

1 than one year in prison. 18 U.S.C. § 922(g) (1). At the time of his
2 conviction, Weatherspoon had two prior felony convictions: (1)
3 attempted burglary; and (2) ex-felon in possession of a firearm.
4 When Weatherspoon was charged and convicted in this case, the
5 government was not required to prove that he knew he was a felon.
6 *United States v. Enslin*, 327 F.3d 788, 798 (9th Cir. 2003). But
7 after Weatherspoon was sentenced, the U.S. Supreme Court concluded
8 that a defendant may be convicted under § 922(g) only if the
9 government proves that the defendant “knew he belonged to the
10 relevant category of persons barred from possessing a firearm.”
11 *Rehaif v. United States*, 139 S. Ct. 2191, 2200 (2019). On the basis
12 of *Rehaif* and the government’s failure to charge his knowledge of
13 status, Weatherspoon now moves to vacate his conviction.

14 **II. Standard**

15 Pursuant to 28 U.S.C. § 2255, a federal inmate may move to
16 vacate, set aside, or correct his sentence if: (1) the sentence
17 was imposed in violation of the Constitution or laws of the United
18 States; (2) the court was without jurisdiction to impose the
19 sentence; (3) the sentence was in excess of the maximum authorized
20 by law; or (4) the sentence is otherwise subject to collateral
21 attack. *Id.* § 2255(a).

22 **III. Analysis**

23 Weatherspoon argues that the omission of the *Rehaif* element
24 from the indictment violated his Fifth Amendment rights
25 guaranteeing that a grand jury find probable cause to support all
26 the necessary elements of the crime and to not be tried on a
27 fatally defective indictment and his Sixth Amendment right to
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1 notice of the charges.¹ He alleges that the defective indictment
2 also deprived the court of jurisdiction. Further, Weatherspoon
3 asserts that his plea was not knowing and voluntary due to the
4 absence of the *Rehaif* element and that his trial conviction
5 violated his due process rights because the jury instructions
6 lacked the *Rehaif* element, and the government did not prove, nor
7 did the jury find, the *Rehaif* element was satisfied.

8 A. Conviction by Guilty Plea

9 Weatherspoon pleaded guilty to Count Two without the benefit
10 of a plea agreement. The plea was not conditional, and “[a]n
11 unconditional guilty plea waives all non-jurisdictional defenses
12 and cures all antecedent constitutional defects, allowing only an
13 attack on the voluntary and intelligent character of the plea.”
14 *United States v. Brizan*, 709 F.3d 864, 866–67 (9th Cir. 2013); see
15 also *Tollett v. Henderson*, 411 U.S. 258, 267 (1973); *United States*
16 *v. Espinoza*, 816 Fed. App’x 82, 85 (9th Cir. June 1, 2020)
17 (unpublished disposition) (unconditional plea waiver precludes all
18 Fifth and Sixth Amendment claims except to the extent they contest
19 the court’s jurisdiction or the voluntariness of the plea).² Thus,
20 as to Count Two, Weatherspoon’s plea bars his claims of
21 constitutional deprivations that occurred prior to entry of the
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23 ¹ Although Weatherspoon’s motion also alleges violation of his
24 Sixth Amendment right to effective assistance of counsel,
25 Weatherspoon clarifies in his reply that he alleges deprivation of
26 counsel only to show the prejudice that resulted from the defect
27 in the indictment and that it is not a standalone claim.

28 ² The court agrees with the well-reasoned opinions of several
courts that none of the exceptions under *Tollett* to the collateral
challenge waiver applies in this case. See, e.g., *United States v.*
Kelbch, 2021 WL 96242, at *2 (D. Nev. Jan. 7, 2021).

1 plea except to the extent the claims allege the court lacked
2 jurisdiction or that his plea was not knowing and voluntary.

3 As to Weatherspoon's jurisdictional argument, it is without
4 merit. The omission of an element from the indictment does not
5 affect the court's jurisdiction. *United States v. Cotton*, 535 U.S.
6 625, 630 (2002); *United States v. Ratigan*, 351 F.3d 957, 962-63
7 (9th Cir. 2003); see also *United States v. Jackson*, 2020 WL
8 7624842, at *1 (9th Cir. Dec. 22, 2020) (unpublished disposition)
9 (rejecting the defendant's argument that omission of the *Rehaif*
10 element deprived the district court of jurisdiction); *United*
11 *States v. Burlison*, 2020 WL 4218317, at *1 (July 23, 2020)
12 (unpublished disposition) (same); *Espinoza*, 2020 WL 2844542, at *1
13 (same); *United States v. Moore*, 954 F.3d 1322, 1332 (11th Cir.
14 2020); *United States v. Hobbs*, 953 F.3d 853, 856 (6th Cir. 2020);
15 *United States v. Balde*, 943 F.3d 73, 88-92 (2d Cir. 2019); *United*
16 *States v. Burghardt*, 939 F.3d 397, 402 (1st Cir. 2019). *Cf. United*
17 *States v. Singh*, 979 F.3d 697, 730 (9th Cir. 2020) (on direct
18 appeal, reviewing omission of *Rehaif* element from indictment for
19 plain error). The indictment otherwise sufficiently states a
20 cognizable criminal offense: possession of a firearm by a convicted
21 felon in violation of 18 U.S.C. § 922(g)(1).

22 Weatherspoon's claims that the court lacked jurisdiction and
23 that the indictment was deficient are moreover procedurally
24 defaulted. "If a criminal defendant could have raised a claim of
25 error on direct appeal but nonetheless failed to do so, he must
26 demonstrate" either "cause excusing his procedural default, and
27 actual prejudice resulting from the claim of error," *United States*
28 *v. Johnson*, 988 F.2d 941, 945 (9th Cir. 1993), or that he is

1 actually innocent of the offense, *Bousley v. United States*, 523
2 U.S. 614, 622 (1998). “[C]ause for a procedural default on appeal
3 ordinarily requires a showing of some external impediment
4 preventing counsel from constructing or raising the claim.” *Murray*
5 *v. Carrier*, 477 U.S. 478, 492 (1986). Actual prejudice “requires
6 the petitioner to establish ‘not merely that the errors at ...
7 trial created a possibility of prejudice, but that they worked to
8 his actual and substantial disadvantage, infecting his entire
9 trial with error of constitutional dimensions.’” *Bradford v.*
10 *Davis*, 923 F.3d 599, 613 (9th Cir. 2019) (internal citation
11 omitted).

12 Weatherspoon could have raised his claims regarding the
13 indictment on direct appeal, but he did not do so. Those claims
14 are therefore procedurally defaulted. It is unnecessary to resolve
15 whether Weatherspoon can demonstrate cause for the default,
16 because even if he could, he cannot demonstrate prejudice.³

17 First, Weatherspoon admitted at his change of plea that he
18 knew it was unlawful for him to possess the firearm and that at
19 the time he possessed the firearm he had been previously convicted
20 of a felony. The court is not persuaded by Weatherspoon’s argument
21 that he never admitted he knew *at the time he possessed the firearm*
22 that it was unlawful for him to do so. Nevertheless, even if he
23 had not made this direct admission, Weatherspoon’s criminal record
24 forecloses any argument that he was unaware of his status as a
25 convicted felon at the time he possessed the firearms in question.
26 Weatherspoon committed the offenses in this case after receiving
27 a 12- to 36-month sentence for attempted burglary and a 12- to 32-

28 ³ Weatherspoon does not argue actual innocence.

1 month sentence for ex-felon in possession of a firearm. (PSR ¶¶ 43
2 & 52). As such, there is no reasonable possibility Weatherspoon
3 did not know he had been convicted of a crime punishable by more
4 than a year in prison. He cannot therefore show that the results
5 of the proceedings would have been any different - *i.e.*, that he
6 would not have entered a plea of guilty to Count Two and would not
7 have been convicted under Count One -- had the indictment contained
8 the *Rehaif* element.

9 Weatherspoon argues that he suffered prejudice because he was
10 convicted by a court lacking jurisdiction. For the reasons
11 previously discussed, this argument is without merit because the
12 errors Weatherspoon complains of did not deprive the court of
13 jurisdiction. Weatherspoon additionally argues that he was
14 prejudiced because the defect deprived him of effective assistance
15 of counsel. For the reasons already discussed, he cannot show a
16 reasonable probability of a different outcome had the *Rehaif*
17 element been included in the indictment, and thus he has not
18 established prejudice on this basis.

19 Weatherspoon alternatively argues that he is not required to
20 demonstrate prejudice to obtain relief because the omission is
21 structural error.

22 "[C]ertain errors, termed structural errors, might affect
23 substantial rights regardless of their actual impact on an
24 appellant's trial." *United States v. Marcus*, 560 U.S. 258, 263
25 (2010) (internal punctuation and citations omitted). Thus,
26 structural error "warrant[s] habeas relief without a showing of
27 specific prejudice." *United States v. Withers*, 638 F.3d 1055, 1063-
28 64 (9th Cir. 2011). "But structural errors are a very limited class

1 of errors that affect the framework within which the trial
2 proceeds, such that it is often difficult to assess the effect of
3 the error." *Marcus*, 560 U.S. at 263 (internal punctuation and
4 citations omitted). Cases in which the Supreme Court has found
5 structural error include total deprivation of counsel, lack of an
6 impartial trial judge, violation of the right to a public trial
7 and an erroneous reasonable-doubt instruction. *See id.* (discussing
8 cases). In contrast, errors that have been found to be non-
9 structural include where the court instructed on an invalid
10 alternative theory of guilt, gave an instruction omitting an
11 element of the offense, or erroneously instructed the jury on an
12 element. *Id.* at 264 (discussing cases).

13 The Ninth Circuit has not yet addressed in a published opinion
14 whether omission of the *Rehaif* element from the indictment is
15 structural error. But it has held that the error is not structural
16 in at least one unpublished decision. *See United States v. Jackson*,
17 2020 WL 7624842, at *1 n.1 (9th Cir. Dec. 22, 2020). And the First,
18 Third, Fifth, Seventh, Eighth, and Tenth Circuits have concluded
19 that *Rehaif* errors are not structural. *United States v. Patrone*,
20 985 F.3d 81, 86 (1st Cir. 2021); *United States v. Nasir*, 982 F.3d.
21 144, 171 n.30 (3d Cir. Dec. 1, 2020); *United States v. Lavalais*,
22 960 F.3d 180, 187 (5th Cir. 2020); *United States v. Payne*, 964
23 F.3d 652, 657 (7th Cir. 2020); *United United States v. Coleman*,
24 961 F.3d 1024, 1030 (8th Cir. 2020); *States v. Trujillo*, 960 F.3d
25 1196, 1207 (10th Cir. 2020); *see also United States v. Hill*, 2020
26 WL 7258551, at *2 n.3 (3d Cir. Dec. 10, 2020) (unpublished
27 disposition); *United States v. Watson*, 820 Fed. App'x 397, 400
28 (6th Cir. 2020) (unpublished disposition); *United States v. Brown*,

1 2021 WL 1955859, at *6 (11th Cir. May 17, 2021) (unpublished
2 disposition).⁴ This court agrees with the well-reasoned opinions
3 of these courts and concludes that omission of the *Rehaif* element
4 from the indictment does not fall within the limited class of
5 errors the Supreme Court has found to be structural, at least where
6 the error has not been timely challenged.⁵

7 Weatherspoon's claim that his guilty plea violated his due
8 process rights because it was not knowing and voluntary is likewise
9 without merit.⁶ Weatherspoon asserts that his plea was not knowing
10 and voluntary because neither he, his counsel nor the court
11 understood all the elements of the offense to which he was
12 pleading. A claim of a due process violation is subject to the
13 harmless error standard of *Brecht v. Abrahamson*, 507 U.S. 619, 623
14 (1993). See *United States v. Montalvo*, 331 F.3d 1052, 1058 (9th
15 Cir. 2003); see also *United States v. Session*, 2020 WL 6381353, at
16 *2 (N.D. Cal. Oct. 30, 2020). Thus, even assuming a defendant
17 establishes a due process violation, he is entitled to relief only

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19 ⁴ The Fourth Circuit has reached the opposite conclusion. *United*
20 *States v. Gary*, 954 F.3d 194, 206 (4th Cir. 2020), cert. granted
United States v. Gary, 141 S. Ct. 974 (2021).

21 ⁵ While there is case law holding that defects in the indictment
22 are structural error, those cases apply only where the claim is
23 timely raised. See, e.g., *United States v. Du Bo*, 186 F.3d 1177,
24 1179 & 1180 n.3 (9th Cir. 1999) ("We hold that, if properly
25 challenged prior to trial, an indictment's complete failure to
26 recite an essential element of the charged offense is not a minor
or technical flaw subject to harmless error analysis, but a fatal
flaw requiring dismissal of the indictment. . . . Untimely
challenges to the sufficiency of an indictment are reviewed under
a more liberal standard."). Weatherspoon's claim here was not
timely raised.

27 ⁶ Weatherspoon correctly argues that the government's procedural
28 default argument was not extended to this claim and is therefore
waived.

1 if the error had a "substantial and injurious effect" on the
2 proceedings. *Brecht*, 507 U.S. at 623. In this context, the question
3 is whether there is a reasonable probability that Weatherspoon
4 would have declined to enter a guilty plea had he been aware the
5 government was required to prove the *Rehaif* element. See *United*
6 *States v. Flynn*, 316 Fed. App'x 658, 659-60 (9th Cir. 2009)
7 (unpublished disposition). Cf. *United States v. Espinoza*, 2020 WL
8 2844542, at *1 (9th Cir. 2020). For the reasons identified above
9 with respect to the showing of prejudice, the court concludes
10 Weatherspoon cannot show that he would not have entered a plea had
11 he been aware of the *Rehaif* element.

12 Weatherspoon asserts that this error was structural and that
13 a showing of prejudice is not required. The court does not agree
14 that such an error, at least in the context of this case, amounts
15 to structural error, and therefore finds Weatherspoon's argument
16 in this respect to be without merit. See e.g., *Ibarra v. United*
17 *States*, 2020 WL 7385713, at *6 (W.D. Wash. Dec. 16, 2020).

18 B. Conviction by Jury Verdict

19 Weatherspoon argues that his conviction under Count One
20 violates his due process because the government did not prove, and
21 the court did not instruct the jury on or require the jury to find,
22 the *Rehaif* element. This claim, like Weatherspoon's attack on his
23 guilty plea, is subject to the harmless error standard and thus,
24 Weatherspoon is entitled to habeas relief only if the error has a
25 "substantial and injurious effect or influence in determining the
26 jury's verdict." *Brecht*, 507 U.S. at 627, 637; see also *United*
27 *States v. Rodrigues*, 678 F.3d 693, 695 (9th Cir. 2012)
28 (instructional error subject to the *Brecht* harmless error

1 standard). For the reasons set forth above, Weatherspoon has not
2 made this showing. Not only did Weatherspoon admit to this court
3 that he was aware of his felon status, but he had been twice
4 convicted and sentenced to prison terms exceeding 12 months. Thus,
5 there is no reasonable probability the outcome of the trial would
6 have been different had the jury been instructed on, and the
7 government required to prove, the *Rehaif* element.

8 Defendant asserts omission of the element from the jury
9 instructions is structural error, relying on *United States v.*
10 *Becerra*, 939 F.3d 995, 1006 (9th Cir. 2019). Weatherspoon's
11 reliance on *Becerra* is unavailing. In *Becerra*, the Ninth Circuit
12 held that the complete failure to orally instruct the jury amounted
13 to structural error. That is not the error alleged here. In fact,
14 *Becerra* explicitly recognized that "[o]mission of a single element
15 of the charged offense from the jury instructions is error, but
16 not structural error." *Id.* at 1003. *Cf. United States v. Gear*,
17 2021 WL 163090 (9th Cir. Jan. 19, 2021) (reviewing *Rehaif* error in
18 jury instructions for plain error). The error is not structural,
19 and Weatherspoon's failure to demonstrate prejudice defeats this
20 due process claim.

21 Weatherspoon also asserts that the prosecutor's statement in
22 closing that the jury was not required to find Weatherspoon knew
23 of his felon status violated his rights. However, like the jury
24 instruction error, prosecutor misconduct is also subject to the
25 harmless error standard. *Darden v. Wainwright*, 477 U.S. 168, 181-
26 83 (1986). For the reasons already set forth, Weatherspoon cannot
27 demonstrate a substantial and injurious effect on the jury's
28 verdict resulting from the prosecutor's statement.

1 C. The *Rehaif* Element

2 Finally, Weatherspoon argues that *Rehaif* requires the
3 government to prove not only that he knew that he was a convicted
4 felon but also that he knew he was barred from possessing firearms.
5 Notwithstanding the fact that Weatherspoon admitted to the court
6 that he knew he was barred from possessing a firearm and his
7 criminal history amply supports an inference that he was aware of
8 his felon status, Weatherspoon's legal argument is also without
9 merit. *United States v. Singh*, 979 F.3d 697, 727 (9th Cir. 2020)
10 ("[The defendant] contends that *Rehaif* requires the Government to
11 prove he knew not only his status, but also that he knew his status
12 prohibited him from owning a firearm. But this interpretation is
13 not supported by *Rehaif*).

14 **IV. Conclusion**


15 Accordingly, because the claims raised in Weatherspoon's
16 § 2255 motion are waived, procedurally defaulted and/or without
17 merit, IT IS THEREFORE ORDERED that the motion to vacate, set aside
18 or correct sentence (ECF No. 103) is hereby DENIED.

19 IT IS FURTHER ORDERED that Weatherspoon is DENIED a
20 certificate of appealability, as jurists of reason would not find
21 the court's denial of the motion to be debatable or wrong.

22 The Clerk of Court shall enter final judgment accordingly.

23 IT IS SO ORDERED.

24 DATED: This 24th day of May, 2021.

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26 
27 UNITED STATES DISTRICT JUDGE

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