sir.

[docket number 45 at 5].

[2] "With a range of 46–56 months, and an assurance that I would not be ACCA enhanced, I agreed to plead guilty." [docket number 47-2 at ¶28].

THE COURT: All right. Are you satisfied with your lawyer, Mr. Aguilera?
THE DEFENDANT: Yes, sir.

[*Id.* at 7].

THE COURT: Do you understand that charge, Mr. Aguilera, in the indictment?
THE DEFENDANT: Yes, sir.
THE COURT: Now, you have a right, you have a right to plead not guilty and demand a trial on this charge.
Do you understand?
THE DEFENDANT: Yes, sir, I understand.
THE COURT: Knowing you have that right, is it still your desire this morning to plead guilty to the charge we've now gone over?
THE DEFENDANT: Yes, sir, it is.

[*Id.* at 8].

THE COURT: And are you pleading guilty because you are guilty and for no other reason, Mr. Aguilera?
THE DEFENDANT: Because I am guilty.

[*Id.* at 10].

THE COURT: Okay. Here's the statutory penalty range for the charge that you're pleading guilty. So listen to me on this. By statute, the statutory penalty range for this felon in possession charge is zero to 10 years in prison. So 10 years being the maximum, zero to 10 years is the range. Supervised release term of up to three years, zero to three years on supervised release, and there's a fine. That fine -- the maximum fine is $250,000. It could be anywhere from no fine to $250,000, and then, you face a $100 mandatory special assessment.
Now, if the Court determines you have three prior convictions for a violent felony or a serious drug offense, or both, that were committed on occasions different from one another, the statutory penalty range I just went over with you increases, and it's a

minimum of 15 years in prison. The supervised release term increases: Instead of three years maximum, it's five years maximum. All else remains the same. The fine is still a maximum of $250,000 and $100 special assessment.
I don't know if you have those prior convictions or not that would cause an enhancement to come into play, but I want you to know it's there in the event that you do, okay?
Do you understand that full statutory range of punishment?

THE DEFENDANT: Yes, sir, I understand.

[*Id.* at 10–11].

THE COURT: Just keep in mind, if anybody, including Mr. Morgan's talking to you about guidelines or sentences, it's fine that he is, number one, but number two, it's estimates, predictions, those are the things that he's talking to you about. Judge Counts will come up with your sentence, and that's going to be independent of anyone else. It may be exactly what Mr. Morgan and others are estimating, but it may not be. It may be higher or it may be lower, but it will be independent.
Do you understand?

THE DEFENDANT: Yes, sir.

[*Id.* at 12].

THE COURT: Okay. Are you pleading guilty this morning freely, voluntarily, and with full knowledge of the consequences?

THE DEFENDANT: Yes, sir, I am.

THE COURT: Has anybody threatened you, forced you, or coerced you to plead guilty today?

THE DEFENDANT: No, sir.

THE COURT: Anybody made any specific promises to you like a specific sentence, a specific guideline range, or any other specific promise that's causing you to plead guilty?

THE DEFENDANT: No, sir.

[*Id.* at 13].

Movant reiterated his sworn statements from his Rearraignment/plea hearing at his evidentiary hearing. Movant clarified that he was never promised a particular sentence, and never promised that the ACCA would not apply to him.

> Q: So what are you saying your attorney promised you?
> A: I was told that it would be 46 to 57 months. I can't sit here and say he promised. Nobody made any actual promise to me. But because I didn't understand how things worked in the Federal system, is why I just went along with it.

[Rough draft of evidentiary hearing at 28].

When former counsel testified at the evidentiary hearing, he clarified that he had advised Movant to plea without a plea agreement to retain his appellate rights.

> Q: Did you at any point in time inquire about a plea agreement?
> A: No. So my advice to him was to plea without a plea agreement so he could keep his right to appeal. That way, if the guidelines did come back to be higher at 100 to 125, like I originally calculated, he could file those and appeal the calculation to the 5th Circuit.

[Rough draft of evidentiary hearing at 71–72].

Former counsel went on to explain what happened when the Presentence Investigation Report was released.

> Q: Sometime later the Presentence Investigation Report is released. Is that correct?
> A: That is correct.
> Q: Is that -- was there something surprising in that report?
> A: To me, yes. It had obviously calculated him as Armed Career Criminal based on there being three adult criminal convictions, one of those that was not on the initial pretrial services report that Mr. Aguilera and I discussed.
> Q: So now there's an additional conviction that's there.
> A: That is correct.
> Q: Is that the first time you learned of that?
> A: That is correct.

[Rough draft of evidentiary hearing at 74–75].

As the Government correctly stated in its first Response to Movant's §2255,

> [R]egarding Petitioner's complaint pertaining to the advice he received regarding his potential Guideline range and his Armed Career Criminal status, any advice that Mr. Morgan did or did not give regarding these matters does not change the reality of the situation that Petitioner was, in fact, an Armed Career Criminal. There is nothing that Mr. Morgan could have done or said to change this reality.

[docket number 50 at 13]. And as is clear to this Court, Movant knew he had been convicted at least three times of felonies, making him eligible for Armed Career Criminal status. That his former counsel advised him otherwise based on Pretrial Services' original disclosure, does not change the fact that Movant was aware that he had been convicted for three separate and distinct felonies (each carrying a sentence of more than one year in the Texas Department of Criminal Justice).[3]

> Q: Additionally, you just testified interestingly enough that you were incarcerated for two of your felony convictions, and you got writted over to another place for your other conviction. Do you recall testifying to that just a moment ago?
> A: Yes.
> Q: When you went to the other facility, where was that at?
> A: Texas DPS. I mean Texas Department of Criminal Justice.
> Q: That's when you went to prison.
> A: Right.
> Q: Where did you go when they writted you out to go plead guilty on your other charge?

[3] According to former trial counsel in affidavits he executed for both the defense and the prosecution: "I am aware of the ramifications under the Armed Career Criminal Act, and I discussed these with Mr. Aguilera. However, based on our discussions and a review of his criminal history, I informed him the Armed Career Criminal Act would not apply in his case as one burglary charge occurred while he was a juvenile." [docket number 47-3 at 1]. "It is very possible my error in advising Mr. Aguilera incorrectly that the Armed Career Criminal Act would not apply to him caused him to plead guilty and deprived him of the right to make the Government prove its case to a jury. As stated in my other affidavit, the ultimate outcome of a 180-month sentence would have occurred whether by guilty plea or jury trial. However, because of a unique set of circumstances, I advised him the Armed Career Criminal Act would not apply to him." [docket number 50-1 at 7].

A: Colleen county.[4]
Q: So a different county.
A: Yes.
Q: So you were aware, and I believe the Court inquired earlier, you were aware that was a completely separate case, completely separate county?
A: No, I wasn't aware. I was told it would run together with what I had at that time.
Q: Are you aware you left one county, went before a different Judge, and pled guilty to another felony offense? Different part of the state of Texas?
A: A plea agreement, yes.

...

Q: So you had already been sentenced on your other case. You were writted out of TDCJ, go to different county, plead guilty, come back. Is that correct?
A: Yes, ma'am.

[Rough draft of evidentiary hearing at 52–54].

Given Movant's own testimony at the evidentiary hearing, the Court finds that former counsel was not deficient in his performance, and even if he were, there was no prejudice sufficient to require action by this Court to remedy. This claim is, therefore, denied.

3. Movant received ineffective assistance of counsel because his attorney allegedly failed to advise him of "the Government's burden to prove he knew he had belonged to a class for which gun possession was prohibited."

Movant states that his conviction under 18 U.S.C. §922(g) is unconstitutional in light of the Supreme Court's decision in *Rehaif v. United States*, 139 S.Ct. 2191 (2019). Title 18, United States Code, §922(g)(1) makes it unlawful for any person who has been convicted of a felony to possess a firearm. To establish a violation of §922(g)(1) before *Rehaif*, the Government was required to prove beyond a reasonable doubt: "(1) that the defendant previously had been convicted of a felony; (2) that he knowingly possessed a firearm; and (3) that the firearm traveled in or affected interstate commerce." *United States v. Meza*, 701 F.3d 411, 418 (5th Cir. 2012) (citations omitted). "Prior to

[4] The Court believes Movant meant Collin County, where McKinney, Texas is located.

Rehaif, countless felons pleaded guilty under §922(g)(1) without ever objecting that the Government should be required to prove they knew they were convicted felons." *United States v. Lavalais*, 960 F.3d 180, 184 (5th Cir. 2020). As a result of the Supreme Court's holding in *Rehaif* interpreting 18 U.S.C. §922(g), the Government, in addition to the foregoing elements, is also required to prove that "the defendant knew he was a felon (or some other person covered by §922(g))." *Id.* at 186 (citing *Rehaif*, 139 S.Ct. at 2194). For purposes of this case, the Government was required to prove with respect to Count One that, at the time Movant possessed the firearm as alleged in the Indictment, he knew he had been convicted of a crime punishable by imprisonment for a term in excess of one year. *See id.*

Movant's *Rehaif* claim fails for multiple reasons. First, contrary to Movant's assertions, *Rehaif* merely held that a defendant must be aware of his relevant status, not that his status made it illegal for him to possess a firearm under §922(g). *See United States v. Bowens*, 938 F.3d 790, 797 (6th Cir. 2019) ("[I]n a prosecution under §922(g)(3), the Government arguably must prove that defendants knew they were unlawful users of a controlled substance, but not, as defendants appear to argue, that they knew unlawful users of controlled substances were prohibited from possessing firearms under federal law").

Next, Movant's claim that he was unaware he was a convicted felon is belied by the record. *See United States v. Hollingshed*, 940 F.3d 410, 416 (8th Cir. 2019) (fact that defendant served more than five years in prison, combined with a jailhouse phone call in which he attempted to find someone else to claim ownership of the firearm, showed he knew he had been convicted of "a crime punishable by imprisonment for a term exceeding one year" when he possessed a firearm).

> Demonstrating prejudice under *Rehaif* will be difficult for most convicted felons for one simple reason: Convicted felons typically know they're convicted felons. And they know the Government would have little trouble proving that they knew. So it is hard to imagine how their conviction or guilty plea was prejudiced by any error under *Rehaif*. As Justice Alito put it: "Juries will rarely doubt that a defendant convicted of a felony has forgotten that

> experience, and therefore requiring the prosecution to prove that the defendant knew that he had a prior felony conviction will do little for defendants." *Rehaif*, 139 S. Ct. at 2209 (Alito, J., dissenting).

United States v. Lavalais, 960 F.3d 180, 184 (5th Cir. 2020).

In pleading guilty, Movant affirmed the truthfulness of the Factual Basis which stated in part as follows:

> RUBEN AGUILERA has multiple felony convictions, including: (1) a 2006 conviction or Possession of a Controlled substance in Penalty Group 1, a Third Degree Felony for which AGUILERA was sentenced to 2 years confinement out of the 291st District Court, Dallas, Texas (Cause No. F-0647653); (2) a 2006 conviction for Theft of a Firearm, a State Jail Felony for which AGUILERA was sentenced to 9 months confinement out of the 291st District Court, Dallas, Texas (Cause No. F-0647649); and (3) a 2007 conviction for two counts of Burglary of Habitation, each a 2nd degree felony, and for each of which AGUILERA was sentenced to 6 years confinement, to run concurrently, out of the 366th District Court, McKinney, Texas (Cause Nos. 366-81692-06 and 366-81981). AGUILERA was a felon and was aware that he was a felon at all times relevant to the present case.

[docket number 28 at 1] (emphasis in original).

The Government, therefore, asserts that it was not required to prove that Movant knew he was prohibited from possessing a firearm or that he was aware of the precise law forbidding his conduct even though, according to the Government, this was proved. Similarly, the Sixth Circuit in *United States v. Bowens*, 938 F.3d 790, 797–98 (6th Cir. 2019), addressed and rejected outright a similar argument by a defendant that *Rehaif* requires the Government to prove that the defendant knew both his status and that he was prohibited from possessing a firearm.

Based on the Court's review of *Rehaif* and the reasoning in *Bowens*, the Court agrees that Movant's "reading of *Rehaif* goes too far" because such an argument "runs headlong into the venerable maxim that ignorance of the law is no excuse. *Rehaif* did not graft onto §922(g) an ignorance-of-the-law defense by which every defendant could escape conviction if he was

unaware of this provision of the United States Code." *Bowens*, 938 F.3d at 797. Movant does not claim that he did not know he was a convicted felon, only that he was unaware that possession of a firearm by a convicted felon was a crime. He admitted in open court, however, that he knowingly possessed the firearms as charged in the indictment and that before he possessed the firearms he had been convicted of felony offenses.

In sum, Movant is not entitled to relief because the record conclusively demonstrates that he knew he was a convicted felon and he was acting unlawfully by possessing firearms. Former trial counsel did not fail to advise him correctly under *Rehaif*, therefore, there was no ineffective assistance through deficient performance and no prejudice to Movant through former trial counsel's advice under *Rehaif*. Accordingly, this claim is denied.

4. The Supreme Court's *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S.Ct. 2111 (June 23, 2022) decision renders 18 U.S.C. §922(g)(1) unconstitutional.

In *Bruen*, the Supreme Court evaluated the constitutionality of the State of New York's firearm licensing regime, and in doing so rejected the two-step means-end test that the Courts of Appeals had "coalesced around" for analyzing Second Amendment challenges in the years since its decisions in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742 (2010). *Bruen*, 142 S.Ct. at 2125–26. In rejecting the test as involving "one step too many," the Court laid out the proper inquiry: "the government must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." *Id.* at 2127. This test "requires courts to assess whether modern firearms regulations are consistent with the Second Amendment's text and historical understanding." *Id.* at 2131. The Court further detailed the analysis a court must undertake in evaluating Second Amendment challenges, stating that,

> When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."

Id. at 2129–30 (quoting *Konigsberg v. State Bar of Cal.*, 366 U.S. 36 (1961)).

To apply the *Bruen* test, the Court must first consider whether the Second Amendment's plain text covers Movant's conduct. It does. Here, the government argues for a constrained reading of "the people" protected by the Second Amendment's protections. *See* U.S. CONST. amend. II. This Court has already found in another similar case that §922(g)(1) is constitutional because felons are excluded from the protections of the Second Amendment, *see, e.g., United States v. Collette*, No. MO:22-CR-00141, 630 F.Supp.3d 841, 2022 WL 4476790, at **5–8 (W.D. Tex. Sept. 25, 2022) (examining American tradition and finding that one could waive his rights—and so his place within "The People"—by committing violent crimes).

A District Court in Idaho recently found that:

> "history and tradition favors limitations on the definition of 'The People'—at least as it concerns individuals who have stepped outside the bounds of society by committing a felony. The Bill of Rights outlines how the government and the citizenry interact. There is nothing to suggest, however, that individuals who willingly step outside the political community, for whatever reason, should never face any consequences or diminution of any right. True, some rights should never be taken away, even if one of 'The People' is seen as unworthy to be in society and is incarcerated. These rights, which apply specifically to those facing prosecution, are immediately obvious by context. Other rights, however, may be curtailed based on a person's choices and are applicable only to 'The People' who choose to remain within the bounds of the political community. The Second Amendment represents such a situation."

United States v. Villalobos, No. 3:19-CR-00040-DCN, 2023 WL 3044770, at *6 (D. Idaho Apr. 21, 2023); *see also United States v. Hughes*, 2023 WL 4205226, at *7 (D.S.C. June 27, 2023) ("Moreover, courts have considered other references to 'the people' in the constitution and have concluded that 'the people' are those who are considered part of the political community—and convicted felons have traditionally been excluded from the political community.") (citing, *inter alia*, *Collette*, 630 F. Supp. 3d at 847–48). *Bruen* in no way made Movant's conviction for felon in possession of a firearm unconstitutional, therefore his claim to the contrary must be denied.

5. Following the Supreme Court's *United States v. Wooden*, 142 S.Ct. 1063 (2022) decision, he should be resentenced without the Armed Career Criminal enhancement.

As the Government correctly summarized, Movant

> also argues that the Supreme Court's decision in *United States v. Wooden*, 142 S.Ct. 1063 (2022), and subsequent guidance issued by the Department of Justice, require indictments to allege potential enhancements under the Armed Career Criminal Act ("ACCA"), and that a jury must find or the Defendant must admit that ACCA predicate offenses occurred on occasions different from one another; and that since those things did not happen in his case, he should be resentenced without the ACCA enhancement.

[docket number 53 at 3–4].

Movant pleaded guilty to a single count of Possession of a Firearm by a Convicted Felon, 18 U.S.C. §§ 922(g)(1) and 924(e)(1). The penalty for this offense varies depending on whether the ACCA applies. The maximum sentence for §922(g) offenses is ten years in prison; however, a minimum sentence of fifteen years is mandated if the ACCA applies. *Wooden v. United States*, 142 S.Ct. 1063, 1068 (2022). The ACCA applies when "(1) a §922(g) offender has previously been convicted of three violent felonies, and (2) those three felonies were committed on 'occasions different from one another.'" *Id.* at 1070 (quoting § 924(e)(1)).

The U.S. Supreme Court in *Wooden* expressly declined to address "whether the Sixth Amendment requires that a jury, rather than a judge, resolve whether prior crimes occurred on a single occasion ... because Wooden did not raise it." *Wooden*, 142 S. Ct. at 1068 n.3. Thus, *Wooden* did not impliedly or explicitly overrule the Fifth Circuit's holding in *United States v. Davis*, 487 F.3d 282, 288 (5th Cir. 2007), that the Sixth Amendment does not require a jury to find that a defendant's prior offenses were committed on occasions different from one another. Moreover, the Fifth Circuit recently rejected a similar argument by a defendant who asserted, based on *Wooden*, "that the facts of his prior convictions, which he did not admit in his plea, cannot be used against him via an ACCA enhancement unless submitted to a jury." *United States v. Williams*, 2023 WL 2239020, at *1 (5th Cir. Feb. 23, 2023) (per curiam).

In *Williams*, the Fifth Circuit concluded that this argument was "foreclosed by Supreme Court precedent." *Id.* (citing *Almendarez-Torres v. United States*, 523 U.S. 224, 226–27 (1998)). The Fifth Circuit also noted that "[t]he Supreme Court has repeatedly declined invitations to revisit *Almendarez-Torres*." *Williams*, 2023 WL 2239020, at *1 (citing *Apprendi v. New Jersey*, 530 U.S. 466, 488-90 (2000); *Alleyne v. United States*, 570 U.S. 99, 111 n.1 (2013); *and James v. United States*, 550 U.S. 192, 214 n.8 (2007)).

Movant also avers that the subsequent guidance issued by the Department of Justice, requires indictments to allege potential enhancements under the ACCA, and that a jury must find or the Movant must admit that ACCA predicate offenses occurred on occasions different from one another; and that since those things did not happen in his case, he should be resentenced without the ACCA enhancement.

This Court is bound by legal precedent, not the policy of the Department of Justice, which can vary from administration to administration. While *Williams* is not a published opinion,

it is persuasive authority and carries more weight than Movant's arguments based on ever-changing policy considerations at the Department of Justice—at least until such time as this issue is addressed by the U.S. Supreme Court.

Lastly, to the extent Movant argues that his appellate counsel was ineffective for failing to raise *Wooden*, *Wooden* was not decided until *after* Movant's direct appeal had been decided by the Fifth Circuit. The Fifth Circuit decided Movant's appeal on February 15, 2022, and *Wooden* was not decided until March 7, 2022. Regardless of what Movant now asserts, the law is clear: counsel is not expected to be clairvoyant and cannot be held as ineffective for failing to anticipate changes in the law. *United States v. Chapa*, 181 F.3d 96, n.21 (5th Cir. 1999) (collecting cases); *see also Nelson v. Estelle*, 642 F.2d 903, 908 (5th Cir. 1981); *and United States v. Garza*, 340 F. App'x 243, 244–45 (5th Cir. 2009) ("As *Fields* reminds, the law in this circuit makes clear that counsel was not required to make meritless objections under then-existing precedent, anticipate changes in the law, or raise every potentially meritless claim.") (citing *United States v. Fields*, 565 F.3d 290, 296–97 (5th Cir. 2009)). Therefore, as Movant's appellate counsel did not have the *Wooden* opinion available to argue on direct appeal, he cannot be said to have been ineffective for failing to argue such, although appellate counsel actually did raise the underlying arguments addressed in *Wooden* on direct appeal, and mentioned to the Fifth Circuit that *Wooden* was pending before the Supreme Court. *See* Appellant's Brief, *United States v. Aguilera*, No. 21-50767 (5th Cir. 2021). As Movant's claim fails both as a stand-alone *Wooden* claim and as an ineffective assistance of appellate counsel claim for failure to show deficient performance, this claim is denied.

VI. Discussion of claim raised at evidentiary hearing—actual innocence claim

Lastly, at his evidentiary hearing, Movant raised the prospect of his actual innocence. Despite the fact that he pleaded guilty, Movant asserted that he was actually innocent of the offense, the same one he swore under oath he committed.

During cross-examination at the evidentiary hearing, the following exchanges took place:

> Q. Now, moving, fast forward to this hearing, purposes of these hearings here today you're not claiming you're actually innocent of this charge.
> Correct?
> A. By the way that I interpret the law --
> Q. Sir, that's a yes or no. Are you innocent --
> A. Yes.
> Q. You're innocent.
> A. Yes.
> ...
>
> Q. So now you're claiming you're innocent of this. You did not possess these firearms. Correct?
> A. Yes.

[Rough draft of evidentiary hearing at 15].

> Q. I'll try again. You're now here today testifying asserting actual innocence for the first time. Correct?
> A. Yes, ma'am.

[*Id.* at 29]. Then the Court tried to clarify why Movant would plead guilty if he was actually innocent.

> THE COURT: So just so I'm clear, Mr. Aguilera, you entered a guilty plea knowing you were innocent of this crime.
> A. Yes, sir.
> Q. You did? And you knew you were under oath at the time. Right?
> A. Yes, sir.
> Q. Why would you do that?
> A. Because I was under the impression that I was going to get a certain range.
> Q. Okay. So you did it so you could limit your exposure. Right?
> A. Can you explain that? How does that --
> Q. Sure. You did it so you could get a certain range. As opposed to going to trial and trying to see if you could win, you entered a guilty plea, knowing you were

innocent, so that you could get a certain plea -- a sentencing range. Right?

A. Yes, sir.

Q. So you were limiting your exposure. But basically hoping you're going to limit your exposure, hoping nobody else find out about the other conviction, because the Judge actually [told] you in the hearing, right, that if you have a third conviction, that can up your exposure. That can mean your sentence [would be] higher. He told you that as you're under oath, pleading guilty, you know you're innocent, and you're thinking I assume that's what you're doing, because he tells you all that, and you're not impaired. You can understand him. Right?

A. Yes.

Q. So you know when he said that, you probably had to be thinking well I hope they don't find that other conviction because then this is going to all be for [naught].

A. No, sir, I didn't think about it like that.

Q. Didn't think about it?

A. Not like that. That's not the context.

Q. You knew you were actually innocent when you were pleading under oath that you were -- you knew you were committing perjury basically. Right?

A. I didn't know I was committing perjury.

Q. You didn't interpret it that way telling a lie under oath as perjury. Right?

A. No. I don't --

Q. Of course not.

[*Id.* at 54–56] (corrections made).

While a claim of actual innocence may provide "a gateway through which a petitioner may pass" when the limitations period has elapsed, "tenable actual-innocence gateway pleas are rare." *McQuiggin v. Perkins*, 133 S.Ct. 1924, 1928 (2013). To meet the threshold requirement, a petitioner must present new evidence in support of his claim and "'show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence.'" *Id.* at 1935 (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)). And additionally, Movant is in no way barred by any limitations period having elapsed.

Here, Movant's assertion of actual innocence is controverted by his previous stipulation of the applicable facts at the time of his guilty plea. [*See generally* docket number 28]. Even if Movant could present a cogent argument for such, actual innocence is not cognizable as a freestanding federal habeas claim. *Reed v. Stephens*, 739 F.3d 753, 766–68 (5th Cir. 2014) (precluding freestanding innocence claim); *Foster v. Quarterman*, 466 F.3d 359, 367–68 (5th Cir. 2006) ("[A]ctual-innocence is not an independently cognizable federal-habeas claim."); *see also United States v. Fields*, 761 F.3d 443, 479 (5th Cir. 2014) ("[W]e note that our caselaw does not recognize freestanding actual innocence claims."). Thus, Movant's final claim fails and is denied.

VII. Certificate of appealability

Because the Motion to Vacate filed in this case is governed by the AEDPA, codified as amended at 28 U.S.C. §2253, a certificate of appealability (COA) is required before an appeal may proceed. *See Hallmark v. Johnson*, 118 F.3d 1073, 1076 (5th Cir. 1997) (noting that actions filed under either 28 U.S.C §2254 or §2255 require a COA). "This is a jurisdictional prerequisite because the COA statute mandates that '[u]nless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals ...'" *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (citing 28 U.S.C. §2243(c)(1)).

A COA will not issue unless the Movant makes "a substantial showing of the denial of a constitutional right," pursuant to 28 U.S.C §2253(c)(2), which requires a Movant to demonstrate "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Tennard v. Dretke*, 542 U.S. 274, 282 (2004) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). Under the controlling standard, this requires a Movant to show "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement

to proceed further.'" *Miller-El*, 537 U.S. at 336. Where denial of relief is based on procedural grounds, the movant must show not only that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right," but also that they "would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 484.

A district court may deny a COA, *sua sponte*, without requiring further briefing or argument. *See Alexander v. Johnson*, 211 F.3d 898, 898 (5th Cir. 2000). For all of the reasons discussed in the opinion, the Court concludes that jurists of reason would not debate whether any ruling in this case was correct or whether the Movant stated a valid claim of the denial of a constitutional right. Therefore, a COA will not issue in this case.

VIII. Conclusion

After an evidentiary hearing, this Court denies all of Movant's claims, as well as denies a COA, and dismisses this case with prejudice.

It is so **ORDERED**.

SIGNED this 13th day of October, 2023.

DAVID COUNTS
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
MIDLAND/ODESSA DIVISION

UNITED STATES OF AMERICA	§	
	§	
vs.	§	NO: MO:21-CR-00062(1)-DC
	§	MO:22-CV-00171
(1) RUBEN AGUILERA	§	

FINAL JUDGMENT

On this day the Court entered an Order denying Movant's Motion to Vacate, Set Aside or Correct Sentence, filed pursuant to 28 U.S.C. §2255, for reasons clarified therein. The Court now enters its final judgment pursuant to Rule 58 of the Federal Rules of Civil Procedure.

It is hereby **ORDERED** that Movant's §2255 is **DENIED AND DISMISSED**.

It is further **ORDERED** that Movant's §2255 is **DISMISSED WITH PREJUDICE**.

It is lastly **ORDERED** that all other pending motions, if any, are **DENIED AS MOOT AND A CERTIFICATE OF APPEALABILITY WILL NOT ISSUE IN THIS CASE.**

It is so **ORDERED**.

SIGNED this 13th day of October, 2023.

DAVID COUNTS
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
MIDLAND/ODESSA DIVISION

UNITED STATES OF AMERICA	§	
	§	
vs.	§	NO: MO:21-CR-00062(1)-DC
	§	
(1) RUBEN AGUILERA	§	

ORDER DENYING MOVANT'S MOTION TO PROCEED *IN FORMA PAUPERIS* ON APPEAL [DOCKET NUMBER 75]

Before the Court is Movant's Application to Proceed *in forma pauperis* (*IFP*) from this Court's denial of his 28 U.S.C. §2255 on the merits, after holding an evidentiary hearing. [docket number 75].

The standards governing *in forma pauperis* motions are set forth in 28 U.S.C. §1915(a). The motion must state "the nature of the action, defense or appeal and affiant's belief that he is entitled to redress." 28 U.S.C. §1915(a). The district court may deny leave to proceed *in forma pauperis* if an appeal is not taken in good faith. *See Cay v. Estelle*, 789 F.2d 318, 326 (5th Cir. 1986). An appeal is taken in good faith if it presents an arguable issue on the merits and therefore is not frivolous. *See Coppedge v. United States*, 369 U.S. 438, 445 (1962); *Howard v. King*, 707 F.2d 215, 219 (5th Cir. 1983). A movant must demonstrate the existence of a non-frivolous issue for appeal. *See Payne v. Lynaugh*, 843 F.2d 177, 178 (5th Cir. 1988). An action is frivolous when there is no arguable legal or factual basis for the claim. *Neitzke v. Williams*, 490 U.S. 319, 325 (1989). Such is the case here.

Movant fails to present a good faith, non-frivolous, arguable issue for appeal. Accordingly, this Application to Proceed *IFP* on Appeal is **DENIED**. **[docket number 75]**.

Although this court has certified that the appeal is not taken in good faith, Movant may challenge this finding under Baugh *v. Taylor*, 117 F.3d 197 (5th Cir. 1997), by filing a separate motion to proceed *IFP* on appeal with the Clerk of the Court, U.S. Court of Appeals for the Fifth Circuit, within 30 days of this order.

It is so **ORDERED**.

SIGNED this 28th day of November, 2023.

DAVID COUNTS
UNITED STATES DISTRICT JUDGE

A•P•P•E•N•D•I•X D

United States Court of Appeals for the Fifth Circuit

No. 23-50778

United States Court of Appeals
Fifth Circuit
FILED
June 6, 2024
Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

RUBEN AGUILERA,

Defendant—Appellant.

Application for Certificate of Appealability
The United States District Court
for the Western District of Texas
USDC Nos. 7:22-CV-171, 7:21-CR-62-1

ORDER:

Ruben Aguilera, federal prisoner #30794-509, seeks a certificate of appealability ("COA") to challenge the denial of his 28 U.S.C. § 2255 motion to vacate his conviction and sentence for possession of a firearm by a convicted felon.

Aguilera contends that (1) his guilty plea was not knowing and voluntary because his counsel performed ineffectively by advising him that the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), would not apply to his sentence; (2) his counsel was ineffective for failing to advise him of the government's burden to show that he knew that he belonged to a class

for which firearms possession was prohibited; (3) his conviction was unconstitutional under *New York Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022); and (4) he should be resentenced without the ACCA enhancement following *United States v. Wooden*, 595 U.S. 360 (2022), and the grant of certiorari in *Erlinger v. United States*, 144 S. Ct. 419 (2023), because his prior offenses were not admitted by him or proven to a jury. Aguilera does not reprise in his COA motion, and therefore abandons, his claim that his appellate counsel was ineffective for failing to argue on direct appeal that he should be resentenced without the ACCA enhancement because his prior offenses were not admitted by him or proven to a jury. *See Hughes v. Johnson*, 191 F.3d 607, 613 (5th Cir. 1999); *Yohey v. Collins*, 985 F.2d 222, 224–25 (5th Cir. 1993).

To obtain a COA, Aguilera must show that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see* 28 U.S.C. § 2253(c)(2). He has not made that showing. Accordingly, his motion for a COA is DENIED. His motion to proceed *in forma pauperis* is also DENIED.

JERRY E. SMITH
United States Circuit Judge

A•P•P•E•N•D•I•X E

CASE NO. 366-81981-06 COUNT Single INCIDENT NO./TRN: 9097129745/A002

THE STATE OF TEXAS	§	IN THE 366TH JUDICIAL
V.	§	DISTRICT COURT
RUBEN OSCAR AGUILERA	§	COLLIN COUNTY, TEXAS
STATE ID NO.: TX06592231	§	

JUDGMENT OF CONVICTION BY COURT—WAIVER OF JURY TRIAL

Judge Presiding:	HON. Greg Brewer	Date Judgment Entered:	May 18, 2007
Attorney for State:	Yoon Kim	Attorney for Defendant:	Charles Chatman

Offense for which Defendant Convicted:
Burglary of Habitation

Charging Instrument: INDICTMENT	Statute for Offense: 30.02 (c)(2) PC	
Date of Offense: April 28, 2006		
Degree of Offense: 2ND DEGREE FELONY	Plea to Offense: GUILTY	Findings on Deadly Weapon: N/A

Terms of Plea Bargain:
SIX (6) years confinement in the INSTITUTIONAL DIVISION, TDCJ; Fine $None; Restitution $None; Court costs; Waive right to appeal and right to file or urge any motion for a new trial

Plea to 1st Enhancement Paragraph:	N/A	Plea to 2nd Enhancement/Habitual Paragraph:	N/A
Findings on 1st Enhancement Paragraph:	N/A	Findings on 2nd Enhancement/Habitual Paragraph:	N/A
Date Sentence Imposed:	May 18, 2007	Date Sentence to Commence:	May 18, 2007
Punishment and Place of Confinement:	Six (6) years INSTITUTIONAL DIVISION, TDCJ		

THIS SENTENCE SHALL RUN Concurrently.

☐ SENTENCE OF CONFINEMENT SUSPENDED, DEFENDANT PLACED ON COMMUNITY SUPERVISION FOR N/A years.

Fine:	Court Costs:	Restitution:	Restitution Payable to:
$ None	$ 286.00	$ None	☐ VICTIM (see below) ☐ AGENCY/AGENT (see below)

Sex Offender Registration Requirements do not apply to the Defendant. TEX. CODE CRIM. PROC. chapter 62
The age of the victim at the time of the offense was N/A .

Time Credited:
If Defendant is to serve sentence in TDCJ, enter incarceration periods in chronological order.
From 5-29-06 to 5-18-07 From _____ to _____ From _____ to _____
From _____ to _____ From _____ to _____ From _____ to _____ 354 days
If Defendant is to serve sentence in county jail or is given credit toward fine and costs, enter days credited below.

CASE NO. 366-81692-06 COUNT Single INCIDENT NO./TRN: 9097129745/A001

THE STATE OF TEXAS	§	IN THE 366TH JUDICIAL
	§	
v.	§	DISTRICT COURT
	§	
RUBEN OSCAR AGUILERA	§	COLLIN COUNTY, TEXAS
	§	
STATE ID NO.: TX06592231	§	

JUDGMENT OF CONVICTION BY COURT—WAIVER OF JURY TRIAL

Judge Presiding:	HON. Greg Brewer	Date Judgment Entered:	May 18, 2007
Attorney for State:	Yoon Kim	Attorney for Defendant:	Charles Chatman

Offense for which Defendant Convicted:
Burglary of Habitation

Charging Instrument: INDICTMENT	Statute for Offense: 30.02 (c)(2) PC

Date of Offense:
March 15, 2006

Degree of Offense: 2ND DEGREE FELONY	Plea to Offense: GUILTY	Findings on Deadly Weapon: N/A

Terms of Plea Bargain:
SIX (6) years confinement in the INSTITUTIONAL DIVISION, TDCJ; Fine $None; Restitution $None; Court costs; Waive right to appeal and right to file or urge any motion for a new trial

Plea to 1st Enhancement Paragraph:	N/A	Plea to 2nd Enhancement/Habitual Paragraph:	N/A
Findings on 1st Enhancement Paragraph:	N/A	Findings on 2nd Enhancement/Habitual Paragraph:	N/A

Date Sentence Imposed:	May 18, 2007	Date Sentence to Commence:	May 18, 2007

Punishment and Place of Confinement: Six (6) years INSTITUTIONAL DIVISION, TDCJ

THIS SENTENCE SHALL RUN Concurrently.

☐ SENTENCE OF CONFINEMENT SUSPENDED, DEFENDANT PLACED ON COMMUNITY SUPERVISION FOR N/A years.

Fine:	Court Costs:	Restitution:	Restitution Payable to:
$ None	$ 284.00	$ None	☐ VICTIM (see below) ☐ AGENCY/AGENT (see below)

Sex Offender Registration Requirements do not apply to the Defendant. TEX. CODE CRIM. PROC. chapter 62

The age of the victim at the time of the offense was N/A .

Time Credited:
If Defendant is to serve sentence in TDCJ, enter incarceration periods in chronological order.
From 5-29-06 to 5-18-07 From _____ to _____ From _____ to _____ 354 days
From _____ to _____ From _____ to _____ From _____ to _____
If Defendant is to serve sentence in county jail or is given credit toward fine and costs, enter days credited below.

A·T·T·A·C·H·M·E·N·T 02

IN THE SUPREME COURT
OF THE UNITED STATES OF AMERICA
WASHINGTON, D.C.

RUBEN AGUILERA, Petitioner; v. UNITED STATES OF AMERICA, Respondent.	PETITION FOR WRIT OF CERTIORARI ON APPEAL FROM THE FIFTH CIRCUIT CRIM NO. 7:21-cr-062 (WDTX) CIV NO. 7:22-cv-171 (WDTX) APPEAL NO. 23-50778

Comes RUBEN AGUILERA, Petitioner ("Aguilera"), and respectfully submits this Petition for a Writ of Certiorari to appeal the denial of a Certificate of Appealability ("COA") from the Fifth Circuit.

Ruben Aguilera, pro se
Reg. No. 30794-509
FCI Beaumont Low
P.O. Box 26020
Beaumont, TX 77720