A 20/20 LOOK AT FIREARMS LAW IN 2020

BY
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For those who attended one of my prior seminars on firearm law, there have been many changes in the last twenty four months. For those who are just learning this complicated area of the law, you will have less to forget than your peers.

It is my intent to make this as usable as possible to both state and federal practitioners. That said, however, the lion share of materials will address the changes which have occurred in the federal court system. I believe this is beneficial to you even in the absence of a federal practice. Certainly, there has been indication from the Oklahoma Court of Criminal Appeals that it is in some ways influenced by the holdings and rulings of the federal system. Generally, of course, these have been rulings which were more restrictive of individual rights than the existing law of the state of Oklahoma.

Just as I have done previously, I will tie my presentation to 18 U.S.C. §922 but this will be more expansive than simply the nine subparagraphs of subparagraph (g) which the prior seminars were tied. I am making my decisions on which areas to address and which to give passing

acknowledgment based on the real world of charging which I have seen in the interim since my last presentation.

Rehaif to the Rescue

In my opinion, *Rehaif v. United States*, 588 U.S. ___, 139 S. Ct. 2191 (2019) is the single most important case since *District of Columbia v. Heller*, 554 U.S. 570, 128 S.Ct. 2785 (2008). Where *Heller* affirmed the 2nd Amendment was an individual not a collective right. *Rehaif* has restored a knowledge/intent to the violation of [certainly] federal firearms law.

To understand the significance of where the law is today, it is necessary to review where it was pre-*Rehaif*. Starting with *U.S. v. Capps*, 77 F.3d 350, 352 (10th Cir. 1996) and its simple requirements 1) the defendant was convicted of a felony; 2) the defendant thereafter knowingly possessed a firearm; and 3) the possession was in or affecting interstate commerce. These three elements formed the basis for many years as sufficient for a conviction of any 18 U.S.C. §922(g)(1-9) prosecution. It is, at least in retrospect, obvious there is an element missing. The three elements only speak of knowing that one has possessed a firearm. Possession was defined as something as innocuous as a transient handling of a firearm. But there was no element which required the government prove the accused knew that

he was a prohibited person or that he knew his conduct was in violation of the law. This omission was never more clearly demonstrated than in the case of *United States v. Games-Perez*, 667 F.3d 1136 (10th Cir. 2012). In *Games-Perez* the defendant was told by the Colorado state court judge that he did not have a conviction so long as he complied with the rules of his probation. Yet, later he was apprehended in possession of a firearm and prosecuted federally for violation of subsection (g)(1) possession after a prior conviction, colloquially stated. The Circuit found that because Games-Perez signed two probation documents one of which stated that he had been convicted of a felony and the other advising that during probation he could not possess a firearm or other dangerous weapons – he was a convicted felon. There is no indication in the Circuit decision that the deferred was ever revoked or accelerated to a conviction status. So it looks like even though the court didn't make him a convicted felon, the Circuit determined the forms of the probation office did. There is no statement that his probation was ever modified in any manner. The Circuit decision only recounts the prosecution in U.S. District Court and the proceedings there. It is unclear from the published decision how the Circuit Court was able to ignore the cited statements of the State trial court and apparently the lack of any final judgment by that court then supplant

that judicial authority with the statements on a pre-printed probation form. The Circuit did the "scienter" "mens rea" dance with *Staples*[1] once again and still arrives at a *Capps* result. The 10th Circuit was not alone however in this interpretation of §922 several other circuit courts had similar holdings. *See, e.g., United States v. Olender,* 338 F.3d 629, 637 (6th Cir.2003); *United States v. Miller,* 105 F.3d 552, 555 (9th Cir.1997), *overruled on other grds., Caron v. United States,* 524 U.S. 308, 118 S.Ct. 2007, 141 L.Ed.2d 303 (1998); *United States v. Langley,* 62 F.3d 602 (4th Cir.1995) (en banc); *United States v. Smith,* 940 F.2d 710, 713 (1st Cir.1991); *United States v. Sherbondy,* 865 F.2d 996, 1001 (9th Cir.1988). Before moving on from *Games-Perez*, it is worth noting the case contained a concurring opinion. This concurring opinion is most noteworthy for the fact that it reads like a dissent more than a concurrence. The concurrence concluded the decision was wrong but was required by *stare decisis*, it was written by Judge Neil Gorsuch.

The other two major prosecution avenues have been 922(g)(8) and (g)(9) which involve protective orders and misdemeanor domestic violence convictions. Similar strict application cases have been the norm and the Rule

[1]511 U.S. 600, 615-616 (1994).

of Lenity has been notably absent. That is to say, the benefit has tended to go in favor or the government or affirmation of convictions. It is only a mild exaggeration, if at all, that firearm prosecutions had reached an almost "strict liability" quality. If you were prohibited and you possessed a firearm you were guilty – no excuses or lack of knowledge permitted.

On June 21, 2019, hopefully this status was changed forever, Hamid Mohamed Ahmed Ali Rehaif's *Petition for Certiorari* was decided. Rehaif's violation of 922(g) arose from his student visa status change. In the Supreme Court, vote counts can be important and in this case the decision was 7-2, with Alito and Thomas being the dissenters.

The question presented to the high court is of extraordinary moment and needs to be fully understood. [at 2194]

> The question here concerns the scope of the word "knowingly." Does it mean that the Government must prove that a defendant knew both that he engaged in the relevant conduct (that he possessed a firearm) and also that he fell within the relevant status (that he was a felon, an alien unlawfully in this country, or the like)? We hold that the word "knowingly" applies both to the defendant's conduct and to the defendant's status. To convict a

> defendant, the Government therefore must show that the defendant knew he possessed a firearm and also that he knew he had the relevant status when he possessed it.

The opinion further states, at 2195:

> The Court of Appeals believed that the criminal law generally does not require a defendant to know his own status, and further observed that no court of appeals had required the Government to establish a defendant's knowledge of his status in the analogous context of felon-in-possession prosecutions.

A comparison of the current iteration of 21 O.S. §§1272 and 1283 which includes a Rehaif prohibition [§1283 E] seems to be out of touch with the requisite federal standard. A review of the current OUJI-CR 6-39 likewise reflects an archaic approach to the elements of the offense, especially in light of recent Supreme Court jurisprudence. This disparity is one which should be raised in your state practices. The Oklahoma Court of Criminal Appeals has a certain propensity to cite to federal or U.S. Supreme Court case law, especially it seems when such citation limits the rights of the citizen. It is, thereby, reasonably equitable to reciprocate with such citations which provide protections to the citizen.

The argument raised by the government in *Rehaif* is certainly one which has caused much consternation by lower courts and which the Supreme Court took great pains to clarify. Unfortunately there is no "simply stated" for this issue. The government argues that the knowledge requirement permits the defendant to escape punishment by making essentially an ignorance of the law defense. The Supreme Court rejected this argument, which is not to say that it may not still have traction with a state or federal district court. Several quotes directly from *Rehaif* will help explain the court's holding. [2195 et seq.]

> Here we can find no convincing reason to depart from the ordinary presumption in favor of scienter. The statutory text supports the presumption. [4] The text of *§924(a)(2)* says that "[w]hoever knowingly violates" certain subsections of §922, including *§922(g)*, "shall be" subject to penalties of up to 10 years' imprisonment. The text of *§922(g)* in turn provides that it "shall be unlawful for any person . . ., being an alien . . . illegally or unlawfully in the United States," to "possess in or affecting commerce, any firearm or ammunition."
>
> The term "knowingly" in *§924(a)(2)* modifies the verb "violates"

and its direct object, which in this case is *§922(g)*. The proper interpretation of the statute thus turns on what it means for a defendant to know that he has "violate[d]" *§922(g)*. With some here-irrelevant omissions, *§922(g)* makes possession of a firearm or ammunition unlawful when the following elements are satisfied: (1) a status element (in this case, "being an alien . . . illegally or unlawfully in the United States"); (2) a possession element (to "possess"); (3) a jurisdictional element ("in or affecting commerce"); and (4) a firearm element (a "firearm or ammunition").

The court analysis continues at 2196:

Beyond the text, our reading of *§922(g)* and §924(a)(2) is consistent with a basic principle that underlies the criminal law, namely, the importance of showing what Blackstone called "a vicious will." 4 W. Blackstone, Commentaries on the Laws of England 21 (1769). As this Court has explained, the understanding that an injury is criminal only if inflicted knowingly "is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of

the normal individual to choose between good and evil." *Morissette, 342 U. S., at 250, 72 S. Ct. 240, 96 L. Ed. 288*. Scienter requirements advance this basic principle of criminal law by helping to "separate those who understand the wrongful nature of their act from those who do not." *X-Citement Video, 513 U. S., at 72-73, n. 3, 115 S. Ct. 464, 130 L. Ed. 372*.

The cases in which we have emphasized scienter's importance in separating wrongful from innocent acts are legion.

Finally, the Supreme Court made the following pronouncement at 2197-98:

Nor do we believe that Congress would have expected defendants under *§922(g)* and *§924(a)(2)* to know their own statuses. If the provisions before us were construed to require no knowledge of status, they might well apply to an alien who was brought into the United States unlawfully as a small child and was therefore unaware of his unlawful status. Or these provisions might apply to a person who was convicted of a prior crime but sentenced only to probation, who does not know that the crime is "*punishable* by imprisonment for a term exceeding one year." *§922(g)(1)* (emphasis added); see also *Games-Perez, 667 F. 3d,*

at 1138 (defendant held strictly liable regarding his status as a felon even though the trial judge had told him repeatedly—but incorrectly—that he would "leave this courtroom not convicted of a felony"). As we have said, we normally presume that Congress did not intend to impose criminal liability on persons who, due to lack of knowledge, did not have a wrongful mental state. And we doubt that the obligation to prove a defendant's knowledge of his status will be as burdensome as the Government suggests. See *Staples, 511 U. S., at 615, n. 11, 114 S. Ct. 1793, 128 L. Ed. 2d 608* ("knowledge can be inferred from circumstantial evidence").

Two things become apparent from this quotation, first the specific reference to *Games-Perez* reveals how strongly [now] Justice Gorsuch felt about that decision when he sat on the 10th Circuit. Second and equally important is the judicial admission that the prosecution of firearms cases had become a strict liability endeavor which, of course, essentially strips the defendant of any prospect of a defense.

But we must still put the "ignorance of the law" mis-argument to rest. The Supreme Court addresses that maxim thusly, at 2198:

This maxim, however, normally applies where a defendant has the requisite

mental state in respect to the elements of the crime but claims to be "unaware of the existence of a statute proscribing his conduct." 1 W. LaFave & A. Scott, Substantive Criminal Law §5.1(a), p. 575 (1986). In contrast, the maxim does not normally apply where a defendant "has a mistaken impression concerning the legal effect of some collateral matter and that mistake results in his misunderstanding the full significance of his conduct," thereby negating an element of the offense. *Ibid*.; see also Model Penal Code *§2.04*, at 27 (a mistake of law is a defense if the mistake negates the "knowledge . . . required to establish a material element of the offense"). Much of the confusion surrounding the ignorance-of-the-law maxim stems from "the failure to distinguish [these] two quite different situations." LaFave, Substantive Criminal Law §5.1(d), at 585.

There, as of this writing, is a case pending appeal to the 10th Circuit which addresses the core elements of the *Rehaif* decision. These issues include the scienter or intent element, the correct jury instruction and whether the offense creating the prohibition is consistent with the disability as established by federal law.

Oklahoma law appears, as noted above, to still be operating under the "strict liability" even lacking the "wrongful mental state" espoused in *Rehaif*.

This is a status which must be challenged and argued in every gun illegal possession case. This issue must especially be briefed and argued if the case is going to trial.

OUJI-CR 6-37

UNLAWFUL POSSESSION OF A FIREARM - ELEMENTS

No person may be convicted of unlawful possession of a firearm unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, knowing;

Second, willful;

Third, (possession of)/(having under one's immediate control);

Fourth, a [Specify Type of Firearm];

Fifth, [Specify Grounds for Unlawfulness of Possession, e.g., carrying a concealed pistol without a valid handgun license].

OUJI-CR 6-40

POSSESSING A FIREARM AFTER A FELONY CONVICTION -

DEFENSE OF LACK OF KNOWLEDGE

The defendant has presented evidence that he/she had no knowledge of the presence of a firearm (under his/her immediate control)/(in the vehicle which

he/she operated)/(in the vehicle in which he/she was a passenger). The question of whether the defendant knew of the presence of the firearm is a question of fact to be determined by the jury. Where there is a conflict in the evidence, it is the exclusive function of the jurors to weigh the evidence and determine the defendant's guilt or innocence. In determining whether the defendant had knowledge of the presence of the firearm you may consider circumstantial evidence.

Committee Comments

The literal terms of section 1283 encompass neither criminal intent nor knowledge of the presence of the firearm. It is settled beyond doubt that the statute does not intend to impose strict liability on former felons who are detected in the presence of a firearm. Rather, the mens rea elements of willfullness and knowledge are integral components; the State must demonstrate that the defendant was cognizant of the presence of the firearm and willfully performed conduct forbidden by the statute regardless of that knowledge, and the jury must be so instructed. *Williams v. State*, 565 P.2d 46, 49 (Okl. Cr. 1977), overruled on other grounds*, Chapple v. State*, 866 P.2d 1213, 1217 (Okl.Cr.

1993), *Williams v. State*, 794 P.2d 759, 763 (Okl.Cr. 1990), and *Lenion v. State*, 763 P.2d 381, 383 (Okl.Cr. 1988); *Rodgers v. State*, 517 P.2d 1138 (Okl. Cr. 1974); *Ware v. State*, 497 P.2d 775 (Okl. Cr. 1972); *Sessions v. State*, 494 P.2d 351 (Okl. Cr. 1972); *Thompson v. State*, 488 P.2d 944, 947 (Okl. Cr. 1971), overruled on other grounds, *Dolph v. State*, 520 P.2d 378, 380-81 (Okl. Cr. 1974). Thus, the elements of willfullness and knowledge are incorporated in the elemental instructions.

The prosecution's burden was stated by the court as follows:

> It is not necessary that the State prove that the defendant had possession of the gun with a specific intent to go to do an unlawful act **but rather the State must prove that the defendant had a previous conviction of a felony and that the defendant carried the pistol on his person**. [Bolding added].

Sessions v. State, supra, 494 P.2d, at 354.

Where the defendant presents evidence demonstrating the absence of requisite cognizance, however slight, the jurors

should be instructed with respect to this defense upon proper request from the defendant.

I would propose that the proper instruction whether in federal court or in state court, after the *Rehaif* decision would read:

POSSESSION OF A FIREARM AFTER A MISDEMEANOR CONVICTION OF A CRIME PURSUANT TO 18 USC §922(g)(__)

The defendant [_____] is charged in count one with a violation of 18 U.S.C. section 922(g)(_). [or state statutory reference]

This law makes it a crime for any person who has been previously convicted in any court of [state predicate offense for charge] to knowingly possess any firearm, in or affecting interstate commerce

No person may be convicted of having violated 18 United States Code, Section 922(g)(_) [or 21 O.S. §_____] unless the government has proven beyond a reasonable doubt each and every element of the offense. These elements are –

(1) the defendant knowingly possessed a firearm;

(2) the defendant knew he was convicted of [prohibiting] offense, before he possessed the firearm [the status];

(3) before the defendant possessed the firearm, the firearm had moved at some time from one state to another; [thiis element not needed for a state prosecution] and

(4) the defendant knew that his status made him a prohibited person from possessing a firearm.

It is the (4)th element of my proposed instruction which separates it from the existing pattern instructions of either the state or the Tenth Circuit Court of Appeals. The commentary on the state pattern instruction says that it is "settled beyond doubt that the statute does not intend to impose strict liability on former felons who are detected in the presence of a firearm" yet then proceeds to describe a strict liability fact pattern which it approves. The commentary focuses solely on whether the defendant knew he possessed a firearm not on whether there was intent [i.e., knowledge of the defendant's status as a person prohibited from possessing a firearm] to violate the prohibition of possession. The *Sessions* example ignores the requirement for the state to demonstrate the defendant knew he had a prior conviction [or other prohibiting factor] which made him a prohibited person. The state has engaged in the same mental legerdemain as the Tenth Circuit engaged in *Gamez-Perez* and repudiated in *Rehaif*.

To see exactly how this works, let's briefly review the operative facts of *Gamez-Perez.*on which his conviction was based and affirmed:

THE COURT: Are you comfortable with understanding what you are giving up and what the consequences are of this plea so that you want to take this plea today?

THE DEFENDANT: Yes, ma'am.

THE COURT: Here is what will happen today, if I accept your plea today, hopefully you will leave this courtroom not convicted of a felony and instead granted the privilege of a deferred judgment, which means you will be supervised by the Department of Probation for a period of two years.

But what I want you to understand is, because you are waiving your right to proceed to a jury trial for all time today, if something goes wrong during this deferred judgment and you don't do what we ask you to do, it is possible that you could be returned into court and at that time you can't ask me to go to a jury trial, do you understand that?

THE DEFENDANT: Yes, ma'am.

THE COURT: Because you are giving that up for all time and the likelihood is that you may end up being convicted of this felony even though you don't have a trial. Do you understand that?

THE DEFENDANT: Okay, ma'am.

THE COURT: That also means it is a Class 5 felony if you end up convicted. So it is all up to you. As you can tell what I'm saying, if you end up convicted, the Court could impose a prison term between one and three years in the Department of Corrections with a two-year period of mandatory parole.

Do you understand that that is the worst case scenario and it could happen in this case?

THE DEFENDANT: Yes, ma'am.

THE COURT: Do you have any questions for me about how that works?

THE DEFENDANT: No, ma'am.

THE COURT: Have you spent enough time meeting with your attorneys so that you feel you understand what your options are?

THE DEFENDANT: Yes, ma'am.

THE COURT: Was she able to answer all of your questions to your satisfaction?

THE DEFENDANT: Yes, ma'am.

THE COURT: Are you satisfied with her representation?

THE DEFENDANT: Yes, ma'am.

THE COURT: Are you thinking clearly this morning?

THE DEFENDANT: Yes, ma'am.

After further colloquy, the district court then stated, “All right. Then I accept the plea of guilty. I find it knowing, intelligent and voluntary. I have made written findings consistent with that determination. I am not entering judgment of conviction at this time, hopefully, I never will.

From that foregoing colloquy Games-Perez could never be convicted under the current standard announced in *Rehaif.* He simply lacked the requisite knowledge that he was a prohibited person. This is the elemental flaw in the state line of precedent and in the OUJI-CR instructions. As practitioners in the diverse counties of Oklahoma, you will need to educate your judges on the proper standard. I do not believe this will be an easy task, but you must frame your arguments in terms of due process, equal protection and lastly, fundamental error if the request is denied. There is ample case law available to your briefing, you do write briefs?, which hold that a materially improper instruction to the jury which results in a conviction is fundamental error and is automatically reversible. Always invoke due process in your arguments as the Oklahoma Court of Criminal Appeals seems to be steadily tacking into that wind. The days of state case law providing greater protections to its citizens accused seem to be behind us.

While there have been assurances that no prosecutions will be brought under state law for those who possess marijuana and have a medical marijuana card; such assurances have not been made in the federal system. Despite these assurances, Oklahoma codified the protections at 63 O.S. 427.8(F) states the following:

> A medical marijuana patient or caregiver in actual possession of a medical marijuana license shall not be subject to arrest, prosecution or penalty in any manner or denied any right, privilege or public assistance, under state law or municipal or county ordinance or resolution including without limitation a civil penalty or disciplinary action by a business, occupational or professional licensing board or bureau, for the medical use of marijuana in accordance with this act.

The federal courts and federal law enforcement generally have been very clear that passage of state laws legalizing marijuana, in particular, but any drug generally, which is a scheduled controlled substance in Title 21 of the U.S. Code remains illegal for purposes of federal prosecution. The prior Bush and Obama administrations had semi-formal abstention positions for state sanctioned marijuana dispensaries. At the beginning of the Trump

administration Attorney General Sessions announced there would be no further overlooking of such establishments and the government was going to prosecute them under federal law. I hasten to point out that I have not actually seen any such prosecutions federally, and Sessions is now gone. But that threat has remained. Such prosecutions have been conducted *United States v. Edwards*, 182 F.3d 333 (5th Cir. 1999) Edwards admitted to being a daily user of marijuana and owned three firearms. Conviction does not require the person to be using drugs at exact moment of finding person in possession of firearms. Accord, *United States v. Purdy*, 264 F.3d 809 (9th Cir. 2001); *United States v. Patterson*, 431 F.3d 832 (5th Cir. 2005). Several courts have also rejected assertions that "unlawful user" is constitutionally vague. Most recently *United States v. Cook*, 970 F.3d 866 (7th Cir. 2020). So what constitutes a "unlawful user" the same circuit answered that a decade ago. In *United States v. Yancey*, 621 F.3d 681, 682, 687 (7th Cir. 2010) the court stated, " the term "unlawful user," as used in section 922(g)(3), to mean one who regularly or habitually ingests a controlled substance in a manner other than as prescribed by a physician. [at 682]. Our opinion adds that such use must be contemporaneous with the defendant's possession of a gun."[687]. In *United States v.Bennett*, 329 F. 3d 769 (10th Cir. 2003) the where the

probation office recommended a base offense level due to Bennet being an unlawful user of or addicted to controlled substances, circuit stated, “The statute does not define the phrases "unlawful user of ... any controlled substance" or "addicted to any controlled substance." It does, however, define "addict" as an "individual who habitually uses any narcotic drug so as to endanger the public morals, health, safety, or welfare, or who is so far addicted to the use of narcotic drugs as to have lost the power of self-control with reference to his addiction." 21 U.S.C. § 802(1).”

... We have already concluded the phrase "addicted to any controlled substance" is distinct in meaning from the phrase "unlawful user of ... any controlled substance." The government only argues that Mr. Bennett was an unlawful user of a controlled substance. In any event, although Mr. Bennett did not fail any drug tests while on bond, we conclude the district court properly held him to be a "prohibited person."

The guidelines do not require a person to be an unlawful user of a

controlled substance while on bond in order to qualify as a prohibited person. An individual's status as a prohibited person is measured "at the time the defendant committed the instant offense." U.S.S.G. § 2K2.1(a)(4)(B). While a court may use evidence of a defendant's unlawful use of drugs while on bond to infer he was a user at the time he possessed a firearm, *see U.S. v. Solomon,* 95 F.3d 33 (10th Cir. 1996) at 35, such evidence is not necessary. The government need only show the defendant was an unlawful user of drugs or addicted to drugs at the time he committed the offense.

While I doubt that it would be availing to the court, where you can show the defendant was aware of the recently added protections pursuant to the above reference section 427.8, you could make a good faith argument that your client in the federal prosecution lacked the *mens rea* for the offense.

Two last §922(g) prohibitions requires our attention, primarily because I am seeing more of these recently in federal prosecutions. These are (g)(8) and (g)(9). They are related and (9) is the only stated misdemeanor. The firstis the protective order. If you have a civil practice and do VPO and divorce work these are must know sections.

The statute [922(g)(8)] states:

who is subject to a court order that—

(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C) (i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury;

The most famous temporary order case is *United States v. Emerson* a couple of decades ago from the Fifth Circuit. However, it opened the flood gates to both federal prosecution of (g)(8) prohibitions and the awareness by defense counsel of how insidious the section is. I continue to advise any client with a pending Protective Order regardless of its character or origin, to divest themselves of any firearms which they possess. My most dire cautionary warning comes from a case in Utah. Randee Lee Bayles's federal conviction arises out of an August 10, 1999, protective order issued by the District Court for San Juan County, Utah, and affirmed by the Utah Court of Appeals and the Utah Supreme Court. The order is set forth on a preprinted form that contains standard language. The issuing judge initialed particular sections that applied to Mr. Bayles.

The protective order imposes the following conditions on Mr. Bayles: (1) it restrains him from "attempting, committing, or threatening to commit abuse or domestic violence" against his ex-wife or her current husband; (2) it prohibits him from "directly or indirectly contacting, harassing, telephoning, or otherwise communicating with [ex-wife];" and (3) it directs him to stay away from the residence, places of employment, and schools of [ex wife] and her family.

The protective order also contains a preprinted paragraph that sets forth the following finding: "The Court having found that Respondent's use or possession of a weapon may pose a serious threat of harm to Petitioner, the Respondent is prohibited from purchasing, using, or possessing a firearm and/or the following weapon(s)." That paragraph **is not** initialed or checked by the issuing judge, and thus the protective order does not itself impose restrictions on Mr. Bayles's possession of firearms.

Following the issuance of the protective order, Mr. Bayles received information from several other sources regarding restrictions on his ownership of firearms. In March 2000, the attorney for Mr. Bayles's ex-wife informed Mr. Bayles' attorney that "[Mr.] Bayles's possession of firearms while subject to a protective order was a violation of federal law." . In response to opposing counsel's communication, Mr. Bayles's attorney expressed some doubts about her reading of federal law. Said attorney did, however, take some steps to cover his own position.

The appellate record reflects the following recitation.

Prior to the time of the filing of the appeal [of the August 10, 1999 protective order], I discussed the nature of federal firearms law with opposing counsel for [ex-wife]. After reviewing the annotated statutory laws cited by

opposing counsel, since there was no criminal conviction, it was not clear to me that [Mr.] Bayles could not possess a firearm when the original temporary order and permanent order did not restrict his possession or ownership of a firearm.

Based on the foregoing, and knowing of my disagreement with counsel's statement of Utah law regarding stalking, I called Randee Bayles and advised him over the phone of (1) the position of his ex-wife's counsel, (2) that federal laws may require him to not possess firearms, (3) that out of an abundance of caution I would recommend that he do so, but (4) not being an expert in criminal law or federal laws of this nature, I was not able to provide a definitive opinion on the matter based on either experience or a more detailed examination of the statutes and related matters.

For reasons which are not clear in the record, an FBI investigation into Randee Bayles firearm ownership and possession ensued. He met with an undercover FBI agent and .. Well... [Mr.] Bayles also admitted that due to an order that his ex-wife had obtained from the courts, he had moved most of his guns to a location away from his house, but that he still had a few guns in his house that he could use for hunting. [Mr.] Bayles also stated that he keeps two handguns in his truck.

The circuit affirmed his conviction and stated,

> [This circuit, along with every other one that has considered the issue, has concluded that a defendant may be convicted of violating § 922(g)(8) even though he or she did not know that the statute prohibited the possession of a firearm after the issuance of a protective order. *See United States v. Reddick,* 203 F.3d 767, 770 (10th Cir.2000) ("We agree with every circuit court that has considered due process challenges to § 922(g)(8) and conclude that due process does not require actual knowledge of the federal statute."

This is no longer the correct statement of the law. *Rehaif* vindicate the innocent conduct rights of citizens. The crime still exists, but there must be shown some knowledge that the federal defendant knew he was prohibited and acted in disregard (i.e., had the *mens rea*) to commit the offense. The predicament in which Bayles found himself was determined to be self inflicted by the 10th Cir. In their words:

> In so concluding, we do not foreclose the possibility that, in a

given case, a defendant's ignorance of the prohibition set forth in the statute, combined with additional circumstances demonstrating that the defendant was actually misled into reasonably believing that the possession of firearms was lawful as a matter of federal law, might remove the case from the heartland. For example, if a state court judge actually (but mistakenly) informed a defendant that federal law did not bar the possession of firearms following the issuance of a protective order, or if the defendant's lawyer made such a statement, then a downward departure might be warranted. In such circumstances, the defendant's possession of the firearm might constitute the kind of "innocent possession" to which we referred in *Jones.*

In this case, however, the record establishes no such circumstances. Although the state court order did not state that Mr. Bayles could not possess a firearm, the order also did not purport to inform Mr. Bayles of the requirements of *federal* law. Instead, the state court order merely recited the restrictions imposed by the state court judge himself. Similarly, Mr. Bayles's

> attorney did not inform his client that federal law allowed him to possess firearms following the issuance of the protective order. Instead, Mr. Bayles's attorney stated that he was unsure of the requirements of federal law but that "federal laws may require him to not possess firearms" and that "out of an abundance of caution [he] would recommend [Mr. Bayles] do so." Apparently, Mr. Bayles chose not to exercise the recommended caution. However, that fact does not establish that he was actually misled about § 922(g)(8) by the state court judge or by his lawyer.

So, if you have a question regarding the effect of a criminal law, especially a federal criminal law, then make the call to someone who can give you a seasoned and reliable answer. I frequently take calls from many jurisdictions regarding the interface between state and federal law regarding firearms. Never expect the court to advocate for your client. That is not the court's job nor responsibility. You must provide the best professional judgment you can to your client. This area is fraught with traps for the unwary.

The Oklahoma statutory protective order is one of those traps. I have had discussions with some members of the Family Law section and they generally believe the language of the state statute protects their clients. I am

not comfortable with that position.

Another issue which has arisen in recent months is the charging of persons in federal court for possessing a firearm while they have a state felony charge pending. Under §922(n) this is the illegal receipt of a firearm by a prohibited person. The punishment for this is found in §924 and is a maximum of five years imprisonment and/or a fine of not more than $250,000.00 dollars or both such imprisonment and fine.

As always, if there is a federal or state firearm issue which raises questions I am willing to discuss the matter with you, just give me a call.