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Legal Sidebar

What You Don't Know Can't Hurt You: Supreme Court to Address Knowledge Requirement for Firearm Offenses

Michael A. Foster
Legislative Attorney

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UPDATE: On June 21, 2019, the Supreme Court held in a 7-2 decision that the knowledge requirement for violations of 18 U.S.C. § 922(g) "applies both to the defendant's conduct and to the defendant's status," meaning that the government "must show that the defendant knew he possessed a firearm and also that he knew he had the relevant status when he possessed it" in order for the defendant to be found guilty of an offense under the statute. The majority opinion, authored by Justice Breyer and joined by Chief Justice Roberts and Justices Ginsburg, Sotomayor, Kagan, Gorsuch, and Kavanaugh, recognized that the statutory term "knowingly" ordinarily applies "to all the subsequently listed elements of the crime." The majority saw "no basis" in the text of the statute, its legislative history, or the Court's precedent "to interpret 'knowingly' as applying to the second § 922(g) element" (possession) "but not the first" (status). Accordingly, the majority concluded that "Congress intended to require the Government to establish that the defendant knew he violated the material elements of § 922(g)," including status.

In a dissenting opinion, Justice Alito, joined by Justice Thomas, disagreed with the majority's textual analysis, noting that the knowledge requirement is contained in a separate statutory provision and, when imported to Section 922(g), can be read in multiple ways. As such, in the dissent's view, reading the statute in the manner favored by the majority frustrates Congress's public safety objectives, leads to anomalies "that Congress is unlikely to have intended," and conflicts with "the legal landscape" at the time of the statute's enactment, making it much more likely that Congress intended the knowledge requirement to not apply to the offender's status. The dissent also worried that, as a practical matter, the Court's decision will "make it significantly harder to convict persons falling into" certain categories under Section 922(g) and "create a mountain of problems with respect to the thousands of prisoners currently serving terms for § 922(g) convictions."

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The original post from April 19, 2019, is below.

Perhaps the most well-known aspect of the federal framework of firearm laws is the Gun Control Act's prohibition on the receipt or possession of guns by persons who fall into specific risk-related categories. Under 18 U.S.C. § 922(g), convicted felons, fugitives from justice, aliens unlawfully present in the United States, and certain other persons are prohibited from possessing, receiving, shipping, or transporting in interstate commerce any firearms or ammunition. And a separate statutory provision subjects those who "knowingly" violate Section 922(g) to criminal penalties.

Criminalizing only "knowing" statutory violations raises a deceptively simple question, however: to be guilty of a federal firearm-possession offense, must a person with a prohibited status simply know that he or she is possessing a gun, or must that person also know of his or her prohibited status under Section 922(g)? In other words, when prosecuting a violation of Section 922(g), does the government have to prove beyond a reasonable doubt only that a defendant knowingly possessed a firearm at a time when he or she fell into a prohibited category, or does the government have to prove that the defendant knowingly possessed a firearm *and* knew that he or she met the prohibiting criterion (e.g., requiring an alien to know that he or she was unlawfully present)?

The courts of appeals that have considered the question have consistently adopted the narrower construction, concluding that the "knowledge" requirement extends to possession but not status under Section 922(g). But the Supreme Court is poised to take up the issue in *Rehaif v. United States*, and at least one Justice, Justice Gorsuch, has suggested prior to joining the Court that he would construe the knowledge requirement to apply more broadly. How the Court ultimately resolves the issue may depend on the importance the Court ascribes to recognizing state-of-mind requirements to avoid criminal punishment for unknowingly unlawful conduct, the underlying purpose of the statutes involved, and the weight of judicial precedent, among other things. This Sidebar provides an overview of *Rehaif v. United States* and briefly discusses the potentially broad implications of the case, as well as the options for Congress moving forward.

Background of *Rehaif*: Hamid Mohamed Ahmed Ali Rehaif, a citizen of the United Arab Emirates, was admitted to the United States in 2013 on a student visa to study mechanical engineering at a university in Florida. His academic pursuits did not go well, however, and he was dismissed from the university in late 2014. Shortly thereafter, his immigration status was officially terminated. Yet Rehaif remained in the United States and opted several months later to engage in a common American pastime that, because of his immigration status, was also now illegal: target practice at a shooting range. Based on his temporary possession of two rented firearms at the range and his purchase of a box of ammunition, Rehaif was charged with violating 18 U.S.C. § 922(g)(5)(A). That provision prohibits an alien who is "illegally or unlawfully in the United States" from possessing any firearm or ammunition in or affecting commerce, and "knowing" violations of the statute are punishable as felonies under 18 U.S.C. § 924.

Lower Court Proceedings: At trial, Rehaif urged the court to require the government to prove not only that he knowingly possessed a firearm while unlawfully present in the United States, but also that he was *aware* of his unlawful immigration status at the time of possession (which he disputed). The trial court rejected Rehaif's contention that the offense required knowledge of status, however, instructing the jury instead that it could return a guilty verdict upon proof that Rehaif (1) was an alien illegally or unlawfully in the United States, (2) knowingly possessed a firearm or ammunition, and (3) possessed the firearm or ammunition "in or affecting interstate commerce." With these instructions, the jury ultimately convicted Rehaif.

On appeal, the Eleventh Circuit agreed with the trial court that the government was not required to establish Rehaif's knowledge of his immigration status at the time he possessed the firearms and ammunition. The court first considered the relevant statutory language and concluded that the text alone lacked clarity, noting that the defendant's status might be fairly characterized as a "surrounding

circumstance[]" (like the jurisdictional requirement of a connection to commerce) to which the state-of-mind requirement would not apply.

Moving beyond the statutory text, the court pointed to the "longstanding uniform body of precedent holding that the government does not have to satisfy a [state-of-mind] requirement with respect to the status element of § 922." Significantly, although Congress did not add the "knowing" requirement to the statute until 1986, courts previously had read a knowledge requirement into the statute and applied it only to the possession element. The appellate court in *Rehaif* thus viewed Congress's codification of a knowledge requirement, as well as its refusal to amend or modify that requirement as courts after 1986 continued to apply it only to the possession element, as congressional "acquiescence" in the narrower interpretation. This conclusion was strengthened, in the court's view, by the assumption that Congress's "repeated efforts to fight violent crime" made it "highly unlikely" that Congress would have intended to "make it easier for felons to avoid prosecution" for gun offenses. Finally, the court acknowledged a "presumption" in American law that a scienter—that is, state of mind— requirement applies to "each of the statutory elements that criminalize otherwise innocent conduct." But the court viewed this presumption to be inapplicable when the element at issue relates only to "a specific fact or detail about [the defendant] himself." In this context, the court noted, there is "little room" for a person to make a reasonable mistake.

Supreme Court Proceedings: The Supreme Court has granted certiorari in *Rehaif* to consider whether the statutory requirement of a "knowing" violation "applies to both the possession and status elements of a § 922(g) crime, . . . or whether it applies only to the possession element." The case is set to be heard on April 23, 2019.

Before the Supreme Court, petitioner Rehaif focuses his argument on the text, structure, and intent behind the statutory provisions at issue, asserting that all three demonstrate that the knowledge requirement "unambiguously" applies to both status and possession. With respect to the text of the statute, Rehaif relies on a concurring opinion that Justice Gorsuch authored when he was still a judge on the Tenth Circuit in a 2012 case, *United States v. Games-Perez*. In that opinion, then-Judge Gorsuch argued that it would "def[y] linguistic sense – and not a little grammatical gravity," to read the knowledge requirement as applying only to possession, as such a reading would require "leapfrogging over the very first" element of the statute (status) "and touching down only at the second." Rehaif maintains that Justice Gorsuch's logic in *Games-Perez* comports with the Supreme Court's recognition at other times that "a phrase in a criminal statute that introduces the elements of a crime with the word 'knowingly'" should ordinarily be read "as applying that word to each [substantive] element." Regarding legislative intent, Rehaif also avers that the statute through which the knowledge requirement was codified—the Firearm Owners' Protection Act of 1986—sought to "ease any undue or unnecessary federal restrictions or burdens on firearm possession," demonstrating that Congress intended to broaden, "rather than retract or leave in place," the state-of-mind requirement that courts previously had recognized under Section 922(g) and predecessor statutes.

The government, however, counters Rehaif's textual argument by ascribing significance to the fact that the phrase "knowingly violates" is contained in a standalone penalty provision that applies to multiple activities regulated in various sections of the Gun Control Act. It would thus make little sense, the government asserts, to "transpose" the word "knowingly" onto the various status requirements and background circumstances in Section 922(g) and other portions of the statute that contain "different verb tenses" (as well as their own distinct state-of-mind requirements in some cases).

The government also argues that adopting Rehaif's position would require effectively overruling the Supreme Court's 1997 decision in *Old Chief v. United States*. In that case, the Court held that when a defendant offers to stipulate to his status—specifically, a prior felony conviction—in a Section 922(g)(1) prosecution, evidence of the nature of the prior conviction is inadmissible. In reaching this conclusion, the Court appeared to discount the proposition that evidence of the past conviction would be relevant to

knowledge and noted that a stipulation of the fact of the conviction is "seemingly conclusive evidence" of the status element. Thus, although *Old Chief* did not squarely address the issue raised in *Rehaif*, the government in *Rehaif* asserts that the Court in *Old Chief* "explicitly relied" on the "understanding" that knowledge solely of conduct (i.e., possessing the firearm) is sufficient for conviction under Section 922(g). Finally, with respect to legislative intent, the government echoes the Eleventh Circuit's view that, in codifying the knowledge requirement for Section 922(g) offenses in 1986, Congress merely adopted "the dominant interpretation that courts had given to" precursor firearm offenses since 1938—i.e., that knowledge of conduct, but not "status or personal circumstances," is required.

Implications and Congressional Options: The government and some amici have suggested that if the Supreme Court reads the Gun Control Act to require the government to prove that a defendant was aware of his or her status at the time of unlawful firearm possession, prosecuting such offenses will become more difficult. In particular, the government argues that proving a convicted felon "knew and later remembered" the nature of his conviction and the potential penalties could be a challenge in some cases. And an amicus maintains that a ruling in favor of Rehaif would blunt one of the "most important tools law enforcement has for preventing gun violence," pointing out that around nine percent of all federal convictions in 2017 alone were for violations of Section 922(g). Rehaif contends that these concerns are overblown, however, noting that "[n]ormally, evidence the government already marshals to prove status also proves knowledge of status." An amicus supporting Rehaif also emphasizes that as a matter of fairness, the prosecution's path to conviction should not be eased by doing away with a state-of-mind requirement when the result would be easier conviction of "persons whose conduct would not even alert them to the probability of strict regulation."

Regardless of the outcome in *Rehaif*, Congress could (consistent with constitutional constraints) amend the statutory language to make clear either that a defendant must have knowledge of his or her prohibited status in order to be subject to criminal penalties or that knowing possession of a firearm is all that is required. Indeed, the Eleventh Circuit's opinion in *Rehaif* invites Congress to weigh in, quoting from a Supreme Court opinion that characterized judicial decisions interpreting legislative language as "balls tossed into Congress's court."