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## UNITED STATES DISTRICT COURT

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## DISTRICT OF NEVADA

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UNITED STATES OF AMERICA,

Case No. 2:15-cr-00053-LRH-VCF

Respondent/Plaintiff,

ORDER

v.

ROBERT BROWN,

Petitioner/Defendant.

15 Before the Court is petitioner Robert Brown’s (“Brown”) motion, to vacate, set aside, or  
16 correct his sentence pursuant to 28 U.S.C. § 2255 (ECF No. 71). Brown filed his motion  
17 considering the recent ruling in *Rehaif v. United States*, 139 S. Ct. 2191 (2019). The Government  
18 opposed (ECF No. 73), arguing that Brown’s claims are procedurally barred because he did not  
19 raise them on direct appeal. In his reply (ECF No. 74), Brown maintains that the constitutional  
20 errors are structural.

21 For the reasons contained within this Order, the Court denies his motion and denies him a  
22 certificate of appealability.

23 **I. BACKGROUND**

24 Brown has an extensive criminal history which, among other things, includes four felony  
25 convictions over the eight-year period leading to the instant offense.

26 The conduct relevant to this motion occurred on February 5, 2015, when Las Vegas police  
27 officers spotted a car with a large necklace hanging from the rearview mirror obstructing the  
28 driver’s view. After running a records check, the officers learned that the car was registered to two

1 individuals who had outstanding arrest warrants. After stopping the car, the officers observed  
2 Brown driving the vehicle, and a woman in the passenger side. After searching both the vehicle  
3 and Brown's person, the officers found a loaded black semiautomatic handgun and 14.4 grams of  
4 marijuana.

5 In March 2016, Brown pleaded guilty to Unlawful Possession of a Firearm by a Previously  
6 Convicted Felon. ECF No. 61. The plea agreement stated that Brown knowingly possessed the  
7 firearm, and that he had been previously convicted of a crime punishable by a term of  
8 imprisonment exceeding one year. ECF No. 62, at 4. In July 2016, this Court sentenced Brown to  
9 42 months and 15 days' imprisonment followed by three years supervised release. Brown did not  
10 appeal.

11 Now, Brown seeks to vacate his sentence under 28 U.S.C. § 2255.

12 **II. LEGAL STANDARD**

13 Pursuant to 28 U.S.C. § 2255, a petitioner may file a motion requesting the court which  
14 imposed sentence to vacate, set aside, or correct the sentence. 28 U.S.C. § 2255(a). Such a motion  
15 may be brought on the following grounds: (1) "the sentence was imposed in violation of the  
16 Constitution or laws of the United States;" (2) "the court was without jurisdiction to impose such  
17 sentence;" (3) "the sentence was in excess of the maximum authorized by law;" or (4) the sentence  
18 "is otherwise subject to collateral attack." *Id.*; *see United States v. Berry*, 624 F.3d 1031, 1038 (9th  
19 Cir. 2010). When a petitioner seeks relief pursuant to a right newly recognized by a decision of  
20 the United States Supreme Court, a one-year statute of limitations applies. 28 U.S.C. §  
21 2255(f). That one-year limitation period begins to run from "the date on which the right asserted  
22 was initially recognized by the Supreme Court." *Id.* § 2255(f)(3).

23 On June 21, 2019, the Supreme Court decided *Rehaif*, overturning established Ninth Circuit  
24 precedent. 139 S. Ct. 2191. In the past, the government was only required to prove that a defendant  
25 knowingly possessed a firearm under 18 U.S.C. §§ 922(g) and 924(a)(2). *Id.* at 2200. Now, under  
26 *Rehaif*, the government "must prove both that the defendant knew he possessed a firearm and that  
27 he knew that he belonged to the relevant category of persons barred from possessing a firearm."  
28 *Id.*

1                   **III. DISCUSSION**

2                   Brown argues that by leaving out the new *Rehaif* element from the original indictment, this  
 3 Court lacked jurisdiction. ECF No. 71, at 14. He further alleges the omission in the indictment  
 4 violated both his Fifth Amendment guarantee that a grand jury find probable cause to support all  
 5 the necessary elements of a crime, and his Sixth Amendment right to effective assistance of counsel  
 6 and to be informed of the nature and cause of the accusation. *Id.* at 16–21.

7                   **A. Unconditional Guilty Plea**

8                   The government contends that by pleading guilty unconditionally, Brown waived his right  
 9 to make any non-jurisdictional challenges to the indictment; specifically, his Fifth and Sixth  
 10 Amendment challenges. *See Tollet v. Henderson*, 411 U.S. 258, 267 (1973). ECF No. 73, at 12.

11                  As part of his plea, Brown waived “...all collateral challenges, including any claims under  
 12 28 U.S.C. § 2255, to his conviction, sentence, and the procedure by which the Court adjudicated  
 13 guilt and imposed sentence, except non-waivable claims of ineffective assistance of counsel.”  
 14 Consequently, Brown waiving “all non-jurisdictional defenses . . . cures all antecedent  
 15 constitutional defects, allowing only an attack on the voluntary and intelligent character of the  
 16 plea.” *United States v. Brizan*, 709 F.3d 864, 866–67 (9th Cir. 2013). Considering the plea’s cut-  
 17 and-dry language, the Court finds Brown’s claims are barred by his guilty plea even in view of the  
 18 exceptions to *Tollett v. Henderson*, 411 U.S. 258 (1973).<sup>1</sup> Nevertheless, the Court still finds it  
 19 necessary to address the jurisdictional and procedural default arguments below.

20                  **B. Jurisdiction**

21                  This Court “has jurisdiction of all crimes cognizable under the authority of the United  
 22 States....” *Lamar v. United States*, 240 U.S. 60, 65 (1916). Any “objection that the indictment does  
 23 not charge a crime against the United States goes only to the merits of the case,” and does not  
 24 deprive the court of jurisdiction. *Id.*; *see also United States v. Cotton*, 535 U.S. 625, 630 (2020)

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 26 <sup>1</sup> *Tollett* limited federal habeas challenges to pre-plea constitutional violations. 411 U.S. at 267. Exceptions to this  
 27 general rule include a claim which the state cannot “constitutionally prosecute.” *Class v. U.S.*, 138 S. Ct. 789, 805  
 28 (2018) (quoting *Menna v. New York*, 423 U.S. 61, 63 (1975) (per curiam)). While Brown claims such an exception  
 exists in the present instance (ECF No. 71, at 21), the Court agrees with other well-reasoned decisions in the District  
 of Nevada which hold it does not. *See United States v. Abundis*, Case No. 2:18-cr-00158-MMD-VCF-1 (D. Nev. Nov.  
 30, 2020) (finding that the exceptions to *Tollett* do not apply under *Rehaif* as the claims “could have been remedied  
 by a new indictment.”).

1 (reiterating *Lamar*). Quite importantly, the Ninth Circuit and decisions within the District of  
 2 Nevada have relied on the principle announced in *Cotton* in cases considering the aftermath of  
 3 *Rehaif*. *See, e.g.*, *United States v. Espinoza*, 816 F. App'x 82, 84 (9th Cir. 2020) (“[T]he  
 4 indictment's omission of the knowledge of status requirement did not deprive the district court of  
 5 jurisdiction.”); *see also United States v. Miller*, Case No. 3:15-cr-00047-HDM-WGC (D. Nev.  
 6 Dec. 8, 2020); *United States v. Baustamante*, Case No. 2:16-cr-00268-APG (D. Nev. Dec. 7,  
 7 2020).

8 Therefore, pursuant to Ninth Circuit precedent and decisions in this District, the Court had  
 9 and continues to have jurisdiction over Brown's case despite *Rehaif*.

10 **C. Procedural Default**

11 The government also argues that his claims are procedurally defaulted. ECF No. 73, at 6.  
 12 While a defendant certainly can question the underlying legality of his sentence or conviction, one  
 13 who does not on direct appeal is procedurally defaulted from doing so unless they can demonstrate:  
 14 (1) cause and prejudice; or (2) actual innocence. *See Bousley v. U.S.*, 523 U.S. 614, 622 (1998)  
 15 (citations omitted). “‘Cause’ is a legitimate excuse for the default; ‘prejudice’ is actual harm  
 16 resulting from the alleged constitutional violation.” *Magby v. Wawrzaszek*, 741 F.2d 240, 244 (9th  
 17 Cir. 1984).

18 Brown did not challenge the validity of the indictment and/or plea on direct appeal, but  
 19 instead, argues his claims have not procedurally defaulted because he can demonstrate cause and  
 20 prejudice, or, in the alternative, the omission in his indictment is a structural error and therefore  
 21 only requires a showing of cause. Each argument is addressed in turn.

22 **1. Cause**

23 Brown can likely demonstrate cause. *Rehaif* overturned long standing precedent in the  
 24 Ninth Circuit, and the decision's constitutional consequences were not “reasonably available to  
 25 counsel.” *Reed v. Ross*, 468 U.S. 1, 16 (1984).

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## 2. Prejudice

Still, Brown cannot demonstrate prejudice. The Ninth Circuit has found in numerous scenarios, that even if a defendant had been aware that the Government would need to prove the knowledge-of-status element, there is no reasonable probability that the outcome would have been different. *See United States v. Espinoza*, 816 F. App'x 82, 84 (9th Cir. 2020) (holding that “the failure of the indictment and plea colloquy to include the element of knowledge of felon status does not require us to vacate [the] conviction...”); *United States v. Schmidt*, 792 F. App'x 521, 522 (9th Cir. 2020) (“Although [defendant] did not argue below that the government was required to prove [defendant] knew he was a felon, under any standard of review there was overwhelming evidence that [defendant] knew he was a felon when he possessed the firearms at issue in this case.”); *United States v. Tuan Ngoc Luong*, 965 F.3d 973, 989 (9th Cir. 2020) (finding in the trial context that, “even if the district court had instructed the jury on the knowledge-of-status element, there is no reasonable probability that the jury would have reached a different verdict...”). In other words, the Ninth Circuit has repeatedly found no actual harm resulted from alleged constitutional violations stemming from the decision in *Rehaif* in cases involving comparable facts to Brown’s.

Here, Brown admitted that he had been convicted of a felony at the time he possessed the weapon. ECF No. 62, at 4. Even more, Brown had a host of prior felony convictions and was on probation at the time he was taken into custody. The Court is not persuaded that the inclusion of the *Rehaif* element would have changed Brown's decision to plead guilty or that his plea was involuntary.

Accordingly, there is no reasonable probability, but for the *Rehaif* error, that the outcome of the proceeding would have been different. Therefore, because Brown has not demonstrated both cause and prejudice, he procedurally defaulted on his claims challenging the legality of his conviction.

## D. Structural Error

Alternatively, Brown argues the constitutional errors are structural, therefore only requiring a showing of cause. “[C]ertain errors, termed structural errors, might affect substantial rights regardless of their actual impact on an appellant’s trial.” *United States v. Marcus*, 560 U.S.

1 258, 263 (2010) (citations omitted). Structural errors go to the very heart of the trial and are not  
 2 “simply an error in the trial process itself.” *Arizona v. Fulimante*, 499 U.S. 279, 310 (1991).

3 While the Ninth Circuit has not decided whether the knowledge-of-status element in *Rehaif*  
 4 presents issues of structural error, numerous other circuits have concluded it does not. *See United*  
 5 *States v. Nasir*, 2020 WL 7041357, at \*19, n.30 (3d Cir. Dec. 1, 2020); *United States v. Coleman*,  
 6 961 F.3d 1024, 1030 (8th Cir. 2020); *United States v. Payne*, 964 F.3d 652, 657 (7th Cir. 2020);  
 7 *United States v. Lavalais*, 960 F.3d 180, 187 (5th Cir. 2020); *United States v. Trujillo*, 960 F.3d  
 8 1196, 1207 (10th Cir. 2020).

9 The Court agrees with these circuit courts and concludes that *Rehaif* likely does not involve  
 10 the limited class of errors the Supreme Court has deemed structural.

11 **E. Certificate of Appealability is Denied**

12 To proceed with an appeal of this Order, Brown must receive a certificate of appealability  
 13 from the Court. 28 U.S.C. § 2253(c)(1); FED. R. APP. P. 22; 9TH CIR. R. 22-1; *Allen v. Ornoski*,  
 14 435 F.3d 946, 950-951 (9th Cir. 2006). For the Court to grant a certificate of appealability, the  
 15 petitioner must make “a substantial showing of the denial of a constitutional right.” 28 U.S.C. §  
 16 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). And the petitioner bears the burden  
 17 of demonstrating that the issues are debatable among reasonable jurists; that a court could resolve  
 18 the issues differently; or that the issues are “adequate to deserve encouragement to proceed  
 19 further.” *Slack*, 529 U.S. at 483-84 (citation omitted).

20 As discussed above, Brown has failed to raise a meritorious challenge to his conviction and  
 21 sentence pursuant to the Ninth Circuit’s decisions following *Rehaif*. As such, the Court finds that  
 22 he has failed to demonstrate that reasonable jurists would find the Court’s assessment of his claims  
 23 debatable or wrong. *See Allen*, 435 F.3d at 950–51. Therefore, the Court denies Brown a certificate  
 24 of appealability.

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## IV. CONCLUSION

IT IS THEREFORE ORDERED that Brown's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 (ECF No. 71) is **DENIED**.

IT IS FURTHER ORDERED that a certificate of appealability is DENIED.

IT IS FURTHER ORDERED that the Clerk of Court **ENTER** a separate and final Judgment denying Brown's § 2255 motion. *See Kingsbury v. United States*, 900 F.3d 1147, 1150 (9th Cir. 2018).

IT IS SO ORDERED.

DATED this 6th day of January, 2021.

*Larry R. Hicks*  
LARRY R. HICKS  
UNITED STATES DISTRICT JUDGE