

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

JUL 8 2022

FOR THE NINTH CIRCUIT

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

UNITED STATES OF AMERICA,

No. 21-35633

Plaintiff-Appellee,

D.C. No.

1:13-cr-00098-SPW-1

v.

MACK EDWARD HARRIS,

MEMORANDUM*

Defendant-Appellant.

Appeal from the United States District Court
for the District of Montana
Susan P. Watters, District Judge, Presiding

Submitted July 6, 2022**
Portland, Oregon

Before: WATFORD, R. NELSON, and LEE, Circuit Judges.

Mack Edward Harris appeals from the district court's order dismissing his motion under 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence. We affirm.

1. The district court correctly concluded that Harris's claim under *Rehaif* v.

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

** The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

United States, 139 S. Ct. 2191 (2019), was procedurally defaulted and that, while he has established cause to excuse his procedural default, he has not shown actual prejudice. *See United States v. Frady*, 456 U.S. 152, 167 (1982).

Rehaif requires the government to prove beyond a reasonable doubt that a defendant knew he had the relevant status under 18 U.S.C. § 922(g). *See* 139 S. Ct. at 2200. For Harris, that means proof that he knew he had been convicted of a crime punishable by more than one year in prison and a misdemeanor crime of domestic violence. 18 U.S.C. § 922(g)(1), (9). Evidence of a defendant's knowledge can be either direct or circumstantial, and Harris's criminal history provides strong circumstantial evidence that he was aware of his status under § 922(g)(1) and (g)(9). *See United States v. Pollard*, 20 F.4th 1252, 1256 (9th Cir. 2021).

With respect to his § 922(g)(1) conviction, Harris had seven prior felony convictions, and he was actually sentenced to more than one year in prison twice. At trial, the government also introduced a signed 2004 guilty plea in which Harris acknowledged that he was pleading guilty to two felonies. While this acknowledgement is not conclusive of Harris's awareness of his status under § 922(g)(1), it likewise constitutes strong circumstantial evidence. *See United States v. Werle*, 35 F.4th 1195, 1206 (9th Cir. 2022). With respect to his § 922(g)(9) conviction, Harris had at least nine prior convictions for misdemeanor

domestic violence offenses.

Harris has not identified any “objective basis in the record” that might have led a jury to believe, in spite of this evidence, that he was unaware he had been convicted of a crime punishable by more than one year in prison and a misdemeanor crime of domestic violence. *Id.* at 1207 n.7. Thus, Harris has failed to show that the *Rehaif* error “worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.” *Frady*, 456 U.S. at 170.

2. The district court correctly concluded that Harris’s double jeopardy claim is time-barred. Harris’s convictions became final on October 2, 2017, and his § 2255 motion was not filed within the one-year limitations period. *See* 28 U.S.C. § 2255(f). Harris argues that his double jeopardy claim is timely because it is intertwined with his *Rehaif* claim and was filed within one year of the Supreme Court’s decision in that case. But Harris’s double jeopardy claim does not depend on his *Rehaif* claim, and the former claim has been available since at least 2014. *See United States v. Mavromatis*, 769 F.3d 1194, 1195 (9th Cir. 2014).

Harris also argues that double jeopardy claims should be categorically exempt from § 2255’s limitations period. He contends that such claims are exempt from § 2254’s exhaustion requirement and that the same type of exception should apply here. There is, however, no double jeopardy exception to § 2254(b)(1)(A).

While a § 2254 petitioner need not wait for a final state court judgment to bring a double jeopardy claim, the petitioner must still exhaust whatever state remedies are available. *See Greyson v. Kellam*, 937 F.2d 1409, 1412–13 (9th Cir. 1991). Harris offers no other basis for his proposed double jeopardy exception to § 2255(f).

AFFIRMED.