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

TYREE MILLER,	:	
Petitioner,	:	
	:	**Criminal No. 14-0648**
v.	:	**Civil No. 19-4461**
	:	
UNITED STATES OF AMERICA	:	
Respondent.	:	

MEMORANDUM

I. Introduction

Petitioner, Tyree Miller, brings a motion to vacate his conviction pursuant to 28 U.S.C. § 2255. Petitioner contends that his conviction for violating 18 U.S.C. § 922(g)(1) for possessing a firearm as a felon, an offense for which he pled guilty, should be vacated in light of the Supreme Court's holding in *Rehaif v. United States*, 139 S. Ct. 2191 (2019).

Having reviewed the filings of Petitioner and the Government, as well as the record in the case, the Court concludes that no evidentiary hearing will be held on the matters asserted in Petitioner's Motion to Vacate because the filings and record of the case conclusively demonstrate that Petitioner is not entitled to relief on this ground.

II. Background

Petitioner pled guilty to possessing a firearm as a felon in violation of 18 U.S.C. § 922(g)(1) before the Honorable Legrome D. Davis on July 19, 2016[1] in accordance with a plea agreement. At that plea hearing, the Government stated that the evidence would prove the following:

> On December 3rd of 2014, a U.S. Magistrate Judge authorized a search warrant for 2515 North Colorado Street in Philadelphia. The property is an abandoned building owned by the Philadelphia Housing Authority. The warrant was based largely on the observations of a known reliable informant who had been in the residence. According to the informant, the defendant, Tyree Miller, along with two other men, used the property at 2515 North Colorado as a drug stash house, and Miller also resided there as did one of the other two men. The informant had seen firearms on the property.
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> On December 4th of 2014, at approximately 6:05 a.m., ATF agents and task force officers searched the property. Teams of agents went to both the front and back doors of the home. The agents at the front door knocked on the door, announced their authority and purpose, got no answer, and went into the property. As those agents entered the front door of the residence, Tyree Miller ran out of the back door shoeless, wearing white socks, gray sweatpants, black hooded sweatshirt, and a black knitted cap. The agents posted at the back of the property detained him. Miller identified himself to the agents by name and said that he lived at 2515 North Colorado Street.
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> Agents cleared the house. There was nobody else inside. Miller was escorted into the first-floor middle room of the house where he identified a pair of black boots as belonging to him. Mr. Miller put on the boots and was placed in a Philadelphia police vehicle while the agents completed their search.

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[1] This matter was reassigned at random pursuant to Local Rule 50.1 of the Local Rules of Criminal Procedure from the calendar of the Honorable Legrome D. Davis to the calendar of the Honorable Chad F. Kenney on September 26, 2019. ECF No. 27.

In the first-floor middle room area of the house, agents saw a small electric space heather and a lamp without a lampshade, both turned on. There was also a small couch, sofa bed, a chair, a table, and blankets near the heater and lamp.

Under the table, agents found an open Adidas bookbag that contained an Intratec model TEC DC-9 9-millimeter pistol with an obliterated serial number. An ammunition magazine containing 20 rounds of 9-millimeter ammunition was in the magazine well of the gun. Near the bookbag, there was another pair of black men's boots. There were toiletries, including toothbrushes, toothpaste, a hairbrush, bars of soap, and a pack of condoms on the tabletop. There was a black vest hung over the chair, and a charging cell phone was found resting on the chair. Mr. Miller said the phone was his.

The agents also recovered some drug packaging and saw a plate and razor sitting out. Mr. Miller had over $700 of cash in his pocket. The other rooms of the house were basically empty. There were no appliances in the kitchen or bathroom, and the house was in a state of disrepair, including a second-floor room with a missing window. Numerous other windows of the house were boarded up.

Both the heater and lamp were plugged into a power strip which was plugged into an electric cord that ran outside of the rear of 2515 North Colorado Street and into the rear of 2519 North Colorado Street. Agents later learned that the property at 2519 North Colorado Street is owned by Mr. Miller's mother, and that Mr. Miller had provided its address to police as his residence in prior arrests. Agents also recovered a key to the padlock securing 2519 North Colorado Street during their search of 2515.

An agent who is an expert in the interstate nexus of firearms confirmed that the gun seized in the search had been manufactured outside of Pennsylvania and thus had a nexus to interstate commerce. Agents also verified that Mr. Miller had a prior conviction for a crime carrying a penalty in excess of one year in prison and thus was prohibited from possessing firearms.

This statement of evidence is submitted with respect as required by Federal Rule of Criminal Procedure 11(b)(3). It does not include additional evidence that would have been presented at trial, nor

> information relevant to the admissibility of the physical evidence and the sentencing.

Plea Hr'g Tr. at 25:14–28:8. Petitioner's attorney confirmed the accuracy of those facts, *id.* at 28:9-17, and the Petitioner himself admitted to the Court that he decided to plead guilty because the gun was his, he was a convicted felon, and he wanted to be honest, *id.* at 5:6-18.

As the plea agreement was made pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C), the parties agreed that the appropriate sentence for this violation was 110 months incarceration, 3 years supervised release, and a fine and special assessment. ECF No. 20 at pp. 1-2 (the "Plea Agreement"). In addition, the Government agreed to forgo presenting proof of Petitioner's prior convictions, which would otherwise have qualified him as an "armed career criminal" pursuant to 18 U.S.C. § 924(e) and consequently subjected Petitioner to a mandatory minimum term of 15 years imprisonment. Plea Agreement at p. 2. Moreover, the Government also agreed to stipulate that Petitioner had assisted with authorities in the investigation or prosecution of his own misconduct by timely notifying the Government of his intent to plead guilty and thus, there should be a one-level downward adjustment made at sentencing under USSG § 3E1.1(b). *Id.* at p. 5.

In turn, Petitioner agreed that if the Court imposed the agreed upon appropriate sentence, he would not file any appeal of the conviction or sentence, nor that he would collaterally attack the conviction, sentence, or any other matter

relating to that prosecution either. *Id.* at p. 6. Petitioner did however retain his right to file a claim, if otherwise allowed by law, that an attorney who represented Petitioner during the course of that criminal case provided constitutionally ineffective assistance. *Id.*

The Court accepted Petitioner's plea of guilty, Plea Hr'g Tr. at 29:1-5, and on October 19, 2016, sentenced Petitioner to 110 months imprisonment, ECF No. 25 at p. 2.

Petitioner filed the instant motion *pro se* on September 25, 2019, pursuant to 28 U.S.C. § 2255, arguing that his conviction should be vacated because the Government did not set forth a factual basis at the plea hearing showing that Petitioner knew of his status as a felon, precluding him from possessing a firearm under § 922(g)(1), which the Supreme Court held to be necessary in *Rehaif v. United States*, 139 S. Ct. 2191 (2019) on June 21, 2019. The Government argues that Petitioner is not entitled to relief because his claim is procedurally defaulted. ECF No. 29 at p. 4.

III. Standard of Review

Under 28 U.S.C. § 2255, a prisoner in federal custody may collaterally attack a sentence if "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." 28 U.S.C. § 2255(a). An evidentiary hearing is required for a § 2255 motion unless the filings and record of the case conclusively demonstrate that the petitioner is not entitled to relief. 28 U.S.C. § 2255(b); *see also Gov't of the Virgin Islands v. Forte*, 865 F.2d 59, 62 (3d Cir. 1989). It is a relatively light burden for a petitioner to demonstrate that an evidentiary hearing is warranted. *See Warren v. United States*, No. 13-270, 2019 WL 4010559, at *2 (W.D. Pa. Aug. 26, 2019) (citing *United States v. Askew*, No. 09-64, 2010 WL 324447, at *5 (W.D. Pa. Jan. 21, 2010)). In determining whether an evidentiary hearing is required, "the court must accept the truth of the movant's factual allegations unless they are clearly frivolous on the basis of the existing record." *United States v. Booth*, 432 F.3d 542, 545 (3d Cir. 2005).

The petitioner bears the burden of proving that his conviction is illegal. *United States v. Davies*, 394 F.3d 182, 189 (3d Cir. 2005). Further, a petitioner "must clear a significantly higher hurdle than would exist on direct appeal" to obtain relief. *See United States v. Cleary*, 46 F.3d 307, 310 (3d Cir. 1995) (quoting *United States v. Frady*, 456 U.S. 152, 166 (1982)). However, because Petitioner has proceeded *pro se* in this matter, the Court will liberally construe his pleadings and filings. *See Etselle v. Gamble*, 429 U.S. 97, 106 (1976).

IV. Discussion

Petitioner contends that his conviction for violating 18 U.S.C. § 922(g) for being a felon in possession of a firearm, an offense for which he pled guilty, should be vacated in light of the Supreme Court's holding in *Rehaif v. United States*, 139 S. Ct. 2191 (2019). In that case, Rehaif was alleged to have been unlawfully present in the United States and in possession of a firearm in violation of 18 U.S.C. § 922(g) and § 924(a)(2). *Id.* at 2194. At his trial, Rehaif objected to the trial judge's instruction to the jury that the "United States was not required to prove" that Rehaif "knew that he was illegally or unlawfully in the United States." *Id.* Rehaif was convicted, and on appeal the Eleventh Circuit held that the jury instruction was correct. *Id.* at 2195.

The Supreme Court reversed, holding that in order to convict a defendant for a violation of 18 U.S.C. § 922(g), "the Government must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm." *Id.* at 2200.

The Government acknowledges that Petitioner permissibly pursues this issue under § 2255, which allows relief where a court decision changing the law after the conviction makes clear that the "conviction and punishment were for an act that the law does not make criminal." *Davis v. United States*, 417 U.S. 333, 346 (1974); ECF No. 29 at p. 4. The Government further acknowledges that Petitioner's claim

is timely, as it was filed within one year of the *Rehaif* decision. *Id.* However, the Government argues that because Petitioner did not previously raise this claim, it is procedurally defaulted. *Id.* The Court agrees.

A. Petitioner failed to assert this claim on direct appeal and it is thus defaulted.

"[A]s a general rule, where a defendant has failed to raise a claim on direct review, the claim may be raised in habeas only if the defendant can demonstrate either cause and prejudice, or actual innocence." *Parkin v. United States*, 565 F. App'x 149, 151 (3d Cir. 2014) (citing *Bousley v. United States*, 523 U.S. 614, 621 (1998)). "The procedural-default rule is neither a statutory nor a constitutional requirement, but it is a doctrine adhered to by the courts to conserve judicial resources and to respect the law's important interest in the finality of judgments." *Massaro v. United States*, 538 U.S. 500, 504 (2003).

Petitioner did not raise this claim on direct appeal. Thus, in order for Petitioner to obtain collateral review on his procedurally defaulted claim, he must show either (1) cause for the procedural default and actual prejudice, or (2) that he is actually innocent. *Parkin*, 565 F. App'x at 151 (citing *Bousley*, 523 U.S. at 622); *United States v. Frady*, 456 U.S. 152, 167-68 (1982) (holding, in the context of a § 2255 motion raising issues that were not raised on direct appeal, that "to obtain collateral relief based on trial errors to which no contemporaneous objection was made, a convicted defendant must show both (1) 'cause' excusing his double

procedural default, and (2) 'actual prejudice' resulting from the errors of which he complains").

Petitioner states that he did not raise this issue on direct appeal because "[t]here was no law at the time to support my claims." ECF No. 26 at p. 4. Petitioner also states elsewhere in his petition that he "also did not have knowledge at all." *Id.* In light of Petitioner's proceeding *pro se*, the Court will thus consider Petitioner's statements as asserting cause for the procedural default and that he is actually innocent of violating § 922(g)(1) because he did not have knowledge of his status as a felon.

1. Petitioner does not and cannot show cause for the procedural default.

Under the first prong of the *Frady* test, a petitioner "must show cause existed for the procedural default, *i.e.* failure to raise the issue at trial and on appeal. To establish cause for procedural default, a defendant must show that some objective factor external to the defense impeded counsel's efforts to raise the claim." *United States v. Pelullo*, 399 F.3d 197, 223 (3d Cir. 2005), *as amended* (Mar. 8, 2005) (quotations and citations omitted). "Examples of external impediments which have been found to constitute cause in the procedural default context include interference by officials, a showing that the factual or legal basis for a claim was not reasonably available to counsel, and ineffective assistance of counsel." *Id.* (quotations and citations omitted).

Petitioner asserts that he did not raise this issue on a direct appeal because "[t]here was no law at the time to support my claims." ECF No. 26 at p. 4. But, as the Government contends "[f]utility 'cannot constitute cause if it means simply that a claim was unacceptable to that particular court at that particular time.'" *Parkin*, 565 F. App'x at 152 (quoting *Bousley*, 523 U.S. at 623 (internal quotation marks omitted)). The claim raised in *Rehaif* was not novel at the time Petitioner could have raised the issue at his plea hearing or at the time he could have filed a direct appeal. *See id.* (citing *Bousley*, 523 U.S. at 622 (the "reasonably available" inquiry focuses on whether the claim was "novel," not whether the claim departed from "settled law")). Indeed, Rehaif began litigating this issue at least five months before Petitioner even pled guilty in this case. *See United States v. Ali Rehaif*, No. 16-CR-3-28, 2016 WL 2770878, at *1 (M.D. Fla. May 12, 2016).

Thus, the issue Petitioner raises now was not so novel so as to establish cause sufficient to excuse Petitioner's procedural default. Rather, the issue was most likely not raised at either the plea hearing or on direct appeal in the instant case because unlike in *Rehaif*, Petitioner's knowledge of the status which prohibited him from possessing a firearm under § 922(g) was obvious whereas in *Rehaif*, a good faith argument could have been made that Rehaif was unaware of his status as an alien unlawfully in the United States.

Moreover, though Petitioner does not appear to assert that cause exists because of any ineffective assistance of counsel claims, even if Petitioner had made such an argument, the Court would find it unpersuasive. First, counsel need not raise every possible objection or issue in order to be deemed "effective" under the relevant case law. Second, this Circuit has held that "failing to predict a change in the law is not deficient performance." *United States v. Doe*, 810 F.3d 132, 154 (3d Cir. 2015) (citing *Sistrunk v. Vaughn*, 96 F.3d 666, 672 (3d Cir. 1996)); *see also*, *Murray v. Carrier*, 477 U.S. 478, 488 (1986) (finding no inequity in requiring petitioner to bear the risk of attorney error that results in a procedural default so long as counsel's performance is not constitutionally ineffective under *Strickland*); *Coleman v. Thompson*, 501 U.S. 722, 753 (1991) ("Attorney ignorance or inadvertence is not 'cause' [for the procedural default] because the attorney is the petitioner's agent when acting, or failing to act, in furtherance of the litigation, and the petitioner must 'bear the risk of attorney error.'"). And finally, as previously discussed, Petitioner's counsel did not likely raise the issue of whether Petitioner had knowledge of his status as a convicted felon when he possessed the firearm because it would have been ill-advised to raise such a disingenuous argument to the court.

Because Petitioner has wholly failed to and cannot show cause as to his procedural default on the claim at issue, the Court need not consider whether

Petitioner can establish actual prejudice. Thus, the Court next considers whether Petitioner can make a threshold showing as to his actual innocence.

2. *Petitioner does not and cannot make a threshold showing of actual innocence.*

"To establish actual innocence, a petitioner must demonstrate that, in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him." *United States v. Davies*, 394 F.3d 182, 191 (3d Cir. 2005) (internal quotation marks and citations omitted). "New reliable evidence is almost always required to establish actual innocence." *Id.* (quoting *Sweger v. Chesney*, 294 F.3d 506, 523 (3d Cir. 2002). However, "in certain circumstances, the lack of new evidence is not necessarily fatal to an argument that a petitioner is actually innocent." *Id.* (quoting *Cristin v. Brennan*, 281 F.3d 404, 420 (3d Cir. 2002). In *Bousley v. United States*, 523 U.S. 614 (1998), for example, "the Supreme Court held that a habeas petitioner may demonstrate 'actual innocence' by pointing to post-conviction decisions 'holding that a substantive criminal statute does not reach [his] conduct.'" *Id.* (quoting *Bousley*, 523 U.S. at 620).

As the Supreme Court notes, Petitioner here would have to make an actual innocence showing, not mere legal insufficiency, in order to overcome the procedural default. *Bousley*, 523 U.S. at 623. "In other words, the Government is not limited to the existing record to rebut any showing that petitioner might make. Rather . . . the Government should be permitted to present any admissible evidence

of petitioner's guilt even if that evidence was not presented during petitioner's plea colloquy and would not normally have been offered before our decision in Bailey. In cases where the Government has forgone more serious charges in the course of plea bargaining, petitioner's showing of actual innocence must also extend to those charges." *Id.* at 624.

Petitioner asserts that he "also did not have knowledge at all." ECF No. 26 at p. 4. Granting *pro se* Petitioner due leeway, the Court assumes that this statement expresses Petitioner's contention that he is factually innocent of violating § 922(g)(1) and consequently, his claim now is not procedurally defaulted. However, Petitioner's claim of innocence flies in the face of the existing record. Section 922(g)(1) defines the relevant status in this matter as any person "who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year." 18 U.S.C. §922(g)(1). Thus, in order for the Court to find that it is more likely than not that no reasonable juror would have convicted Petitioner of the charged crime, the Court must find that Petitioner was unaware that he had been convicted of a crime punishable by imprisonment for a term exceeding one year.

However, the undisputed presentence report[2] established that Petitioner had been previously convicted three times for drug trafficking offenses in the Philadelphia Court of Common Pleas, all of which allowed a sentence of more than one year. PSR at pp. 8-9. Moreover, for each of those crimes Petitioner was sentenced to a maximum term of more than one year (23 months) and in one of those cases, he was barred from parole eligibility for at least 18 months. *Id.* Indeed, Petitioner was still on probation for those offenses when he committed the instant violation. *Id.* at p. 9. Moreover, Petitioner signed the colloquy form for his guilty plea to those three drug trafficking offenses, which clearly stated that he was pleading guilty to offenses punishable by imprisonment for a term exceeding one year. ECF No. 29-1 at p. 2.

Consequently, it is indisputable that Petitioner knew that he had been previously convicted of a crime punishable by more than one year of imprisonment when he possessed the firearm at issue. Accordingly, the Court finds that Petitioner has not and cannot make a showing of actual innocence and thus, his claim for vacating his conviction pursuant to § 2255 is barred as procedurally defaulted.

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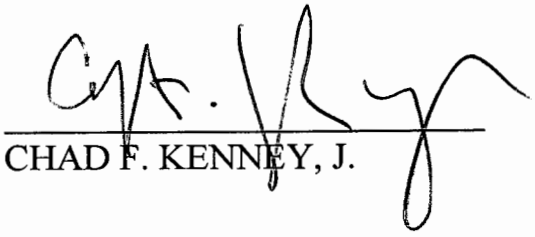
[2] In Petitioner's Sentencing Memorandum, Petitioner noted that the defense only objected to the presentence report in so far as it stated that Petitioner should be sentenced pursuant to a guideline range of 180 to 188 months. ECF No. 23 at pp. 1-2.

V. Conclusion

For the foregoing reasons, the Court concludes that the filings and record of the case conclusively demonstrate that Petitioner is not entitled to relief on the ground asserted. Accordingly, the ground for relief asserted in Petitioner's Motion to Vacate (ECF No. 26) will be denied with prejudice. An appropriate order will follow.

DATED: 11-22-2019

BY THE COURT:



CHAD F. KENNEY, J.

cc: U.S. Attorney - ECF
Pro Se Petitioner - USPS

IN THE UNITED STATES DISTRICT COURT
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	:	
UNITED STATES OF AMERICA,	:	
Respondent.	:	

ORDER

AND NOW, on this 22nd day of November 2019, upon consideration of Petitioner's Motion to Vacate (ECF No. 26) and the Government's Response (ECF No. 29), and in accordance with the accompanying memorandum, it is hereby **ORDERED** that Petitioner's Motion to Vacate (ECF No. 26) is **DENIED with prejudice**.

BY THE COURT:

CHAD F. KENNEY, J.

c.c: U.S. Attorney – ECF
Pro Se Petitioner – USPS