ADDENDUM

NOT FOR PUBLICATION

FILED

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. K. JEFFERY KNAPP, Defendant-Appellant.	No. 20-30120 D.C. Nos. 6:19-cr-00003-CCL-1 6:19-cr-00003-CCL MEMORANDUM*

Appeal from the United States District Court
for the District of Montana
Charles C. Lovell, District Judge, Presiding

Argued and Submitted May 5, 2021
Seattle, Washington

Before: CHRISTEN and BENNETT, Circuit Judges, and SILVER,** District Judge.

Defendant K. Jeffery Knapp appeals his conviction and sentence for being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Roslyn O. Silver, United States District Judge for the District of Arizona, sitting by designation.

In 1994, Knapp was convicted by a Colorado court of second-degree sexual assault and intimidating a witness. He was sentenced to eight years in prison for the sexual assault and six years for intimidating a witness, with the sentences to be served consecutively. After serving nine years, Knapp was released from prison in February 2003. When released, he was given a document that stated he was "unconditionally discharged from the custody of the Department of Corrections pursuant to [Colo. Rev. Stat. §] 18-1-105." In 2019, the government executed a search warrant at Knapp's home and seized sixteen firearms and ammunition. The government then charged Knapp with violating § 922(g)(1). Knapp stipulated to the fact of his prior Colorado convictions and to his knowing possession of the firearms found in his home. At trial, Knapp testified that he thought his right to possess a firearm had been restored by his discharge document. The jury found him guilty, and the district court sentenced him to 63 months. Knapp appeals his conviction and sentence.

1. Knapp contends that his right to possess a firearm was restored by operation of Colorado law, and thus he was not a convicted felon for the purposes of § 922(g)(1). We review de novo the district court's denial of Knapp's motion to dismiss on this ground. *United States v. Ziskin*, 360 F.3d 934, 942 (9th Cir. 2003).

Section 921(a)(20) provides that "[a]ny conviction . . . for which a person . . . has had civil rights restored shall not be considered a conviction for purposes of

[§ 922(g)(1)], unless such . . . restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms." 18 U.S.C. § 921(a)(20). Thus, "we must determine whether state law expressly prohibited [the defendant] from possessing firearms, notwithstanding the substantial restoration of his civil rights." *United States v. Collins*, 61 F.3d 1379, 1382 (9th Cir. 1995). Knapp argues that we should analyze whether Colorado law prohibited him from possessing firearms by looking at the law at the time he was indicted for his Colorado crimes. But our caselaw is clear that we "must look to the whole of state law *at the time of restoration* of civil rights." *United States v. Huss*, 7 F.3d 1444, 1446 (9th Cir. 1993) (alteration omitted) (rejecting defendant's argument that "we look to the state law in effect at the time of conviction"), *overruled on other grounds by United States v. Sanchez-Rodriguez*, 161 F.3d 556 (9th Cir. 1998) (en banc). Colorado automatically restores substantial civil rights to felons once they have completed their sentences. *See, e.g.*, Colo. Const. art. 7 § 10. While Knapp's civil rights were substantially restored when he was released from prison in 2003, Colorado law at that time prohibited all firearm possession by convicted felons. Colo. Rev. Stat. § 18-12-108(1) (2002). Thus, Knapp's right to possess a firearm was not restored by Colorado law.

Knapp also argues that applying Colorado's felon-in-possession law at the time of his release violates the Ex Post Facto Clause. We disagree. A statute is not

an ex post facto law if it is "a bona fide regulation of conduct which the legislature has power to regulate," and the "overall design and effect of the statute . . . bear out the non-punitive intent." *Huss*, 7 F.3d at 1447–48 (citation omitted). Colorado's felon-in-possession law, Colo. Rev. Stat. § 18-12-108(1), is non-punitive because a prior felony conviction "can reasonably be said to indicate unfitness to engage in the future activity of possessing firearms." *Id.* at 1448. Further, section 18-12-108(1) is "part of a larger statutory scheme designed to regulate the possession of firearms." *Collins*, 61 F.3d at 1383; *see* Colo. Rev. Stat. § 18-12-108.5(1) (prohibiting juveniles from possessing firearms). Thus, application of section 18-12-108(1) to Knapp does not violate the Ex Post Facto Clause.

2. Knapp also appears to argue that his right to possess a firearm was restored by his discharge document, despite Colorado law. *See United States v. Laskie*, 258 F.3d 1047, 1049–50 (9th Cir. 2001). Knapp characterizes his argument as a sufficiency of the evidence claim because the district court submitted to the jury the issue of whether Knapp's right to possess a firearm was restored. However, § 921(a)(20)'s restoration exception "is a question of law to be decided by the judge," *United States v. Akins*, 276 F.3d 1141, 1146 (9th Cir. 2002), *overruled on other grounds as recognized by United States v. Lenihan*, 488 F.3d 1175 (9th Cir. 2007) (per curiam), even when the purported restoration is premised on a discharge document, *see Laskie*, 258 F.3d at 1049. Thus, the fact that the jury decided the

question against Knapp is irrelevant to our review. As a matter of law, the discharge document did not restore Knapp's rights, because it is silent as to restoration of rights. *See Jennings v. Mukasey*, 511 F.3d 894, 901 (9th Cir. 2007). Accordingly, however characterized, Knapp's argument fails.

3. Knapp challenges the sufficiency of the evidence about his knowledge of his status as a convicted felon. After *Rehaif v. United States*, 139 S. Ct. 2191 (2019), the government must prove the defendant knew he was a convicted felon in § 922(g)(1) cases. *See United States v. Singh*, 979 F.3d 697, 727–28 (9th Cir. 2020). Section 921(a)(20) defines § 922(g)(1) to exclude convictions for which the felon's rights have been restored. Thus, Knapp argues that *Rehaif* extends to § 921(a)(20) and requires the government to prove beyond a reasonable doubt that he knew his right to possess a firearm was not restored. We assume without deciding that *Rehaif* extends to the restoration exception in § 921(a)(20) and evaluate Knapp's claim on the merits.

Knapp raises this argument as a sufficiency of the evidence claim, which we review de novo because he preserved his claim before the district court. *United States v. Stewart*, 420 F.3d 1007, 1014 (9th Cir. 2005). Thus, we view the evidence "in the light most favorable to the prosecution," and determine whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 1014–15 (citation omitted).

We conclude that the government presented sufficient evidence that Knapp knew his right to possess a firearm was not restored. Knapp testified that he regained his civil rights upon his release from prison because the discharge document stated he was "unconditionally discharged," and thus he thought he was "restored to [his] full rights as a United States citizen." He also testified that he thought the discharge document's restoration included his right to possess a firearm, because "[i]f anybody had ever told me that I'd lost my gun rights, there would be the place to state it." However, on cross-examination, Knapp conceded that the discharge document did not explicitly restore or even mention any civil rights (or firearm possession). A rational juror could have found Knapp's explanation unreasonable and discredited his testimony that he thought the discharge document restored his rights. Knapp also testified that he had never tried to purchase a firearm, despite accumulating a significant collection of firearms and ammunition by other means. Viewing the evidence in the light most favorable to the government, there was sufficient evidence for at least one rational juror to conclude that Knapp knew his right to possess a firearm was not restored.

4. Knapp claims the district court made several sentencing errors. First, he argues the district court erred in denying him a two-level reduction in his offense level for acceptance of responsibility. *See* U.S. Sent'g Guidelines Manual (U.S.S.G.) § 3E1.1(a). We review the district court's determination for clear error.

United States v. Gillam, 167 F.3d 1273, 1279 (9th Cir. 1999). Although Knapp stipulated to the firearm possession and his previous convictions, he contested at trial the issue of whether he knew his status as a convicted felon. Knapp's insistence that he lacked the mens rea to violate § 922(g)(1) is "incompatible with acceptance of responsibility." *United States v. Burrows*, 36 F.3d 875, 883 (9th Cir. 1994).

Second, Knapp argues the district court improperly enhanced his offense level by finding that his second-degree sexual assault conviction qualified as a crime of violence. *See* U.S.S.G. § 2K2.1(a)(3). We review de novo whether a state crime is a crime of violence. *United States v. Slade*, 873 F.3d 712, 714 (9th Cir. 2017). The government concedes that Knapp's statute of conviction, Colo. Rev. Stat. § 18-3-403 (repealed 2000), reaches conduct that would not constitute a crime of violence. But the statute is divisible because its subsections constitute functionally separate crimes—the subsections have different mens rea requirements, and prohibit conduct ranging from statutory rape to sexual assault in medical contexts.[1] Because the

[1] Knapp's statute of conviction provided:

> (1) Any actor who knowingly inflicts sexual penetration or sexual intrusion on a victim commits sexual assault in the second degree if:
> (a) The actor causes submission of the victim to sexual penetration by any means other than those set forth in section 18-3-402 [first-degree sexual assault statute], but of sufficient consequence reasonably calculated to cause submission against the victim's will; or
> (b) The actor causes submission of the victim to sexual intrusion by any means other than those set forth in section 18-3-402 [first-degree sexual assault

statute is divisible, we look at Knapp's charging document, judgment of conviction, and the docket sheet from his trial, which establish that Knapp was convicted of second-degree sexual assault under either subsection (a) or subsection (b) of section 18-3-403(1). *See Coronado v. Holder*, 759 F.3d 977, 985–86 (9th Cir. 2014). Thus, Knapp's crime was "sexual penetration [or intrusion] on a non-consenting victim." *People v. Smith*, 638 P.2d 1, 4 (Colo. 1981) (interpreting section 18-3-403(1)(a), (b)). That crime is categorically a "forcible sex offense." *See* U.S.S.G. § 4B1.2(a)(2). A "forcible sex offense" does not require force or violence, "so long as consent to the sex offense was shown to be lacking," *United States v. Gallegos-Galindo*, 704 F.3d 1269, 1272 (9th Cir. 2013), *abrogated on other grounds by*

> statute], but of sufficient consequence reasonably calculated to cause submission against the victim's will; or
> (c) The actor knows that the victim is incapable of appraising the nature of the victim's conduct; or
> (d) The actor knows that the victim submits erroneously, believing the actor to be the victim's spouse; or
> (e) At the time of the commission of the act, the victim is less than fifteen years of age and the actor is at least four years older than the victim and is not the spouse of the victim; or
> [(f) repealed]
> (g) The victim is in custody of law or detained in a hospital or other institution and the actor has supervisory or disciplinary authority over the victim and uses this position of authority, unless the sexual intrusion is incident to a lawful search, to coerce the victim to submit; or
> (h) The actor engages in treatment or examination of a victim for other than bona fide medical purposes or in a manner substantially inconsistent with reasonable medical practices.

Colo. Rev. Stat. § 18-3-403 (repealed 2000).

Descamps v. United States, 570 U.S. 254 (2013), and covers any sexual contact, not just sexual penetration, *see United States v. Quintero-Juno*, 754 F.3d 746, 753–54 (9th Cir. 2014). The district court thus did not err in finding that Knapp had been convicted of a crime of violence.

Third, Knapp claims the district court erred in applying the semiautomatic firearm enhancement, *see* U.S.S.G. § 2K2.1(a)(3), because the Sentencing Commission lacked the authority to promulgate that enhancement. This presents a question of law we review de novo. *United States v. Booten*, 914 F.2d 1352, 1354 (9th Cir. 1990). The semiautomatic firearm enhancement was initially promulgated at the direction of Congress pursuant to the Violent Crime Control and Law Enforcement Act ("VCCLEA"). *See* Pub. L. No. 103-322, § 110501, 108 Stat. 1796, 2015 (1994). The expiration of the VCCLEA in 2004 does not affect the justifications for the semiautomatic firearm enhancement, *see United States v. Maness*, 566 F.3d 894, 897 (9th Cir. 2009) (per curiam), especially when the Sentencing Commission later reenacted the enhancement in Amendment 691, *see* U.S.S.G. app. C. Further, the enhancement for possession of semiautomatic firearms relates to "the circumstances under which the offense was committed which mitigate or aggravate the seriousness of the offense," as well as "the public concern generated by the offense." 28 U.S.C. § 994(c)(2), (5). Thus, the Sentencing Commission had the authority to promulgate the enhancement, and the district court did not err in

applying it here.

Finally, Knapp challenges the substantive reasonableness of the district court's sentence. We review for abuse of discretion, considering the totality of the circumstances and the 18 U.S.C. § 3553(a) factors. *United States v. Ressam*, 679 F.3d 1069, 1087–88 (9th Cir. 2012). The district court correctly calculated Knapp's total offense level at 26, with a Guidelines imprisonment range of 63 months to 78 months. The court considered the relevant factors and ultimately sentenced Knapp to 63 months' imprisonment—the low end of the Guidelines range. We find the district court's sentence substantively reasonable.

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. K. JEFFERY KNAPP, Defendant-Appellant.	No. 20-30120 D.C. Nos. 6:19-cr-00003-CCL-1 6:19-cr-00003-CCL District of Montana, Helena ORDER

Before: CHRISTEN and BENNETT, Circuit Judges, and SILVER,* District Judge.

The panel has unanimously voted to deny Appellant's petition for panel rehearing. Judges Christen and Bennett have voted to deny the petition for rehearing en banc, and Judge Silver has so recommended.

The full court has been advised of Appellant's petition for rehearing en banc, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are DENIED.

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* The Honorable Roslyn O. Silver, United States District Judge for the District of Arizona, sitting by designation.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. JEFFREY KENNETH KNAPP, Defendant.	CR-19-03-H-CCL ORDER

Before the Court is Defendant's Motion to Dismiss the Indictment under Rule 12(b)(3)(A) of the Federal Rules of Criminal Procedure. (Doc. 23). The government opposes the motion.

The Indictment charges the Defendant with one count of "Prohibited Person in Possession of a Firearm" in violation of 18 U.S.C. § 922(g)(1). The Indictment alleges that Defendant is prohibited from possessing a firearm based on his December 28, 1994, conviction of a crime punishable by imprisonment for a term exceeding one year under the laws of the State of Colorado, and that Defendant, on April 3, 2019, knowingly possessed, in and affecting interstate and foreign commerce firearms and ammunition. (Doc. 10).

LEGAL STANDARD

A motion to dismiss an indictment is governed by Rule 12 of the Federal Rules of Criminal Procedure, which allows a party to "raise by pretrial motion any

defense, objection, or request that the court can determine without a trial on the merits." Fed. R. Crim. P. 12(b)(1). Motions based on "a defect in instituting the prosecution" must be "raised by pretrial motion if the basis for the motion is then reasonably available and the motion can be determined without a trial on the merits." Fed. R. Crim. P. 12(b)(3)(A). Although the Court "may make preliminary findings of fact necessary to decide the legal questions" presented by a pretrial motion, the Court must not invade the province of the jury by prematurely deciding whether the government can prove the elements of the charged offense. *United States v. Nukida*, 8 F.3d 665, 669 (9th Cir. 1993).

DISCUSSION

Arguments based on Colorado Statute

Defendant argues that he cannot be charged as a prohibited person in possession of a firearm because the Colorado law in effect at the time he was charged with the predicate convictions only prohibited persons previously convicted of "burglary, arson, or a felony involving the use of force or violence or the use of a deadly weapon, or attempt or conspiracy to commit such offenses" from owning firearms. (Doc. 24 at 3, citing Colo. Rev. Stat. § 18-12-108 (1990)). Defendant argues in the alternative that even if he had been charged and convicted of one of the crimes enumerated in the 1990 version of Colo. Rev. Stat. § 18-12-108, his rights would have been restored by February of 2013. (Doc. 24 at 4).

Defendant appears to acknowledge that the amended version of Colo. Rev. Stat. § 18-12-108, which took effect on July 1, 1994, prohibits possession of a weapon by any offender convicted of a felony. (Doc. 24 at 6). He argues that applying the amended Colorado statute violates the *ex post facto* prohibitions of the United States Constitution. (Doc. 24 at 6).

The Court begins its analysis by determining when, if ever, the State of Colorado restored Defendant's right to possess firearms. The Court looks to the whole of state law at the time of the restoration of civil rights when deciding whether a defendant's prior conviction constitutes a predicate offense for purposes of 18 U.S.C. § 922(g)(1). *United States v. Cardwell*, 967 F.2d 1349, 1350 (9th Cir. 1992).

The Court first determines "whether [Knapp's] civil rights were substantially restored by [Colorado] law. *United States v. Collins*, 61 F.3d 1379, 1382 (9th Cir. 1995). "Colorado, like many states, restores various civil rights such as the rights to vote, sit on a jury, and hold office to its convicted felons once they have completed their sentences." *United States v. Hall*, 20 F.3d 1066, 1068 (10th Cir. 1994). Knapp claims that he completed serving his Colorado criminal sentence by February 3rd of 2003. (Doc. 24 at 3). Knapp's civil rights were substantially restored by state law when he discharged his sentence in February of 2003.

The Court next determines "whether state law expressly prohibited [Knapp] from possessing firearms, notwithstanding the substantial restoration of his civil rights." *Collins*, 61 F.3d at 1382. The 1993 amendment to Colo. Rev. Stat. § 18-12-108, which went into effect in July of 1994, made it a "crime for any convicted felon to possess a firearm." *United States v. Norman*, 129 F.3d 1393, 1397 (10th Cir. 1997). In 2003, the first subsection of Colo. Rev. Stat. § 18-12-108 prohibited anyone convicted of a felony anywhere in the United States from possessing a firearm, stating: "A person commits the crime of possession of a weapon by a previous offender if the person knowingly possesses, uses, or carries upon his or her person a firearm as described in section 18-1-901(3)(h) or any other weapon that is subject to the provisions of this article subsequent to the person's conviction for a felony, or subsequent to the person's conviction for attempt or conspiracy to commit a felony, under Colorado or any other state's law or under federal law." Colo. Rev. Stat. Ann. § 18-12-108(1) (2003).[1] Knapp's right to possess firearms was not restored by the State of Colorado when he finished serving his sentence in 2003. *See Collins*, 61 F.3d at 1383.

The Court must also consider whether the 1993 amendment to the Colorado statute, which went into effect after Knapp was charged but before he was

[1] The 2003 version of Colo. Rev. Stat. § 18-12-108 is unchanged from the 1994 version and remains the same as of 2019.

sentenced, violates the *ex post facto* clauses of the United States Constitution. The United States Court of Appeals for the Ninth Circuit considered and rejected a similar argument in *Collins*. 61 F.3d at 1383. Defendant Collins, like Knapp, argued that his Illinois convictions did not qualify as convictions for purposes of 18 U.S.C. § 921(a) because Illinois law was amended to prohibit felons from possessing firearms after he was convicted and while he was incarcerated, and that application of the amended statutes violated the *ex post facto* clause. *Id.* In rejecting this argument, the Ninth Circuit relied in part on an Illinois Court of Appeals' decision rejecting such an argument. *Id.*

This Court, following the lead of the Ninth Circuit in *Collins*, considers Colorado law in determining Knapp's *ex post facto* challenge to a Colorado statute. The Colorado Court of Appeals considered this issue in *People v. DeWitt*, 275 P.3d 728 (Colo. Ct. App. 2011), applying the reasoning of the United States Supreme Court in *Weaver v. Graham*, 450 U.S. 24 (1981). The United States Supreme Court has long recognized "that two critical elements must be present for a criminal or penal law to be *ex post facto*: it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it." *Weaver*, 450 U.S. at 29. The Colorado Court of Appeals rejected the defendant's *ex post facto* argument in *DeWitt* because the prohibited conduct in that case – "defendant's possession of a firearm – occurred in 2009,

well after the 1994 amendment." *DeWitt*, 275 P.3d at 732. The same is true in the instant case – Knapp's alleged possession of firearms occurred in 2019, after the 1994 amendment to the Colorado statute. If Knapp is convicted, he will be convicted for his 2019 possession of firearms. While it may be true that the conduct that led to Knapp's prior convictions occurred before the statute was amended, any punishment imposed will be for his 2019 conduct, not for the conduct that led to his prior convictions.

Argument based on recent Supreme Court ruling.

Defendant asks the Court to dismiss the indictment against him because the government cannot prove that he knew that he was prohibited from possessing a firearm. (Doc. 24 at 5). Defendant argues that the Supreme Court's recent ruling in *Rehaif v. United States*, 588 U.S. ___, 2019 WL 2552487 (Jun. 21, 2019), requires the United States to prove that a defendant knows that it is illegal for him to possess a firearm in order to convict him of violating 18 U.S.C. 922(g). (Doc. 26 at 8). The government argues that it need only prove that Knapp knew that he had been convicted of a felony. (Doc. 25 at 8). The Court need not resolve this dispute at this time, as it is clear that Defendant's argument is an attempt to challenge the government's ability to prove an essential element of its case. Such a challenge constitutes "a premature challenge to the sufficiency of the government's evidence." *Nukida*, 8 F.3d at 669.

CONCLUSION & ORDER

Defendant's arguments in support of his motion to dismiss are either lacking in merit as a matter of law or require factual findings that cannot be made before trial. Accordingly,

IT IS HEREBY ORDERED that Defendant's motion to dismiss (Doc. 23) is denied.

IT IS FURTHER ORDERED that counsel for the United States and Defendant shall each file a brief on or before August 16, 2019 (the deadline for submitting jury instructions) setting forth the legal and factual basis for a proposed instruction addressing the "knowing" requirement in the wake of *Rehaif.*

Done and dated this 25th day of July, 2019.

CHARLES C. LOVELL
SENIOR UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. JEFFREY KENNETH KNAPP, Defendant.	CR-19-03-H-CCL ORDER

Before the Court is Defendant's "Post-Trial Motion for Judgment of Acquittal Under Rule 29(c) Fed. R. Crim. P." (Doc. 84). The United States opposes the motion. The Court has reviewed the record in its entirety and is prepared to rule.

PROCEDURAL HISTORY

On April 4, 2019, the United States filed a criminal complaint charging Mr. Knapp with being a "Prohibited Person in Possession of a Firearm" in violation of 18 U.S.C. § 922(g)(1). Magistrate Judge Lynch issued an arrest warrant and Mr. Knapp appeared before Magistrate Judge Lynch that day. Mr. Knapp was represented at his initial appearance by Andy Nelson of the Federal Defender's Office and Ms. Hunt was appointed to represent him for future proceedings. Magistrate Judge Lynch released Mr. Knapp, subject to certain conditions.

On May 1, 2019, a grand jury indictment was filed, charging Mr. Knapp with one count of "Prohibited Person in Possession of a Firearm" in violation of 18 U.S.C. § 922(g)(1). The Court set trial for June 17, 2019.

On May 28, Defendant filed a motion to continue all pretrial deadlines on behalf of her client. Her motion was based on her need to obtain information from the State of Colorado regarding the felony convictions that served as the basis for the charge against her client. The Court convened a telephone conference with counsel for both parties to discuss the need to set a new trial date and the parties agreed that they could be prepared for trial on September 3, 2019. The Court issued an order the same day setting trial for September 3, 2019, and extending other pretrial deadlines.

On June 21, 2019, the Court granted Ms. Hunt's second motion to continue the pretrial deadlines, extending the motions deadline until June 27, 2019. The Court did not continue the trial or change the August 16, 2019, plea agreement deadline.

On June 21, 2019, the United States Supreme Court held that to convict a defendant of being a prohibited person in possession of a firearm, the United States "must show that the defendant knew he possessed a firearm and also that he knew he had the relevant status when he possessed it." *Rehaif v. United States*, 139 S.Ct. 2191, 2194 (2019).

On June 27, 2019, Defendant filed a motion to dismiss the indictment against him. The government opposed the motion, and the Court entered its order denying the motion to dismiss on July 25, 2019. Recognizing the potential impact of the *Rehaif* decision as to the essential elements of the charged crime, the Court asked the parties to submit briefs and proposed jury instructions as to the "knowing" element on or before August 16, 2019.

On August 13, 2019, the parties filed a joint motion to waive the grand jury indictment and allow the government to proceed by superseding information. The Court heard and granted the motion on August 21, 2019. On August 22, 2019, the Court entered an order resetting trial for October 22, 2019, the date agreed upon during the August 21, 2019, hearing.

On October 22, 2019, at the close of the government's evidence, Defendant made a Rule 29 Motion for Judgment of Acquittal as to the superseding information, which was denied. Defendant renewed his motion after both parties had rested, later that day, and the Court denied the renewed motion. On October 23, 2018, a unanimous jury found Defendant guilty of being a prohibited person in possession of a firearm as charged in the superseding information. Now before the Court is Defendant's timely-filed renewed motion for judgment of acquittal as to the single count of the superseding information, which motion is again opposed by the government.

LEGAL STANDARD

The familiar standard for deciding a motion for acquittal, as articulated in *Jackson v. Virginia*, requires this Court to determine whether, "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." 443 U.S. 307, 319 (1979)(emphasis in original).

DISCUSSION

The Court used the model Ninth Circuit instruction, as revised after the United States Supreme Court decided *Rehaif,* to instruct the jury as to the elements of the charged offense. The Court instructed the jury that the government must prove each of the following elements beyond a reasonable doubt:

> First, the defendant knowingly possessed firearms and ammunition;
>
> Second, the firearms and ammunition had been shipped from one state to another;
>
> Third, at the time the defendant possessed the firearms and ammunition, the defendant had been convicted of a crime punishable by imprisonment for a term exceeding one year; and
>
> Fourth, at the time defendant possessed the firearms and ammunition, he knew that he had been convicted of a crime punishable by imprisonment for a term exceeding one year.

(Doc. 79 at 13).

///

The only element disputed by Defendant is the fourth element. He argued at trial and continues to argue that he did not know that he was a convicted felon and that his civil rights, including his right to bear arms, were restored when he was released from prison in 2003. The Court provided the following Ninth Circuit model instruction to explain the requirement that the defendant knew about his prior conviction:

> an act is done knowingly if the defendant is aware of the act and does not act through ignorance, mistake, or accident. The government is not required to prove that the defendant knew that his acts or omissions were unlawful. You may consider evidence of the defendant's words, acts, or omissions, along with all the other evidence, in deciding whether the defendant acted knowingly.

(Doc. 79 at 15).

At Defendant's request, the Court also instructed the jury that any "conviction that has been expunged, set aside, or for which a person has been pardoned or has had his civil rights restored shall not be considered a conviction for purposes of a federal firearm violation, unless the pardon, expungement or restoration of civil rights expressly provides the person may not possess firearms." (Doc. 79 at 17).

The Court properly instructed the jury that the government had the burden of proving every element of the charged offense beyond a reasonable doubt.

There was nothing in any individual instruction or in the instructions as a whole that created a presumption shifting the burden of proof regarding knowledge to the defendant.

The government offered sufficient evidence to support the jury's finding as to the fourth element of the charged offense in presenting its case in chief. At the close of its case, the government offered the parties' stipulations, which included a stipulation that Defendant had prior convictions. Special Agent Sprenger testified that the convictions were for felonies and that Defendant was sentenced to terms of imprisonment exceeding one year. The government offered sufficient evidence during its case in chief to allow a rational trier of fact to conclude that Defendant knew that he had been convicted of a crime punishable by a term of imprisonment exceeding one year.

After the government rested, Defendant testified. He explained his understanding that, upon his release from imprisonment, his civil rights, including his right to bear arms, had been restored. Defendant offered his discharge paperwork (Exhibit 522, admitted without objections) to support his claim.

Exhibit 522 provides no support for Defendant's claim that his civil rights were restored when he was discharged from prison in Colorado. It contains no reference to the term "civil rights." It refers only to this unconditional discharge from the custody of the Colorado Department of Corrections.

When cross-examined, Defendant admitted that Exhibit 522 does not include the term "civil rights" and does not state that he was pardoned or that his conviction was expunged or set aside. Defendant also admitted that he was still required to register based on those convictions.

The government chose not to offer rebuttal testimony, apparently seeing no need to rebut Defendant's testimony. After retiring to deliberate at 11:16 a.m., the jury reached its verdict by 11:50 a.m. The jury's quick return of a guilty verdict demonstrates that it was not persuaded by Defendant's testimony or by his reliance on his discharge paperwork.

The jury's verdict was supported by sufficient evidence as to each and every element of the charged offense. Accordingly,

IT IS HEREBY ORDERED that Defendant's motion for judgment of acquittal (Doc. 84) is DENIED.

Dated this 3rd day of December, 2019.

CHARLES C. LOVELL
SENIOR UNITED STATES DISTRICT JUDGE

HISTORY OF INSTITUTIONAL VIOLENCE (Review and validate entire background of precipitation [illegible])

COLORADO DEPARTMENT OF CORRECTIONS

STATUTORY DISCHARGE

FROM FACILITY

COMMITMENT NAME (Last, First, MI)	DOC NO.	Institution/Unit
KNAPP, JEFFREY K.	85333	FCF/L.U.1

The above named inmate is to be unconditionally discharged from the custody of the Department of Corrections pursuant to 16-1-105.

This Discharge from the Colorado Department of Corrections includes the following convictions by case number and county. (Please list.)

94CR956	Jefferson County	
93JD320	Jefferson County	
93JD1064	Jefferson County	
94CR956	Jefferson County	

DISCHARGE EFFECTIVE February 7, 2003

/s/ Christine D Moschetti January 28, 2003

for the Executive Director Date

Christine Moschetti, Supervisor Time/Release

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EXHIBIT 522_Colorado Statutory Discharge