

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION**

WATKINS BROWN,	:	
	:	
Petitioner,	:	
	:	CASE NO. 4:18-CR-00019-CDL-MSH
v.	:	CASE NO. 4:19-CV-00208-CDL-MSH
	:	28 U.S.C. § 2255
UNITED STATES OF AMERICA,	:	
	:	
Respondent.	:	

REPORT AND RECOMMENDATION

Pending before the Court are Petitioner Watkins Brown's motion to vacate his conviction and sentence pursuant to 28 U.S.C. § 2255 (ECF No. 62) and his amended motion to vacate (ECF No. 75). For the hereinbelow reasons, the Court recommends that Petitioner's motion to vacate and amended motion to vacate be denied.

BACKGROUND

On April 12, 2018, a federal grand jury indicted Petitioner for one count of possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1) and one count of possession of a stolen firearm in violation of 18 U.S.C. § 922(j). Indictment 1-2, ECF No. 1. Following his arrest pursuant to this indictment, Petitioner had his initial appearance on April 16, 2018, and, through counsel, he pled not guilty. Text-only Minute Entry, ECF No. 6; Plea Sheet 1, ECF No. 8. Petitioner proceeded to trial, which commenced on June 13, 2018. Minute Entry 1-2, ECF No. 27. At the commencement of trial, the Government dismissed the possession of a stolen firearm charge. Trial Tr. 6:08-

6:17, ECF No. 48. At the close of trial and before the jury began deliberations, Petitioner and the Government stipulated

that [Petitioner] has been convicted of a crime punishable by imprisonment for a term in excess of one year, and that this fact may be presented to the jury to satisfy the convicted felon element of the violation of 18 U.S.C. § 922(g)(1) in lieu of submission to the jury of [Petitioner's] prior felony conviction.

2d Stipulation 1-2, ECF No. 33; Trial Tr. 113:07-113:13.

After a one-day trial, the jury returned a verdict against Petitioner, finding him guilty of possession of a firearm by a convicted felon. Trial Tr. 239:02-239:18; Jury Verdict 1, ECF No. 28. On August 21, 2018, the Court sentenced Petitioner to 103 months imprisonment, three years supervised release, and a \$100 mandatory assessment. Sent'g Tr. 18:19-19:20, ECF No. 52. The Court entered judgment accordingly on September 7, 2018. Judgment 1-6, ECF No. 39. Petitioner appealed to the U.S. Court of Appeals for the Eleventh Circuit on September 7, 2018. Notice of Appeal 1, ECF No. 41. The Eleventh Circuit affirmed Petitioner's conviction and sentence and issued its Mandate on August 26, 2019. *United States v. Brown*, 782 F. App'x 850, 851-52 (11th Cir. 2019) (per curiam); 11th Cir. Mandate 1, ECF No. 55.

The Court received Petitioner's *pro se* motion to vacate his conviction and sentence (ECF No. 62) on December 13, 2019. Respondent filed a response (ECF No. 64) on January 31, 2020, and the Court received Petitioner's reply (ECF No. 65) on March 17, 2020. On June 17, 2020, Petitioner, through intended counsel, filed a motion to appoint counsel (ECF No. 67) and amended motion to appoint counsel (ECF No. 70). Petitioner also requested that the Court stay any ruling on Petitioner's original *pro se* motion to vacate

(ECF No. 62) until he filed a new amended motion to vacate through appointed counsel. Am. Mot. to Appoint Counsel 1-2, ECF No. 70. The Court granted Petitioner's motion on June 18, 2020. Text-only Order, ECF No. 71. On September 10, 2020, Petitioner filed an unopposed motion to stay further briefing until the Eleventh Circuit issued an opinion in *United States v. Coats*, No. 18-13113-DD (11th Cir. Apr. 27, 2020). Mot. to Stay 1-3, ECF No. 72. On September 29, 2020, Petitioner moved to withdraw his motion to stay. Mot. to Withdraw 1, ECF No. 29. On September 30, 2020, the Court granted Petitioner's motion to withdraw and ordered him to file an amended motion to vacate within thirty days. Text-only Order, ECF No. 74. Petitioner filed his amended motion to vacate (ECF No. 75) on December 20, 2020, Respondent responded (ECF No. 78) on February 2, 2021, and Petitioner replied (ECF No. 79) on March 3, 2021. Petitioner's motion to vacate and amended motion to vacate are ripe for review.

DISCUSSION

Petitioner moves to vacate his conviction and sentence, arguing (1) his indictment failed to set forth the essential elements of an offense in violation of the Fifth Amendment, and (2) his indictment failed to give him fair notice of the nature of the charges in violation of the Sixth Amendment. Am. Mot. to Vacate 3-17, ECF No. 75. Respondent contends Petitioner is not entitled to habeas relief because (1) the procedural default rule bars Petitioner from raising these claims, and (2) in the alternative, Petitioner fails to show a violation of his Fifth or Sixth Amendment rights. Resp. to Am. Mot. to Vacate 3-15, ECF No. 78. The Court recommends that Petitioner's claims be denied for procedural default and, in the alternative, that his claims be denied on the merits.

I. *Rehaif v. United States*

In support of both of his claims, Petitioner relies on the Supreme Court’s decision in *Rehaif v. United States*, -- U.S. --, 139 S. Ct. 2191 (2019). *See* Am. Mot. to Vacate 3-8. In *Rehaif*, petitioner challenged his conviction for unlawful possession of a firearm in violation of 18 U.S.C. § 922(g). *Rehaif*, 139 S. Ct. at 2194-95. 18 U.S.C. § 922(g) provides that “[i]t shall be unlawful for any person [who qualifies as a person who falls within a category listed at § 922(g)(1) to (9)] to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.” Prior to the Supreme Court’s ruling in *Rehaif*, in order to convict a defendant of violating 18 U.S.C. § 922(g), the Government was required to prove (1) the defendant qualified as a person prohibited from possessing a firearm among the categories listed in § 922(g), (2) the defendant knowingly possessed a firearm or ammunition, and (3) the firearm or ammunition was transported in interstate commerce. *United States v. Rehaif*, 888 F.3d 1138, 1143-1147 (11th Cir. 2018), *rev’d*, 139 S. Ct. 2191 (2019); *see also United States v. Jackson*, 120 F.3d 1226, 1229 (11th Cir. 1997) (*per curiam*).

In *Rehaif*, the Supreme Court held that in order to convict a defendant charged with possession of a firearm in violation of § 922(g), the Government must also prove the defendant “knew he belonged to the relevant category of persons barred from possessing a firearm[.]”—referring to this element as “knowledge of status.” *Rehaif*, 139 S.Ct. at 2200. In *Rehaif*, the petitioner’s relevant status was an alien “illegally or unlawfully in the United States[.]” 18 U.S.C. § 922(g)(5)(A). The Supreme Court “express[ed] no view . . . about

what precisely the Government must prove to establish a defendant’s knowledge of status in respect to other § 922(g) provisions not at issue [there].” *Rehaif*, 139 S.Ct. at 2200. After *Rehaif*, the Eleventh Circuit has held that an indictment charging a defendant with a violation of § 922(g)(1)—like Petitioner’s indictment here—must allege the knowledge-of-status element of the offense, and if a defendant pleads guilty, a district court must advise the defendant of the Government’s burden to prove this element. *See United States v. Innocent*, 977 F.3d 1077, 1082 (11th Cir. 2020) (noting indictment under § 922(g)(1) is “erroneous” if it does not include knowledge of felon status as an element of the crime); *United States v. Thomas*, 810 F. App’x 789, 797 (11th Cir. 2020) (“[A]s *Rehaif* makes plain, the district court erred when it failed to advise [the defendant] during the plea colloquy that knowledge of his status as a felon at the time of his offense was an element of his §§ 922(g) and 924(a)(2) offense that the government must prove.”).

II. Procedural Default

Respondent argues Petitioner’s motion to vacate should be denied because the procedural default rule bars him from raising his *Rehaif* claims. Resp. to Am. Mot. to Vacate 3-9. The Court agrees and recommends that Petitioner’s motion be denied on this ground.

A. Procedural Default Standards

“Under the procedural default rule, a defendant generally must advance an available challenge to a criminal conviction or sentence on direct appeal or else the defendant is barred from presenting that claim in a § 2255 proceeding.” *Lynn v. United States*, 365 F.3d 1225, 1234 (11th Cir. 2004) (per curiam). “This rule generally applies to all claims,

including constitutional claims.” *Id.* “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). “[P]rocedural default can be excused, however, if one of the two exceptions to the procedural default rule applies. The exceptions are: (1) for cause and prejudice, or (2) for a miscarriage of justice, or actual innocence.” *McKay v. United States*, 657 F.3d 1190, 1196 (11th Cir. 2011); *see also Lomelo v. United States*, 891 F.2d 1512, 1515 n.9 (11th Cir. 1990) (“The ‘cause and actual prejudice’ standard for federal habeas petitioners mirrors the standard used to evaluate collateral attacks on state convictions.” (citations omitted)).

B. Petitioner’s Procedural Default of his *Rehaif* Claims

Here, on direct appeal of his conviction and sentence to the Eleventh Circuit, Petitioner raised one claim: the evidence at trial was insufficient to convict him of possession of a firearm by a convicted felon. *Brown*, 782 F. App’x at 851-52. Specifically, he argued the jury lacked sufficient evidence to find that he knowingly possessed a firearm. *Id.* at 852 (“[T]he only issue on appeal is whether there was enough evidence for a jury to find [Petitioner] knowingly possessed the firearm.”). On appeal, Petitioner “stipulated, and [did] not . . . dispute, that he is a convicted felon[.]” *Id.* By contrast, in his amended motion to vacate, Petitioner raises two *Rehaif* claims, arguing for the first time that his indictment was insufficient under the Fifth and Sixth Amendments. Am. Mot. to Vacate 3-17. Because Petitioner failed to raise either of his *Rehaif* claims on direct appeal, his claims

are procedurally defaulted, and he may not raise them in a motion to vacate unless he shows that an exception to the procedural default rule applies. *Lynn*, 365 F.3d at 1234.

C. Cause for Procedural Default and Prejudice

Petitioner argues the procedural default rule does not bar him from raising his *Rehaif* claims because he has shown cause for his failure to raise these claims on direct appeal and resulting prejudice. Am. Mot. to Vacate 10-17. Respondent contends Petitioner fails to show either cause or prejudice. Resp. to Am. Mot. to Vacate 4-6. The Court agrees.

1. *Cause for Procedural Default*

Petitioner asserts that the novelty of his *Rehaif* claims constitutes cause to excuse his procedural default. Am. Mot. to Vacate 10-13. He relies on *Reed v. Ross*, 468 U.S. 1 (1984), where the Supreme Court excused procedural default of a claim raised in a habeas application under 28 U.S.C. § 2254, holding “that where a constitutional claim is so novel that its legal basis is not reasonably available to counsel, a defendant has cause for his failure to raise the claim in accordance with applicable state procedures.” *Reed*, 468 U.S. at 16; *see also id.* at 14-15 (“If counsel has no reasonable basis upon which to formulate a constitutional question, setting aside for the moment exactly what is meant by ‘reasonable basis,’ it is safe to assume that he is sufficiently unaware of the question’s latent existence that we cannot attribute to him strategic motives of any sort.” (internal citations omitted)). The Court “identified three situations in which a ‘new’ constitutional rule, representing a clear break with the past, might emerge from [the Supreme] Court[]” to establish cause for procedural default due to the novelty of the defaulted claim: (1) where “a decision of [the Supreme] Court . . . explicitly overrule[s] one of [its] precedents[,]” (2) where “a decision

may overturn a longstanding and widespread practice to which [the Supreme] Court has not spoken, but which a near-unanimous body of lower court authority has expressly approved[.]" and (3) where "a decision may disapprove a practice [the Supreme] Court arguably has sanctioned in prior cases." *Id.* at 17 (internal citations, quotations, and alterations omitted); *see also Lomelo*, 891 F.2d at 1515 (finding that a petitioner established cause for procedural default on direct appeal where he challenged "settled law in this circuit, as in all other circuits").

Petitioner argues the second situation applies here. Am. Mot. to Vacate 10. When Petitioner was convicted and sentenced in 2018, the Supreme Court had not yet decided *Rehaif*, and "all the courts of appeals to address the question [had] held that [§ 922(g)'s *mens rea* requirement] does not apply to the defendant's status." *Rehaif*, 139 S. Ct. at 2210 (Alito, J., dissenting). The Eleventh Circuit was among those courts of appeals. *See Jackson*, 120 F.3d at 1229; *see also Rehaif*, 888 at 1143-1147, *rev'd*, 139 S. Ct. 2191 (2019). Thus, Petitioner asserts that the novelty exception identified in *Reed* applies because "[e]ven the most creative lawyer could not have found any binding or persuasive authority" to cite on direct appeal in support of the proposition that § 922(g) requires proof of a defendant's knowledge of status. Am. Mot. to Vacate 12.¹

¹ At the outset, the Court notes that in *United States v. Innocent*, 977 F.3d 1077 (11th Cir. 2020), the Eleventh Circuit considered the direct appeals of two defendants challenging their § 922(g)(1) convictions under *Rehaif*. *Innocent*, 977 F.3d at 1079-81. The Eleventh Circuit reviewed defendants' convictions for plain error and held that they were not entitled to relief. *Id.* at 1082-84. Defendants also argued that the Eleventh Circuit should overturn their convictions because their *Rehaif* claims were novel. *Id.* at 1084. The Court concluded that procedural default standards did not apply to defendants' direct appeals because "a set of rules governing applications for the writ of habeas corpus, is different from plain-error review." *Id.* The Eleventh Circuit, however, also stated, without further explanation, that "*Rehaif* was not 'truly novel' in the sense necessary

Respondent contends the novelty exception does not apply here and cites *Bousley v. United States*, 523 U.S. 614 (1998), in support. In *Bousley*, petitioner filed a motion to vacate, arguing his guilty plea to use of a firearm in relation to a drug trafficking crime under 18 U.S.C. § 924(c) was involuntary and invalid because the sentencing court misinformed him of the elements of the crime. *Bousley*, 523 U.S. at 616-17. Specifically, after Petitioner pled guilty, was sentenced, and directly appealed to the Eighth Circuit, the Supreme Court decided *Bailey v. United States*, 516 U.S. 137 (1995). *Id.* at 617-18. In *Bailey*, the Court held that a conviction under § 924(c)(1) requires the Government to prove “active employment of the firearm.” *Bailey*, 516 U.S. at 144. The *Bousley* petitioner argued his guilty plea was invalid under *Bailey*, the district court denied petitioner’s motion to vacate, and the Eighth Circuit affirmed, holding, *inter alia*, that petitioner’s claim was barred by the procedural default rule because he failed to raise it on direct appeal. *Bousley*, 523 U.S. at 621; *see also Bousley v. Brooks*, 97 F.3d 284, 287-88 (8th Cir. 1996), *rev’d*, 523 U.S. 614 (1998).

On appeal to the Supreme Court, the *Bousley* petitioner cited *Reed* in arguing that he had shown cause for procedural default pursuant to the novelty exception in light of *Bailey*. *Bousley*, 523 U.S. at 622. The Supreme Court recognized that “a claim that ‘is so novel that its legal basis is not reasonably available to counsel’ may constitute cause for a procedural default.” *Bousley*, 523 U.S. at 622 (quoting *Reed*, 468 U.S. at 16). The Court,

to excuse procedural default.” *Id.* (citations omitted). This single sentence does not appear to be an alternative holding since the Eleventh Circuit determined that procedural default standards did not apply to defendants’ appeals. Thus, in an abundance of caution, the Court has thoroughly analyzed Petitioner’s arguments as to cause to excuse procedural default.

however, disagreed that the exception applied in *Bousley*, holding that even though the Supreme Court decided *Bailey* after petitioner's direct appeal, his argument as to the elements of § 924(c) "was most surely not a novel one." *Id.* The Court noted that even before the Court decided *Bailey*, "at the time of petitioner's plea, the Federal Reporters were replete with cases involving challenges to the notion that 'use' is synonymous with mere 'possession.'" *Id.* (citations omitted). Petitioner also argued that "before *Bailey*, any attempt to attack [his] guilty plea would have been futile." *Id.* at 623 (citation omitted). The Court found that even assuming petitioner's *Bailey* claim was futile, "futility cannot constitute cause if it means simply that a claim was unacceptable to that particular court at that particular time."² *Id.* (internal quotations omitted) (citing *Engle v. Isaac*, 456 U.S. 107, 130 (1982)).

Here, Respondent argues that like in *Bousley*, Petitioner fails to show cause for procedural default pursuant to *Reed*'s novelty exception because his claim concerning the § 922(g) knowledge-of-status element was available to him on direct appeal. Resp. to Am. Mot. to Vacate 5-6. Respondent notes that other defendants had raised similar arguments concerning the elements of § 922(g). *Id.* at 6. Petitioner disagrees and attempts to distinguish *Bousley* on two grounds. Reply 3-4. Both are unavailing. First, he argues that whereas the law concerning the *Bousley* petitioner's conviction was unsettled when petitioner directly appealed his conviction before *Bailey*, here, the courts of appeals had

² The Supreme Court remanded *Bousley* for the district court and Eighth Circuit to determine whether petitioner could demonstrate actual innocence to excuse procedural default. *Bousley*, 523 U.S. at 623-24.

unanimously held that § 922(g) did not require proof of knowledge of status before *Rehaif*. *Id.* at 3-4 (citing *Bailey*, 516 U.S. at 142 (“The Circuits are in conflict both in the standards they have articulated . . . and in the results they have reached[.]” (internal citations omitted))); *Rehaif*, 139 S. Ct. at 2210 (Alito, J., dissenting) (“[A]ll the courts of appeals to address the question [had] held that [§ 922(g)’s *mens rea* requirement] does not apply to the defendant’s status.”)).

In effect, Petitioner appears to assert that he has shown cause for procedural default solely because courts had rejected the argument advanced in *Rehaif*. “To the contrary, cause for a procedural default on appeal ordinarily requires a showing of some external impediment preventing counsel from constructing or raising the claim.” *Murray v. Carrier*, 477 U.S. 478, 492 (1986). To that end, the Eleventh Circuit has held that in determining whether a petitioner has shown cause pursuant to the novelty exception, “the question is not whether legal developments or new evidence has made a claim easier or better, but whether at the time of the direct appeal the claim was available at all.” *Lynn*, 365 F.3d at 1235. “Where a number of others had raised the claim before the petitioner failed to do so, the claim is not sufficiently novel to meet the cause requirement.” *Howard v. United States* 374 F.3d 1068, 1072 (11th Cir. 2004) (citations omitted). Additionally, “[t]he fact that every circuit which had addressed [an] issue had rejected the proposition that became the [Supreme Court’s later] rule [on the issue] simply demonstrates that reasonable defendants and lawyers could well have concluded it would be futile to raise the issue.” *McCoy v. United States*, 266 F.3d 1245, 1258 (11th Cir. 2001). “[T]he Supreme Court could not have been clearer that perceived futility does not constitute cause to excuse a procedural

default.” *Id.* at 1259 (citing *Bousley*, 523 U.S. at 623; *Smith v. Murray*, 477 U.S. 527, 535 (1996)).

The Eleventh Circuit’s decision in *Howard v. United States*, 374 F.3d 1068 (11th Cir. 2004), is instructive. In *Howard*, petitioner filed a motion to vacate arguing that the district court wrongfully considered his two state convictions at sentencing because he was not represented by counsel in the state proceedings. *Howard*, 374 F.3d at 1070. Petitioner relied on *Alabama v. Shelton*, 535 U.S. 654 (2002), which the Supreme Court decided after he was sentenced and directly appealed. *Id.* In *Shelton*, the Supreme Court held that a defendant is entitled to appointed counsel where he faces a suspended sentence which may result in later confinement for violating of the terms of the suspended sentence. *Shelton*, 535 U.S. at 662. Because the *Howard* petitioner did not raise a *Shelton* claim in his direct appeal, the Eleventh Circuit considered whether he could show cause for his procedural default under the novelty exception since *Shelton* was decided after his direct appeal. *Howard*, 374 F.3d at 1072-73.

The Eleventh Circuit held that petitioner failed to show cause because “the legal basis for the right later recognized in *Shelton* was readily available at the time of [petitioner’s] federal sentencing hearing.” *Id.* at 1073. The Eleventh Circuit recognized that “[t]he existence of [courts of appeals] decisions [on the *Shelton* issue] at the time of [petitioner’s] sentencing establishes that other defendants had long been raising the issue.” *Id.*; see also *id.* at 1072 (“Where a number of others had raised the claim before the petitioner failed to do so, the claim is not sufficiently novel to meet the cause requirement.”

(citations omitted)). Consequently, the Court concluded that petitioner’s *Shelton* “claim was not sufficiently unheard to be novel for cause purposes.” *Id.* at 1073.³

Similarly, here, although binding precedent in the Eleventh Circuit at the time Petitioner pled guilty would have made an argument similar to the one raised in *Rehaif* seemingly futile, a knowledge-of-status argument was not novel. Like in *Bousley* and *Howard*, even at the time Petitioner directly appealed to the Eleventh Circuit, petitioners had regularly challenged their convictions under § 922(g)—even before *Rehaif*—by arguing that the Government failed to allege or prove knowledge of status. *See, e.g., United States v. Young*, 766 F.3d 621, 629-30 (6th Cir. 2014) (per curiam), *cert. denied*, -- U.S. --, 135 S. Ct. 1475 (Mem.) (2015); *United States v. Butler*, 637 F.3d 519, 523-25 (5th Cir. 2011) (per curiam), *cert denied*, 565 U.S. 1092 (Mem.) (2011); *United States v. Reap*, 391 F. App’x 99, 103-04 (2d Cir. 2010) (per curiam), *cert. denied*, -- U.S. --, 131 S. Ct. 3040 (Mem.) (2011); *United States v. Kind*, 194 F.3d 900, 907 (8th Cir. 1999); *United States v. Ballentine*, 4 F.3d 504, 505-06 (7th Cir. 1993), *cert. denied*, 510 U.S. 1179 (Mem.) (1994); *see also Bousley*, 523 U.S. at 622 (finding that petitioner failed to show cause under the novelty exception where “at the time of petitioner’s plea, the Federal Reporters were replete with cases involving challenges[]” similar to petitioner’s); *Howard*, 374 F.3d at 1073 (“The existence of [courts of appeals] decisions at the time of [petitioner’s] sentencing establishes that other defendants had long been raising the issue.”). Contrary

³ In *Howard*, the Eleventh Circuit ultimately remanded the case “[b]ecause the government procedurally defaulted its procedural bar defense” by failing to raise the defense in the district court. *Howard* 374 F.3d at 1074. Respondent has raised the defense here.

to Petitioner’s assertion, courts’ unanimous rejection of that argument merely shows the possible futility of the argument at that time; it does not show that the argument was so novel that it constitutes cause to excuse procedural default. *McCoy*, 266 F.3d at 1258-59 (“The fact that every circuit which had addressed the issue had rejected the proposition that became the *Apprendi* rule simply demonstrates that reasonable defendants and lawyers could well have concluded it would be futile to raise the issue[,] [but] . . . the Supreme Court could not have been clearer that perceived futility does not constitute cause to excuse a procedural default.” (citations omitted)).

Based, in part, on the prevalence of the claim raised in *Rehaif*, courts throughout the Eleventh Circuit have held that petitioners who did not challenge their § 922(g) indictments during their pre-*Rehaif* direct appeals failed to establish cause for procedural default based on the novelty exception. *Cardenas v. United States*, Nos. 19-10183-CV-KING, 13-10013-CR-KING, 2021 WL 1078182, at *5 (S.D. Fla. Feb. 25, 2021), *recommendation adopted by* 2021 WL 1062229 (S.D. Fla. Mar. 19, 2021); *Mata v. United States*, Nos. 18-20229-CR-MORENO, 19-24100-CIV-MORENO/HUNT, 2021 WL 799341, at *2 (S.D. Fla. Jan. 14, 2021), *recommendation adopted by* 2021 WL 796015 (S.D. Fla. Mar. 2, 2021); *Long v. United States*, Nos. 17-00026-KD-B, 19-00452-KD-B, 2020 WL 7391292, at *7-8 (S.D. Ala. Nov. 9, 2020), *recommendation adopted by* 2020 WL 7395140 (S.D. Ala. Dec. 16, 2020); *United States v. Lee*, No. 1:18-00249-KD-B, 2020 WL 5412981, at *3-4 (S.D. Ala. Sept. 8, 2020); *Gayle v. United States*, No. 19-cv-62904-BLOOM/Reid, 2020 WL 4339359, at *4 (S.D. Fla. July 28, 2020); *Gilbert v. United States*, Nos. CV 119-178, CR 114-125, 2020 WL 4210632, at *8 (S.D. Ga. June 23, 2020), *recommendation adopted by*

2020 WL 4208240 (S.D. Ga. July 22, 2020); *Dawkins v. United States*, Nos. 7:16-cr-00440-LSC-SGC-1, 7:19-cv-08047-LSC, 2020 WL 3576841, at *1-3 (N.D. Ala. July 1, 2020), *denying certificate of probable cause to appeal*, No. 20-12840-D, 2020 WL 8270518 (11th. Cir. Dec. 1, 2020); *see also Davis v. United States*, Nos. 4:16-cr-37-CDL-MSH, 4:19-cv-69-CDL-MSH, 2020 WL 8919332, at *16 (M.D. Ga. Dec. 8, 2020), *recommendation adopted by* 2021 WL 1081117 (M.D. Ga. Mar. 19, 2021). Courts in other circuits agree. *See, e.g., Wilson v. United States*, Nos. 3:14-cr-254-RJC-DSC-1, 3:19-cv-280-RJC, 2020 WL 4950930, at *7-8 (W.D.N.C. Aug. 24, 2020); *Waring v. United States*, Nos. 17 Cr. 50 (RMB), 19 Cv. 7982 (RMB), 2020 WL 898176, at *1-2 (S.D.N.Y. Feb. 25, 2020); *United States v. Bryant*, Nos. 11 CR 765 (RJD), 16 CV 3423 (RJD), 2020 WL 353424, at *3 (E.D.N.Y. Jan. 21, 2020); *United States v. Wilson*, No. 1:17-CR-60, 2019 WL 6606340, at *6 (W.D. Mich. Dec. 5, 2019). These decisions square with the Eleventh Circuit's analysis of the novelty exception. *See Howard*, 374 F.3d at 1072; *McCoy*, 266 F.3d at 1258-59; *Lynn*, 365 F.3d at 1235. Accordingly, this Court similarly finds that Petitioner fails to show cause for procedural default based on the novelty exception.

Second, Petitioner argues that Respondent's reliance on *Rehaif*, itself, to show that Petitioner's Fifth and Sixth Amendment challenges were available on direct appeal is misplaced because *Rehaif* concerned a conviction under § 922(g)(5), while Petitioner was convicted under § 922(g)(1). Reply 4. This argument, however, seems to undermine Petitioner's own citation of *Rehaif* to challenge his conviction under § 922(g)(1). *See Am. Mot. to Vacate* 3-8. Nevertheless, the argument is unpersuasive because, as explained above, before Petitioner filed his direct appeal, petitioners had repeatedly challenged their

§ 922(g) convictions based on the Government’s failure to prove petitioners’ knowledge of their relevant statuses. Thus, the argument—even if it was seemingly futile—was available to Petitioner on direct appeal, and like in *Bousley*, he fails to show cause for procedural default based on the novelty exception. Because Petitioner fails to show cause, he may not avoid procedural default.

2. *Resulting Prejudice*

Even assuming Petitioner shows cause for procedural default, Respondent argues the procedural default rule still bars Petitioner from raising his *Rehaif* claims because he fails to show resulting prejudice. Resp. to Am. Mot. to Vacate 6-7; *see also McKay*, 657 F.3d at 1196 (requiring a petitioner to show both cause and actual prejudice to overcome procedural default). The Court agrees.

“To [overcome procedural default] on a cause and prejudice theory, a petitioner must show ‘actual prejudice.’” *Fordham v. United States*, 706 F.3d 1345, 1350 (11th Cir. 2013) (citation omitted). “The ‘cause and actual prejudice’ standard for federal habeas petitioners mirrors the standard used to evaluate collateral attacks on state convictions.” *Lomelo*, 891 F.2d at 1515 n.9 (citations omitted). To establish actual prejudice, a petitioner “must shoulder the burden of showing, not merely that the errors at his trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.” *United States v. Frady*, 456 U.S. 152, 170 (1982) (emphasis in original); *see also Ward v. Hall*, 592 F.3d 1144, 1178 (11th Cir. 2010). “The actual prejudice standard is more stringent than the plain error

standard.” *Granada v. United States*, -- F.3d --, 2021 WL 923282, at *7 (11th Cir. Mar. 11, 2021) (internal quotations and citation omitted).

Petitioner asserts that he satisfies the prejudice requirement for two reasons: (1) the indictment defects constitute structural errors, and (2) he suffered actual prejudice. Am. Mot. to Vacate 13-17. First, Petitioner maintains the alleged indictment defects were structural errors which “always result in fundamental unfairness[,]” abrogating the need for a thorough review for actual prejudice. Am. Mot. to Vacate 13-14 (citing *Weaver v. Massachusetts*, -- U.S. --, 137 S. Ct. 1899, 1908-11 (2017)); Reply 4-7. “Structural errors are a very limited class of errors that affect the framework within which the trial proceeds such that it is often difficult to assess the effect of the error[.]” *United States v. Marcus*, 560 U.S. 258, 263 (2010) (internal quotations, alterations, and citations omitted). A structural error results in a fundamentally flawed record, so “any inquiry into its effect on the outcome of the case would be purely speculative.” *Satterwhite v. Texas*, 486 U.S. 249, 256 (1988). “The existence of such defects . . . requires automatic reversal of the conviction because they infect the entire trial process.” *Brecht v. Abrahamson*, 507 U.S. 619, 629-30 (1993) (citations omitted).

The Supreme Court has recognized that “there is a strong presumption” that an error does not constitute a structural error. *Rose v. Clark*, 478 U.S. 579 (1986). Accordingly, the Supreme Court has identified structural errors “only in a very limited class of cases.” *Johnson v. United States*, 520 U.S. 461, 468 (1997); see, e.g., *McCoy v. Louisiana*, -- U.S. --, 138 S. Ct. 1500, 1511 (2018) (counsel’s admission of defendant’s guilt over defendant’s objection); *Vasquez v. Hillery*, 474 U.S. 254, 263 (1986) (exclusion of grand jurors of the

same race as defendant); *Waller v. Georgia*, 467 U.S. 39, 49 n.9 (1984) (deprivation of right to public trial); *McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8 (1984) (deprivation of right to self-representation); *Gideon v. Wainwright*, 372 U.S. 335, 343-45 (1963) (deprivation of right to counsel).

Respondent correctly notes that the Eleventh Circuit has declined to characterize *Rehaif* errors as structural errors. Resp. to Am. Mot. to Vacate 7; *see also United States v. Haynes*, 798 F. App'x 560, 564-65 (11th Cir. 2020) (per curiam) (“[Petitioner] asserts that plain-error review does not apply to his claim because . . . the error is structural. . . . [T]hese assertions are wrong.” (citations omitted)); *United States v. Price*, 828 F. App'x 573, 577 (11th Cir. 2020) (per curiam) (“Despite [petitioner’s] claim that *Rehaif* error is structural, we have consistently reviewed *Rehaif* arguments raised for the first time on appeal for plain error.” (citing *United States v. Bates*, 960 F.3d 1278, 1296 (11th Cir. 2020); *United States v. McLellan*, 958 F.3d 1110, 1118-20 (11th Cir. 2020); *United States v. Moore*, 954 F.3d 1322, 1337-38 (11th Cir. 2020); *United States v. Reed*, 941 F.3d 1018, 1021 (11th Cir. 2019))). Petitioner, however, contends the Eleventh Circuit failed to thoroughly consider the issue. Reply 7. The Court disagrees. When repeatedly presented with the opportunity, the Eleventh Circuit has clearly declined to characterize *Rehaif* indictment defects as structural errors. In published decisions, the Eleventh Circuit did not apply the structural-error review Petitioner advocates, and the Court is bound by those decisions. *Bates*, 960 F.3d at 1296; *McLellan*, 958 F.3d at 1118-20; *Moore*, 954 F.3d at 1337-38; *Reed*, 941 F.3d at 1021. Petitioner’s assertion that the Eleventh Circuit may revisit the issue and reverse course is speculative and unavailing. *See* Reply 7.

Moreover, the Eleventh Circuit’s analysis of *Rehaif* errors as non-structural is well-reasoned, and other courts have agreed. Although the Supreme Court has not considered whether the omission of an element in an indictment constitutes a structural error, in *Neder v. United States*, 527 U.S. 1 (1999), the Supreme Court held that “a jury instruction that omits an element of the offense . . . differs markedly from the constitutional violations we have found to defy harmless-error review” and does not constitute a structural error. 527 U.S. at 8. The Court declined to adopt the petitioner’s “argument that the omission of an element will *always* render a trial unfair.” *Id.* at 9 (emphasis in original). The Court reasoned that the omission of an element “did not render [petitioner’s] trial ‘fundamentally unfair’” because petitioner “was tried before an impartial judge, under the correct standard of proof and with the assistance of counsel; a fairly selected, impartial jury was instructed to consider all of the evidence and argument in respect to [his] defense[.]” *Id.* at 9.

The same reasoning applies here. While Petitioner’s indictment omitted an element of § 922(g) later recognized in *Rehaif*, he was represented by competent counsel, proceeded to trial before an impartial judge and jury, and the jury found him guilty after considering all the evidence under the proper standards. He does not dispute any of these facts. Although Petitioner stipulated to his prior felony convictions at trial and on direct appeal, nothing prevented Petitioner from arguing that § 922(g) included a knowledge-of-status element and presenting evidence to show that he was not a convicted felon or that he lacked knowledge of that status. In reviewing the omission of the knowledge-of-status element from pre-*Rehaif* indictments, plea colloquies, and jury instructions concerning § 922(g), the First, Fifth, Sixth, Eighth, and Tenth Circuits have held that the omissions did not

constitute structural errors. *United States v. Patrone*, 985 F.3d 81, 85-86 (1st Cir. 2021); *United States v. Hicks*, 958 F.3d 399, 401-02 (5th Cir. 2020); *United States v. Watson*, 820 F. App'x 397, 400-01 (6th Cir. 2020); *United States v. Coleman*, 961 F.3d 1024, 1029-30 (8th Cir. 2020); *United States v. Trujillo*, 960 F.3d 1196, 1203-05 (10th Cir. 2020). The Fourth Circuit disagrees. *United States v. Medley*, 972 F.3d 399, 411-14 (4th Cir. 2020), *reh'g granted*, 828 F. App'x 923 (Mem.) (4th Cir. 2020).

As explained above, the Eleventh Circuit appears to agree with the majority of the circuits that *Rehaif* errors do not constitute structural errors because the Court has reviewed *Rehaif* claims under the standard of review which applies to non-structural errors. *See Bates*, 960 F.3d at 1296; *McLellan*, 958 F.3d at 1118-20; *Moore*, 954 F.3d at 1337-38; *Reed*, 941 F.3d at 1021; *see also Haynes*, 798 F. App'x at 564-65; *Price*, 828 F. App'x at 577. Relying on these Eleventh Circuit decisions, other district courts in the Eleventh Circuit have reached the same conclusion. *See Cardenas*, 2021 WL 1078182, at *5; *United States v. Jones*, Nos. 4:16-cr-13/MW/MAF, 4:20-cv-379/MW/MAF, 2020 WL 5260781, at *2 (N.D. Fla. Aug. 3, 2020), *recommendation adopted by* 2020 WL 5260568 (N.D. Fla. Sept. 2, 2020); *United States v. Moody*, Nos. 5:18-cr-34/RH/MJF, 5:20-cv-192/RH/MJF, 2020 WL 4756679, *2 (N.D. Fla. July 20, 2020), *recommendation adopted by* 2020 WL 4755356 (N.D. Fla. Aug. 15, 2020). This Court similarly finds that Petitioner's defective indictment does not constitute a structural error and evaluates the record for actual prejudice.

Second, Petitioner contends he suffered actual prejudice because the alleged indictment defects affected all subsequent proceedings in his criminal case. Am. Mot. to

Vacate 15-17. He argues that his defective indictment likely affected (1) the grand jury’s finding of probable cause that he violated § 922(g)(1), (2) the Magistrate Judge’s initial bond determination, (3) trial counsel’s investigation of Petitioner’s prior felonies, (4) the parties’ decision to stipulate to Petitioner’s prior felony convictions, (5) the trial judge’s instructions to the jury as to the elements of the offense, and (6) the jury’s findings as to the sufficiency of the evidence to convict Petitioner of violating § 922(g)(1). *Id.* at 15-16 (“Consider just some of the ways a missing element impacts a prosecution[.]”). In support, he cites, *inter alia*, Eleventh Circuit cases concerning constructive amendment of indictments. *Id.* at 16-17 (citing *United States v. Madden*, 733 F.3d 1314, 1318 (11th Cir. 2013); *United States v. Ross*, 131 F.3d 970, 980 (11th Cir. 1997)).

Petitioner fails to show prejudice based on these unsubstantiated speculations as to the effects of the indictment’s omission of the knowledge-of-status element. He does not particularize these hypothetical examples to his case, and his speculations are particularly unavailing because Petitioner stipulated to his prior felony convictions. *See* 2d Stipulation 1-2; Trial Tr. 113:07-113:13. Petitioner’s examples of the “*possibility* of prejudice” arising from a defective indictment are insufficient to establish actual prejudice. *Fraday*, 456 U.S. at 170 (emphasis in original). Petitioner fails to show that the defective indictment “worked to [Petitioner’s] *actual* and substantial disadvantage[.]” *Id.* (emphasis in original).

The Eleventh Circuit has “consult[ed] the entire record” in evaluating whether petitioners could show actual prejudice based on their *Rehaif* claims. *Moore*, 954 F.3d at 1337; *see also Reed*, 941 F.3d at 1021-22. Courts in the Eleventh Circuit and elsewhere have also considered a petitioner’s entire record and consistently held that a petitioner who

did not raise a *Rehaif* claim on direct appeal fails to show prejudice to excuse procedural default where petitioner acknowledged his prior felony convictions. *Mata*, 2021 WL 799341, at *3; *Benoit v. United States*, No. 2:16-cr-00070-JDL-1, 2021 WL 681114, at *5 (D. Me. Feb. 22, 2021), *recommendation adopted by* 2021 WL 1032289 (D. Me. Mar. 17, 2021); *Long*, 2020 WL 7391292, at *7-8; *Gayle*, 2020 WL 4339359, at *4; *Lee*, 2020 WL 5412981, at *3-4; *Dawkins*, 2020 WL 3576841, at *1-3; *Moody*, 2020 WL 4756679, *2; *Wilson*, 2020 WL 4950930, at *7-8; *Waring*, 2020 WL 898176, at *2; *Bryant*, 2020 WL 353424, at *4; *see also Davis*, 2020 WL 8919332, at *16. Unlike Petitioner here, petitioners in these cases acknowledged their prior felony convictions while pleading guilty to violating § 922(g)(1). Nevertheless, even where a petitioner proceeded to trial and was found guilty of violating § 922(g)(1), at least one court in the Eleventh Circuit has held that petitioner failed to show prejudice to avoid procedural default where (1) petitioner stipulated to the prior felony convictions, (2) petitioner's presentence reports ("PSR") cited those convictions, and (3) petitioner previously received a sentence of more than one year. *Richardson v. United States*, Nos. 2:17-cr-11-SPC-MRM, 2:20-cv-305-SPC-MRM, 2021 WL 719613, at *4 (M.D. Fla. Feb. 24, 2021); *see also Lowe*, 2020 WL 2200852, at *2 (holding petitioner failed to show prejudice where evidence of prior felony convictions was introduced at trial).

In considering the entire record here, it is readily apparent that Petitioner cannot show actual prejudice. Petitioner stipulated that he had previously been convicted of multiple felonies. 2d Stipulation 1-2; Trial Tr. 113:07-113:13. He made the same stipulation on direct appeal to the Eleventh Circuit. *Brown*, 782 F. App'x at 852.

Specifically, Petitioner stipulated that he had been convicted of the following felonies in the Superior Court of Muscogee County, Georgia on June 29, 2012: (1) robbery by snatching, (2) sale of marijuana, and (3) burglary. 2d Stipulation 1. He was sentenced to seven years, serve two in confinement for each conviction. *Id.* His PSR listed these prior felony convictions, and Petitioner did not object to the nature of the convictions. Revised Final PSR ¶¶ 24-26, ECF No. 37; *see also* Pet'r's Obj. to PSR 1, ECF No. 36. During his sentencing hearing, Petitioner acknowledged that he had “a felony” before his arrest for possession of a firearm by a convicted felon. Sent’g Tr. 16:16-19 (“And they didn’t have no physical evidence or nothing about it being me. They just going by what the officer said, because of my background, how I got a felony.”). Petitioner has neither challenged the validity of his stipulations nor alleged that his trial counsel was ineffective in making the stipulations. Therefore, even assuming Petitioner has shown cause for procedural default, he has not established actual prejudice to avoid the procedural default rule because there was ample evidence showing that he knew he was a convicted felon.

D. Miscarriage of Justice or Actual Innocence

Although Petitioner does not raise an actual innocence or miscarriage of justice exception to procedural default, Respondent also argues that Petitioner fails to show that this exception applies. Resp. to Am. Mot. to Vacate 7-9; *see also Bousley*, 523 U.S. at 623-24 (remanding motion to vacate to determine whether petitioner could show actual innocence to excuse procedural default after petitioner failed to show cause and prejudice based on the novelty exception). The Court agrees.

“[A] credible showing of actual innocence may allow a prisoner to pursue his constitutional claims . . . on the merits notwithstanding the existence of a procedural bar to relief.” *McQuiggin v. Perkins*, 569 U.S. 383, 392 (2013); *see also McKay*, 657 F.3d at 1196. “This rule, or fundamental miscarriage of justice exception, is grounded in the ‘equitable discretion’ of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons.” *Herrera v. Collins*, 506 U.S. 390, 404 (1993). “‘Actual innocence’ means factual innocence, not mere legal insufficiency.” *Bousley*, 523 U.S. at 623-24 (citing *Sawyer v. Whitley*, 505 U.S. 333, 339 (1992)). “To establish actual innocence, petitioner must demonstrate that, in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him.” *Id.* at 623 (internal quotations and citations omitted).

Here, as explained above, Petitioner stipulated that he had previously been convicted of multiple felonies before his arrest for possession of a firearm by a convicted felon. 2d Stipulation 1-2; Trial Tr. 113:07-113:13; *Brown*, 782 F. App’x at 852. Importantly, he does not allege that he lacked knowledge of his status of convicted felon. Thus, Petitioner cannot credibly argue that he did not know he was a convicted felon when he committed the federal offenses. Accordingly, he fails to show actual innocence. Because Petitioner procedurally defaulted his *Rehaif* claims by failing to raise them on direct appeal and because he has not shown that an exception to the procedural default rule applies, he is barred from raising his *Rehaif* claims in his motion to vacate. He raises no other claims for relief in his amended motion to vacate, and, therefore, the Court **RECOMMENDS** that his amended motion to vacate be **DENIED** for procedural default.

III. Petitioner's Amended Motion to Vacate

Respondent argues that even if the Court does not apply the procedural default rule and reaches the merits of Petitioner's *Rehaif* claims, his amended motion to vacate should be denied on the merits. Resp. to Am. Mot. to Vacate 9-15. The Court agrees and, in the alternative, recommends that Petitioner's amended motion to vacate be denied on this ground.

Petitioner argues his indictment defects violated his Fifth and Sixth Amendment rights. Am. Mot. to Vacate 4-6. The Fifth Amendment provides that “[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury[.]” U.S. CONST. amend V. The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation.” U.S. CONST. amend VI.

An indictment is sufficient [under the Fifth and Sixth Amendments] when it “(1) presents the essential elements of the charged offense, (2) notifies the accused of the charges to be defended against, and (3) enables the accused to rely upon a judgment under the indictment as a bar against double jeopardy for any subsequent prosecution for the same offense.

United States v. Wayerski, 624 F.3d 1342, 1349 (11th Cir. 2010) (citation omitted). “If an indictment specifically refers to the statute on which the charge was based, the reference to the statutory language adequately informs the defendant of the charge.” *United States v. Fern*, 155 F.3d 1318, 1323 (11th Cir. 1998). “Moreover, the constitutional standard is fulfilled by an indictment that tracks the wording of the statute, as long as the language sets forth the essential elements of the crime.” *United States v. Ndiaye*, 434 F.3d 1270, 1299 (11th Cir. 2006) (internal quotations and citations omitted). Petitioner contends his

indictment violated his Fifth and Sixth Amendment rights by omitting the knowledge-of-status element of § 922(g) recognized in *Rehaif* and that his conviction must be vacated in light of these errors. Am. Mot. to Vacate 4-6.

As an initial matter, for the reasons explained above, Petitioner fails to show that his indictment defect constitutes a structural error. The Court, therefore, does not apply the structural-error standard and, instead, applies the general habeas standard for evaluating alleged constitutional errors. *See Ross v. United States*, 289 F.3d 677, 681-82 (11th Cir. 2002) (per curiam) (concluding that an alleged error raised in a motion to vacate under § 2255 was not structural and reviewing for harmless error). “Section 2255 does not provide a remedy for every alleged error in conviction and sentencing.” *Spencer v. United States*, 773 F.3d 1132, 1138 (11th Cir. 2014). Rather 28 U.S.C. § 2255(a) provides relief where “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.” “Relief under 28 U.S.C. § 2255 is reserved for transgressions of constitutional rights and for that narrow compass of other injury that could not have been raised on direct appeal and would, if condoned, result in a complete miscarriage of justice.” *Richards v. United States*, 837 F.3d 965, 966 (11th Cir. 1988) (per curiam) (internal quotations and citation omitted).

Because Petitioner alleges violations of his Fifth and Sixth Amendment rights, his claims are cognizable in a motion to vacate under § 2255, and the Court must determine whether his alleged non-structural errors warrant reversal of his convictions. “[T]he

appropriate standard for reviewing the harmlessness of a non-structural constitutional error on collateral review of a state court judgment is the standard enunciated in *Kotteakos v. United States*, 328 U.S. 750, . . . (1946).” *Ross*, 289 F.3d at 682 (citing *Brecht*, 507 U.S. at 636-38). The Eleventh Circuit also “applies ‘[this] harmless error standard to the habeas review of federal court convictions.’” *Phillips v. United States*, 849 F.3d 988, 993 (11th Cir. 2017) (quoting *Ross*, 289 F.3d at 682). “Under that standard, a defendant is entitled to habeas relief when an error results in actual prejudice because it ‘had substantial and injurious effect or influence in determining the jury’s verdict.’” *Ross*, 289 F.3d at 682 (quoting *Brecht*, 507 U.S. at 638). “Stated another way, a § 2255 movant ‘is entitled to reversal only when the error resulted in actual prejudice because it had substantial and injurious effect or influence in determining’ the final result.” *Rosales-Diaz v. United States*, 805 F. App’x 660, 666 (11th Cir. 2020) (per curiam) (internal alterations omitted) (quoting *Vines v. United States*, 28 F.3d 1123, 1130 (11th Cir. 1994)). A petitioner bears the burden of proving that he is entitled to relief. *Rivers v. United States*, 777 F.3d 1306, 1316 (11th Cir. 2015) (citation omitted).

In *United States v. Innocent*, 977 F.3d 1077 (11th Cir. 2020), defendants argued on direct appeal that the sentencing court lacked jurisdiction because their indictments omitted the § 922(g) knowledge-of-status element. *Innocent*, 977 F.3d at 1079-81. The Eleventh Circuit concluded that “[t]he indictments were erroneous because they did not include an element of the crime charged, knowledge of felon status.” *Innocent*, 977 F.3d at 1082 (citing *Rehaif*, 139 S. Ct. at 2194, 2200). Petitioner’s indictment similarly omits the knowledge-of-status element. *See* Indictment 1. The Court assumes, without deciding,

that Petitioner’s indictment was erroneous under *Rehaif* and violated Petitioner’s Fifth and Sixth Amendment rights. *See Ndiaye*, 434 F.3d at 1299 (holding that an indictment must, *inter alia*, “set[] forth the essential elements of the crime”).⁴

Even assuming Petitioner establishes that his indictment errors constitute Fifth and Sixth Amendment violations, he is not entitled to relief because he fails to show that the “error[s] resulted in actual prejudice because [they] had substantial and injurious effect or influence in determining” the final result. *Vines*, 28 F.3d at 1130. As explained above, Petitioner could not credibly argue that he did not know his status as a convicted felon because he stipulated that he had previously been convicted of multiple felonies before his arrest for possession of a firearm by a convicted felon. 2d Stipulation 1-2; Trial Tr. 113:07-113:13; *Brown*, 782 F. App’x at 852. Courts in the Eleventh Circuit, including this Court,

⁴ The Court notes, however, that in *United States v. Moore*, 954 F.3d 1322 (11th Cir. 2020), the Eleventh Circuit considered a *Rehaif* argument similar to the one raised in *Innocent* and further discussed the requirements for an indictment. The Court noted that “[t]he standard for whether an indictment sufficiently alleges a crime is not demanding.” *Id.* at 1332. “An indictment tracking the statutory language and stating approximately the time and place of an alleged crime is sufficient.” *Id.* (citing *United States v. Brown*, 752 F.3d 1344, 1353 (11th Cir. 2014)). Petitioner’s indictments in *Moore* “track[ed]—and cite[d]—the language from 18 U.S.C. § 922(g)(1),” and the Eleventh Circuit recognized that the “indictment[s] were clearly sufficient prior to *Rehaif*.” *Id.* at 1333. While the Supreme Court later interpreted § 922(g) to require proof of knowledge of status in *Rehaif*, “[r]eading this knowledge requirement into the statute while also holding that indictments tracking the statute’s text are insufficient would be incongruous.” *Id.* The Eleventh Circuit concluded that “[t]he absence of an element of an offense in an indictment is not tantamount to failing to charge a criminal offense against the United States.” *Moore*, 954 F.3d at 1333. The *Moore* petitioner did not raise a Fifth or Sixth Amendment challenge. Like in *Moore*, however, Petitioner’s indictment tracks the language of § 922(g) and specifies the firearm Petitioner possessed. *See* Indictment 1. Thus, based on *Moore*, the Court is not convinced that Petitioner establishes a Fifth or Sixth Amendment violation. *See also Ndiaye*, 434 F.3d at 1299 (“The constitutional standard is fulfilled by an indictment that tracks the wording of the statute, as long as the language sets forth the essential elements of the crime.”). Regardless, Petitioner is not entitled to relief because he fails to show actual prejudice.

which have reached the merits of petitioners' *Rehaif* claims have held that petitioners failed to show actual prejudice and were not entitled to habeas relief where they acknowledged their prior felony convictions. *Long*, 2020 WL 7391292, at *8-9; *Gayle*, 2020 WL 4339359, at *5-6; *Lee*, 2020 WL 5412981, at *5; *Moody*, 2020 WL 4756679, *2; *Richardson*, 2021 WL 719613, at *4-5; *Davis*, 2020 WL 8919332, at *16. Similarly, Petitioner fails to establish actual prejudice resulting from his alleged constitutional errors, and he is not entitled to relief. Therefore, in the alternative, to the extent Petitioner may avoid procedural default, the Court **RECOMMENDS** that his amended motion to vacate (ECF No. 75) be **DENIED** on the merits of his claims.

III. Petitioner's Original Motion to Vacate

In his original *pro se* motion to vacate, Petitioner raised three *Rehaif* claims which are similar to the claim raised by appointed counsel in his amended motion to vacate: (1) the Court lacked jurisdiction because his indictment omitted the § 922(g) knowledge-of-status element, (2) Petitioner is actually innocent because his indictment omitted the knowledge-of-status element, and (3) appellate counsel was ineffective in failing to raise an argument on appeal as to the indictment's omission of the knowledge-of-status element. Mot. to Vacate 4-7, ECF No. 62; Mem. in Supp. of Mot. to Vacate 3-12, ECF No. 62-1. Through appointed counsel, Petitioner filed an amended motion to vacate (ECF No. 75) after Respondent responded (ECF No. 64) to his original motion to vacate. He did not raise these three claims in his amended motion, and neither Petitioner nor his appointed counsel has indicated whether they intended for his amended motion to replace his original motion.

Thus, in an abundance of caution, the Court addresses Petitioner's three grounds raised in his original *pro se* motion to vacate.

Respondent argues Petitioner's first two claims should be dismissed for procedural default. Resp. to Mot. to Vacate 3-5, ECF No. 64. As explained above, Petitioner did not raise a *Rehaif* claim on direct appeal. See *Brown*, 782 F. App'x at 851-52. Accordingly, under the procedural default rule, Petitioner is barred from raising these claims in his motion to vacate. *Lynn*, 365 F.3d at 1234. As thoroughly discussed above, Petitioner cannot show either cause and prejudice or actual innocence to excuse his procedural default, and his claims raised in his original motion to vacate, therefore, should be denied. In the alternative, Respondent argues that to the extent the Court reaches the merits of Petitioner's first two claims, those claims lack merit. Resp. to Mot. to Vacate 5-10. The Court agrees. As to Petitioner's first claim, the Eleventh Circuit has held that an indictment's omission of the § 922(g) knowledge-of-status element does not deprive the Court of jurisdiction. *Innocent*, 977 F.3d at 1083-84; *Moore*, 954 F.3d at 1332-38; *Reed*, 941 F.3d at 1021-22. As to Petitioner's second claim, he fails to show actual innocence because he stipulated that he had previously been convicted of multiple felonies. 2d Stipulation 1-2; Trial Tr. 113:07-113:13; *Brown*, 782 F. App'x at 852; see also *Innocent*, 977 F.3d at 1083-84. For these reasons, Petitioner's first two claims lack merit.

As to Petitioner's third claim, Respondent argues Petitioner fails to show that appellate counsel was ineffective in failing to raise a *Rehaif* claim on direct appeal. Resp. to Mot. to Vacate 10-13. To prevail on a claim of ineffective assistance of counsel, a petitioner must establish, by a preponderance of the evidence, that his attorney's

performance was deficient and that he was prejudiced by the inadequate performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Chandler v. United States*, 218 F.3d 1305, 1313 (11th Cir. 2000). However, “[a] court considering a claim of ineffective assistance must apply a ‘strong presumption’ that counsel’s representation was within the ‘wide range’ of reasonable professional assistance.” *Harrington v. Richter*, 562 U.S. 86, 104 (2011) (quoting *Strickland*, 466 U.S. at 689 (1984)).

To establish deficient performance, a petitioner must prove that counsel’s performance was unreasonable under prevailing professional norms and that the challenged action was not sound strategy. There is a strong presumption that the challenged action constituted sound trial strategy. *Chateloin v. Singletary*, 89 F.3d 749, 752 (11th Cir. 1996). To show that counsel’s performance was unreasonable, a petitioner must establish that no competent counsel would have taken the action in question. *Van Poyck v. Florida Dep’t of Corr.*, 290 F.3d 1318, 1322 (11th Cir. 2002) (per curiam).

To satisfy the prejudice prong, a petitioner must show there is a reasonable probability that, but for counsel’s inadequate representation, “the result of the proceedings would have been different.” *Meeks v. Moore*, 216 F.3d 951, 960 (11th Cir. 2000). If a petitioner fails to establish that he was prejudiced by the alleged ineffective assistance, a court need not address the performance prong of the *Strickland* test. *Holladay v. Haley*, 209 F.3d 1243, 1248 (11th Cir. 2000). A petitioner’s burden when bringing an ineffective assistance claim “is not insurmountable” but “is a heavy one.” *Chandler*, 218 F.3d at 1314.

Here, Petitioner cannot establish deficient performance based on counsel’s failure to raise a claim as to his indictment’s omission of the knowledge-of-status element before

Rehaif because “[i]t is well-settled that an attorney’s failure to anticipate a change in the law will not support a claim of ineffective assistance of appellate counsel.” *Geter v. United States*, 534 F. App’x 831, 836 (11th Cir. 2013) (per curiam) (collecting cases). Moreover, even assuming appellate counsel could have foreseen a potential change in law and raised a claim as to the omission of the knowledge-of-status element based on the prevalence of such claims in appellate cases, Petitioner fails to establish prejudice because he stipulated to his prior felony convictions, and, thus, he cannot show that “the result of the proceedings would have been different.” *Meeks*, 216 F.3d at 960; *see* 2d Stipulation 1-2; Trial Tr. 113:07-113:13; *Brown*, 782 F. App’x at 852. As explained above, any claim concerning omission of the knowledge-of-status element would have lacked merit and not resulted in reversal of Petitioner’s conviction. *See Innocent*, 977 F.3d at 1083-84; *Moore*, 954 F.3d at 1332-38; *Reed*, 941 F.3d at 1021-22. Therefore, to the extent Petitioner continues to raise the claims advanced in his original motion to vacate, the Court **RECOMMENDS** that his original motion to vacate (ECF No. 62) be **DENIED**.

CERTIFICATE OF APPEALABILITY

Rule 11(a) of the Rules Governing Section 2255 Proceedings for the United States District Courts provides that “[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant.” A certificate of appealability may issue only if the applicant makes “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). If a court denies a collateral motion on the merits, this standard requires a petitioner to “demonstrate 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). When a court denies a collateral motion on procedural grounds, this standard requires a petitioner to demonstrate that “jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Id.* at 478. Petitioner cannot meet either of these standards and, therefore, a certificate of appealability in this case should be denied.

CONCLUSION

For the foregoing reasons, the Court recommends that Petitioner’s motion to vacate (ECF No. 62) and amended motion to vacate (ECF No. 75) be denied. Pursuant to 28 U.S.C. § 636(b)(1), Petitioner may serve and file written objections to this Recommendation, or seek an extension of time to file objections, within fourteen (14) days after being served with a copy hereof. The district judge shall make a de novo determination of those portions of the Recommendation to which objection is made. All other portions of the Recommendation may be reviewed for clear error.

Petitioner is hereby notified that, pursuant to Eleventh Circuit Rule 3-1, “[a] party failing to object to a magistrate judge’s findings or recommendations contained in a report and recommendation in accordance with the provisions of 28 U.S.C. § 636(b)(1) waives the right to challenge on appeal the district court’s order based on unobjected-to factual and legal conclusions if the party was informed of the time period for objecting and the consequences on appeal for failing to object. In the absence of a proper objection, however, the court may review on appeal for plain error if necessary in the interests of justice.”

SO RECOMMENDED, this 5th day of April, 2021.

/s/ Stephen Hyles

UNITED STATES MAGISTRATE JUDGE