

IN THE
SUPREME COURT OF THE UNITED STATES

No. _____

OCTOBER TERM, 2020

SHANE ARNOLD,

Petitioner,

- VS -

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

GARY PAUL BURCHAM
BURCHAM & ZUGMAN
402 West Broadway, Suite 1130
San Diego, CA 92101
Telephone: (619) 699-5930
Attorney for Petitioner

QUESTION PRESENTED FOR REVIEW

Whether a defendant satisfies the final two prongs of plain error review for a *Rehaif v. United States*, ___ U.S. __, 139 S. Ct. 2191 (2019), trial error if he demonstrates that, but for the district court's omission of the knowledge-of-status element at trial, he would have introduced evidence bearing upon this point in support of a viable knowledge-of-status defense?

TABLE OF CONTENTS

Authorities Cited	ii
Question Presented for Review	Prefix
Petition for Writ of Certiorari.	1
Jurisdiction and Citation of Opinion Below	2
Constitutional Provisions at Issue	2
Federal Rule at Issue	2
Introduction	4
Statement of Facts and Case.....	5
Argument	7
Conclusion	12
Word Count Certification	

Appendix:

Appendix “A” (Ninth Circuit Court of Appeals
Memorandum)

Appendix “B” (Ninth Circuit Court of Appeals order denying
petition for rehearing and suggestion for rehearing *en banc*)

TABLE OF AUTHORITIES

CASES

<i>Chambers v. Miss.</i> , 410 U.S. 284 (1973)	7-11
<i>In re Oliver</i> , 333 U.S. 257 (1948)	7-11
<i>Montana v. Egelhoff</i> , 518 U.S. 37 (1996)	7-11
<i>Neder v. United States</i> , 527 U.S. 1 (1999)	11
<i>Rehaif v. United States</i> , 139 S. Ct. 2191 (2019)	<i>passim</i>
<i>United States v. Benamor</i> , 937 F.3d 1182 (9th Cir. 2019)	9
<i>United States v. Gary</i> , 963 F.3d 420 (4th Cir. 2020)	10
<i>United States v. Johnson</i> , 963 F.3d 847 (9th Cir. 2020)	9
<i>United States v. Maez</i> , 960 F.3d 949 (7th Cir. 2020)	9
<i>United States v. Stanford</i> , 823 F.3d 814 (5th Cir. 2016)	9
<i>United States v. Welch</i> , 951 F.3d 901 (8th Cir. 2020)	9

FEDERAL STATUTES

18 U.S.C. § 922(g)	5,8-9,11
28 U.S.C. § 1254	2

STATE STATUTES

Cal. Penal Code § 242	10-11
Cal Penal Code § 273.5	4-5,8,10

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Petitioner respectfully prays that a *writ of certiorari* issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on November 25, 2020.

JURISDICTION AND CITATION OF OPINION BELOW

On November 25, 2020, the Ninth Circuit affirmed Petitioner's conviction in an unpublished Memorandum opinion, attached as Exhibit "A" to this petition. The Ninth Circuit denied Petitioner's petition for rehearing, and suggestion for rehearing en banc, on January 11, 2021. This Court has jurisdiction to review the Ninth Circuit's decision pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AT ISSUE

Fifth Amendment to the U.S. Constitution:

No person shall . . . be deprived of life, liberty, or property, without due process of law.

Sixth Amendment to the U.S. Constitution:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

FEDERAL RULE AT ISSUE

Federal Rule of Criminal Procedure 52:

(a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

(b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

INTRODUCTION

Petitioner asks the Court to grant review of the instant case in order to decide the proper prejudice analysis for a *Rehaif v. United States*, __ U.S. __, 139 S. Ct. 2191 (2019), plain trial error. The Ninth Circuit panel looked to the record from Petitioner’s bench trial to determine whether he had been prejudiced by the failure of the district court to require the government to prove Petitioner’s knowledge-of-status in connection with his 18 U.S.C. § 922(g) count. The Ninth Circuit found no effect on Petitioner’s substantial rights given the state court minutes which the government had placed into the record which showed that Petitioner had been convicted of a misdemeanor domestic violence conviction, pursuant to Cal. Penal Code § 273.5. In this pre-*Rehaif* trial, however, Petitioner had been completely denied his right to present a defense as to this particular element due to the district court’s error, and he would have introduced evidence bearing upon this element as part of a viable knowledge-of-status defense had he been allowed. Petitioner asks the Court to review this case to determine whether the Ninth Circuit’s *Rehaif* prejudice analysis under these circumstances is violative of the Fifth and Sixth Amendments.

STATEMENT OF FACTS AND CASE

In 2017, Petitioner was charged with, among other counts, being a prohibited person in possession of a firearm in violation of 18 U.S.C. § 922(g). As to the section 922(g) count, the indictment alleged that Petitioner was barred from possessing a firearm because he had been convicted of a “misdemeanor crime of domestic violence, namely, Infliction of Corporal Injury on a Spouse or Co-Habitant, in violation of California Penal Code Section 273.5, in the Superior Court of the State of California, County of Los Angeles, case number 6IW0886, on or about September 30, 1996.”

In a pre-*Rehaif*, bench trial, in order to prove up the existence of the prior misdemeanor domestic violence conviction, the government admitted as an exhibit the criminal minutes from Petitioner’s 1996 case. This document showed the fact of conviction, as well as the fact that Petitioner had been ordered to complete a domestic violence class as part of the sentence. Given the state of the law at the time of trial, Petitioner presented no defense to the knowledge-of-status element of the charge. The district court convicted Petitioner of the section 922(g) charge, and sentenced him to 10 years in custody, to run concurrently to a sentence of 135 months on counts one and two of the indictment.

On direct appeal, Petitioner raised multiple claims related to the *Rehaif*

error, including that reversal was required because the government introduced insufficient evidence to prove Petitioner’s knowledge of this status as a prohibited person. The Ninth Circuit construed Petitioner’s claim as an argument that the district court applied the wrong legal standard in assessing his guilt by omitting the knowledge-of-status element required by *Rehaif*, and denied relief. [Mem. at 5]. The panel found plain error, but declined to find that Petitioner had been prejudiced because the trial record showed that Petitioner had been convicted of a Cal. Penal Code § 273.5(a) domestic violence misdemeanor conviction, that as part of his conviction he had enrolled in a 52-week domestic violence program, and this evidence established beyond a reasonable doubt that he had the required knowledge under Rehaif. [Ex. “A” at 6]. The Ninth Circuit denied Petitioner’s petition for rehearing, and suggestion for rehearing *en banc*, without further comment. [Ex. “B”].

ARGUMENT

THE COURT SHOULD REVIEW THIS CASE TO CORRECT THE NINTH CIRCUIT'S UNCONSTITUTIONAL REHAIF v. UNITED STATES, 139 S. Ct. 2191 (2019), PLAIN ERROR PREJUDICE DETERMINATION

“A person’s right to reasonable notice of a charge against him, and an opportunity to be heard in his defense -- a right to his day in court -- are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel.” *In re Oliver*, 333 U.S. 257, 273 (1948). “The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State’s accusations.” *Chambers v. Miss.*, 410 U.S. 284, 294 (1973). “Due process demands that a criminal defendant be afforded a fair opportunity to defend against the State’s accusations.” *Montana v. Egelhoff*, 518 U.S. 37, 63 (1996).

“Where the defendant may introduce evidence to negate a subjective mental-state element, the prosecution must work to overcome whatever doubts the defense has raised about the existence of the required mental state.” *Egelhoff*, 518 U.S. at 65. “On the other hand, if the defendant may not introduce evidence that might create doubt in the factfinder’s mind as to whether that element was met, the prosecution will find its job so much the easier.” *Id.* “If a jury may not consider the defendant’s evidence of his mental state, the jury may impute to the defendant the

culpability of a mental state he did not possess.” *Id.*

At the time of Petitioner’s trial, the 18 U.S.C. § 922(g) status requirement mandated that the government demonstrate only that the defendant had been convicted of a disqualifying offense at the time he possessed a firearm. In the instant case, that was a California misdemeanor conviction under California Penal Code § 273.5 which Petitioner suffered in 1996. At trial, the government introduced the criminal minutes from that case to show the fact of conviction, and Petitioner presented no defense to this knowledge-of-status element because the state of the law at that time precluded such a defense.

The Court’s decision in *Rehaif* demonstrated that the trial court committed error in its failure to require the government to prove that Petitioner knew he had been convicted of a misdemeanor domestic violence crime at the time of this offense. *See Rehaif*, 139 S. Ct. at 2200 (concluding that section 922(g) requires the government to “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.”). The Ninth Circuit rejected Petitioner’s claim that this plain error required reversal based upon its finding that the evidence from trial proved “beyond a reasonable doubt that [Petitioner] had the requisite knowledge under *Rehaif* for a conviction under 18 U.S.C. § 922(g)(9). [Ex. “A” at 6].

The Ninth Circuit’s plain error analysis in this case violated the Fifth and Sixth Amendments because Petitioner had been completely foreclosed from defending the knowledge-of-status element at trial, and had he been allowed to contest this element, he would have introduced evidence in support of a viable defense to this charge. While “cases involving a claim that the defendant was denied the right to present an adequate defense typically involve the court’s excluding certain testimony or evidence,” *United States v. Stanford*, 823 F.3d 814, 836 (5th Cir. 2016), here Petitioner was completely foreclosed from defending this element of the charge because of the state of the law at that time. But unlike other cases where defendants charged with felon-in-possession under section 922(g) had no viable defense to the knowledge-of-status element available to them due to the nature of their criminal histories, *see, e.g., United States v. Johnson*, 963 F.3d 847, 853-54 (9th Cir. 2020) (defendant had three prior felonies, each for which he served a state prison sentence); *United States v. Benamor*, 937 F.3d 1182, 1188-89 (9th Cir. 2019) (defendant had seven felonies with multiple state prison commitments, and even a prior felon-in-possession conviction), *United States v. Maez*, 960 F.3d 949, 965-66 (7th Cir. 2020) (no prejudice from *Rehaif* error given multiple prior felony convictions); *United States v. Welch*, 951 F.3d 901, 907 (8th Cir. 2020) (defendant could not show his substantial rights were affected because he had previously

“received and served several prison sentences longer than one year for felony convictions”), Petitioner did have a viable defense to this requirement given what occurred in his prior state case.

Petitioner had been charged in 1996 with two counts - Cal. Penal Code § 273.5 (misdemeanor corporal injury of a spouse, cohabitant, or fellow parent), and Cal. Penal Code § 242 (misdemeanor simple battery). Petitioner ultimately pled to the section 273.5 misdemeanor charge, but did so in the form of a no contest plea. The trial court imposed a suspended sentence of one year in jail, and three years of probation. Unlike the situation with a felony conviction where courts have found that “[f]elony status is simply not the kind of thing that one forgets,” *United States v. Gary*, 963 F.3d 420, 423 (4th Cir. 2020) (Wilkinson, J., concurring), here Petitioner was convicted only of a misdemeanor, and through a *nolo contendre* plea to one of two charged counts.

Given this record, Petitioner maintained the viable defense that due to the nature of the charges and the manner of disposition of his case, he was unaware that he had been convicted of a misdemeanor domestic violence offense. The minutes do not confirm anything other than the conviction itself, and the fact that a non-domestic violence misdemeanor also had been charged in the case supports the claim that Petitioner was unaware that he had been convicted of this precise offense. As to

the other fact relied upon by the Ninth Circuit panel to find a lack of prejudice – that Petitioner also had enrolled in a domestic violence counseling program – this also was not dispositive as to his knowledge-of-status, as such a program could have been imposed in connection with the original section 242 misdemeanor battery charge.

Even where a trial court erroneously omits an element from a criminal charge, harmless error review generally is available. *See Neder v. United States*, 527 U.S. 1, 18-19 (1999) (concluding that the omission of an element is an error that is subject to harmless-error analysis). The Court affirmed in that case due to an absence of prejudice, but noted that, as to the omitted materiality element, “Petitioner does not suggest that he would introduce any evidence bearing upon the issue of materiality if so allowed.” *Id.* at 14. As set forth above, this case presents a very different situation, as Petitioner has asserted that he would have introduced evidence on the knowledge-of-status issue had the district court properly construed section 922(g).

In sum, if the rights the Court has discussed in cases such as *In re Oliver* and *Egelhoff* are to be given sufficient meaning, the Ninth Circuit’s prejudice approach in this case must be corrected. A defendant hardly is given a “fair opportunity to defend against the State’s accusations,” *Chambers*, 410 U.S. at 294, when he is improperly precluded from contesting an important *mens rea* component of the charge against him at trial, but then the error is reviewed by relying on the

corresponding incomplete record to determine prejudice. Because Petitioner was completely barred from presenting a defense on the knowledge-of-status element, and he would have introduced evidence bearing on this status in support of a viable defense requirement had the district court not erred, the Ninth Circuit's plain error prejudice analysis violated the Fifth and Sixth Amendments. Petitioner asks this Court to review this case in order to correct the Ninth Circuit's unconstitutional application of *Rehaif*.

CONCLUSION

For the above reasons, Petitioner respectfully requests that the Court grant the instant petition to review the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted,

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/s/ Gary P. Burcham
GARY PAUL BURCHAM
BURCHAM & ZUGMAN
402 West Broadway, Suite 1130
San Diego, CA 92101
Telephone: (619) 699-5930
Attorney for Petitioner