FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. TYRONNE POLLARD, JR., *Defendant-Appellant.*	No. 20-15958 D.C. Nos. 4:20-cv-01136-JSW 4:17-cr-00613-JSW-1 OPINION

Appeal from the United States District Court
for the Northern District of California
Jeffrey S. White, District Judge, Presiding

Argued and Submitted April 16, 2021
San Francisco, California

Filed August 27, 2021

Before: Ryan D. Nelson and Danielle J. Forrest,[*] Circuit Judges, and Janis Graham Jack,[**] District Judge.

Opinion by Judge R. Nelson;
Concurrence by Judge Forrest

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[*] Formerly known as Danielle J. Hunsaker.

[**] The Honorable Janis Graham Jack, United States District Judge for the Southern District of Texas, sitting by designation.

SUMMARY[***]

28 U.S.C. § 2255

The panel affirmed the district court's denial of Tyrone Pollard, Jr.'s 28 U.S.C. § 2255 motion in which he challenged his felon-in-possession guilty plea on the ground that he was not informed of 18 U.S.C. § 922(g)(1)'s knowledge-of-status element.

Pollard filed the motion after the Supreme Court in *Rehaif v. United States*, 139 S. Ct. 2191 (2019), held that § 922(g)(1) requires the government to prove that the defendant knew he was a felon at the time of possession. The district court denied the motion because Pollard had not shown actual prejudice and thus failed to overcome the procedurally defaulted nature of his claim.

The panel held that Pollard failed to show cause for not raising his claim during the underlying criminal proceedings as it was reasonably available to him at the time he pled guilty. Explaining that novelty and futility are not the same, the panel wrote that futility is insufficient to overcome procedural default. The panel wrote that Pollard's knowledge-of-status argument was reasonably available to him at the time he pled guilty because the Federal Reporters were replete with cases raising the same argument. Thus, Pollard did not show cause for the procedural default.

[***] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

The panel held that Pollard also failed to show actual prejudice from any error as nothing in the record objectively demonstrates that he would not have pled guilty had he known of § 922(g)(1)'s knowledge-of-status element.

Concurring in part and concurring in the judgment, Judge Forrest wrote that there is no need to address the cause prong of the procedural-default analysis because Pollard cannot meet the prejudice prong. She also disagreed that Supreme Court precedent dictates the majority's broad futility-can-never-be-cause rule.

COUNSEL

Geoffrey M. Jones (argued), Fairfax, California, for Defendant-Appellant.

Merry Jean Chan (argued), Chief, Appellate Section, Criminal Division; David L. Anderson, United States Attorney; Briggs Matheson, Assistant United States Attorney; United States Attorney's Office, San Francisco, California; for Plaintiff-Appellee.

OPINION

R. NELSON, Circuit Judge:

After *Rehaif v. United States*, 139 S. Ct. 2191 (2019), Tyronne Pollard, Jr., collaterally challenged his felon-in-possession guilty plea because he was not informed of 18 U.S.C. § 922(g)(1)'s knowledge-of-status element. Because Pollard has not adequately shown cause for his failure to raise this claim on direct appeal or actual prejudice, his claim remains procedurally defaulted. *See Bousley v. United States*, 523 U.S. 614, 621 (1998); *see also Greer v. United States*, 141 S. Ct. 2090 (2021). We therefore affirm.

I

In December 2017, Pollard was indicted for possessing a gun as a felon. *See* 18 U.S.C. § 922(g)(1). As the crime implies, this was not Pollard's first offense. Over the last twenty years, he was convicted of several felonies and served over five years in prison. His federal felon-in-possession indictment was not his first gun-related offense either. In 2004, Pollard was sentenced to over a year in prison for violating California's felon-in-possession statute. So when officers found guns in Pollard's possession in 2017, the federal government's allegations were straightforward: Pollard was a felon who knowingly possessed a gun and ammunition that were transported in interstate commerce. Pollard pled guilty. He was sentenced to 57 months and did not appeal.

A year later, the Supreme Court decided *Rehaif*, holding that § 922(g)(1) requires the government to prove that the defendant knew he was a felon at the time of possession. *See generally* 139 S. Ct. at 2191. Pollard then filed a motion to vacate his conviction and sentence under 28 U.S.C.

§ 2255(a), contending that his guilty plea was not intelligent, knowing, or voluntary without having been informed of § 922(g)(1)'s knowledge-of-status element. The district court denied Pollard's motion because he had not shown actual prejudice and thus failed to overcome the procedurally defaulted nature of his claim. This appeal followed.

II

We have jurisdiction under 28 U.S.C. § 2253(a) and review the denial of Pollard's § 2255 motion de novo. *United States v. Hardiman*, 982 F.3d 1234, 1236 n.1 (9th Cir. 2020) (per curiam) (citation omitted).

III

"Habeas review is an extraordinary remedy and will not be allowed to do service for an appeal." *Bousley*, 523 U.S. at 621 (internal quotation marks and citation omitted). And like any petitioner who tries to collaterally attack a guilty plea, Pollard must overcome "significant procedural hurdles" before a court can reach the merits of his challenge. *Id.* Specifically, Pollard's motion is procedurally defaulted since he did not appeal his conviction in 2018. *Id.* Thus, Pollard must show (1) cause for why he did not object to or directly appeal the alleged error and (2) actual prejudice resulting from the error to overcome that default. *Id.* at 622 (citation omitted); *Murray v. Carrier*, 477 U.S. 478, 485 (1986) (citation omitted).[1] This showing is "a significantly higher hurdle than would exist on direct appeal." *United*

[1] Alternatively, a petitioner can show actual innocence to overcome procedural default. *Bousley*, 523 U.S. at 622–23 (citation omitted). Pollard does not argue that here.

States v. Frady, 456 U.S. 152, 166 (1982). Pollard has neither shown cause nor actual prejudice.

A

"[A]bsent exceptional circumstances, a defendant is bound by the tactical decisions of competent counsel." *Reed v. Ross*, 468 U.S. 1, 13 (1984). This means a defense counsel's inadvertent or intentional decision to not pursue a claim at trial or on appeal is insufficient to show cause on collateral review. *Carrier*, 477 U.S. at 486. Instead, cause turns on whether "some objective factor external to the defense impeded counsel's efforts" to raise a claim. *Id.* at 488.

The Supreme Court has not catalogued every situation that can constitute cause. *See Ross*, 468 U.S. at 13. It has given examples though. For instance, a defendant has shown cause when the claim is "so novel that its legal basis is not reasonably available to counsel." *Id.* at 16; *see also Carrier*, 477 U.S. at 488. In other words, the claim is not one where "other defense counsel have perceived and litigated that claim." *Engle v. Isaac*, 456 U.S. 107, 134 (1982). Thus, if a petitioner had the tools to construct the legal argument during his underlying proceedings, the argument is not novel enough to constitute cause for failing to raise it earlier. *See Anderson v. Kelley*, 938 F.3d 949, 962 (8th Cir. 2019). For this reason, the petitioner's claim in *Bousley* was not novel given "the Federal Reporters were replete with cases involving" the same claim. 523 U.S. at 622.

Novelty and futility are not the same, however. By definition, a futile claim is never novel—it has been perceived and raised at one point, even if ultimately rejected by a reviewing court. *See Isaac*, 456 U.S. at 134. Defense counsel may choose not to pursue a claim that has been

rejected, but that is not to say the claim does not exist. A defendant's "*opportunity* to object" is not the same as his "likelihood of *prevailing* on the objection." *Greer*, 141 S. Ct. at 2099. Hence the Eleventh Circuit aptly noted, "[i]n procedural default cases, the question is not whether legal developments or new evidence has made a claim easier or better, but whether at the time of the direct appeal the claim was available at all." *Lynn v. United States*, 365 F.3d 1225, 1235 (11th Cir. 2004) (citing *Smith v. Murray*, 477 U.S. 527, 534 (1986)).

So what impact does futility have on a procedurally defaulted claim? None. "[F]utility cannot constitute cause if it means simply that a claim was unacceptable to that particular court at that particular time." *Bousley*, 523 U.S. at 623 (citation omitted). For that reason, the Supreme Court did not excuse Bousley's default simply because the lower court had previously rejected the same claim. *Id.* Put simply, procedural default is a high bar, overcome only in "exceptional circumstances," *Ross*, 468 U.S. at 13, and arguing futility does not clear that bar. The opportunity for habeas relief is not a second chance to litigate issues previously available to a defendant.

Applying these principles, Pollard has not shown cause. Section 922(g)(1)'s knowledge-of-status argument is not novel. In fact, prior to *Rehaif*, defendants throughout the country had repeatedly raised the argument. *See Rehaif*, 139 S. Ct. at 2199. True, every court to address the issue since § 922(g)(1)'s most recent amendment had rejected finding a knowledge-of-status element. *See id.* at 2195; *id.* at 2210 n.6 (Alito, J., dissenting) (collecting cases); *see also, e.g.*, *United States v. Miller*, 105 F.3d 552, 555 (9th Cir. 1997) (rejecting a knowledge-of-status element). But, again, futility is insufficient to overcome procedural default.

Because "the Federal Reporters were replete with cases" raising the same argument, Pollard's knowledge-of-status argument was reasonably available to him at the time he pled guilty, and thus he has not adequately shown cause. *See Bousley*, 523 U.S. at 622.

The district court erred by concluding otherwise. It distinguished *Bousley*'s futility language from Pollard's motion since the underlying issue in *Bousley* was subject to a circuit split but the underlying issue in *Rehaif* was not. True enough. *Compare Bousley*, 523 U.S. at 618, *with Rehaif*, 139 S. Ct. at 2201 (Alito, J., dissenting). But it does not matter *how* futile a claim is. Whether a claim is futile or "entirely futile" (as Pollard argues), *Bousley* gives a bright-line rule: futility is not enough to show cause. 523 U.S. at 623 (citation omitted); *see also Isaac*, 456 U.S. at 130. Pollard may not have succeeded in raising the argument, but he had the opportunity to do so. *See Greer*, 141 S. Ct. at 2099.

Pollard also argues his claim was novel under *Ross*, but we are unpersuaded. *Ross* outlined three situations when defense counsel would not have had a "reasonable basis" to raise a claim: the Supreme Court (1) explicitly overrules its precedent; (2) "overturn[s] a longstanding and widespread practice to which [it] has not spoken, but which a near-unanimous body of lower court authority has expressly approved"; or (3) disapproves a practice that it "arguably ha[d] sanctioned in prior cases." 468 U.S. at 17 (alteration adopted) (citations omitted). Pollard thinks the second situation applies since the Supreme Court reversed every circuit when deciding *Rehaif*.

But *Ross* is inapplicable. Foremost, *Ross* confined its "attention to the specific situation presented [t]here: one in which this Court has articulated a *constitutional principle*

that had not been previously recognized but which is held to have retroactive application." *Id.* (emphasis added). *Rehaif*, however, was a matter of statutory interpretation, so *Ross*'s examples of novel claims do not apply. The second situation is also dicta, not explaining when a practice qualifies as "longstanding and widespread."[2] *See id.* at 17. Since *Ross* was decided almost four decades ago, the Supreme Court has never relied on the second situation to excuse default, and we have never found it dispositive. And most important, *Bousley* was decided after *Ross*, *Bousley*'s futility rule was dispositive rather than dicta, and that rule made no exception for claims that received consistent negative treatment in the courts. *See* 523 U.S. at 623. We follow the Supreme Court's explicit holding in *Bousley*.

For these reasons, Pollard has not shown cause. Though his claim may have been futile, it was not novel—the tools to construct and raise the argument were readily available to him.

[2] For example, the constitutional rule discussed in *Ross* had been in place "for over a century." 468 U.S. at 18. But here, Congress enacted the current § 922(g)(1) in 1986. *Rehaif*, 139 S. Ct. at 2199. It is thus unclear whether the circuits' consistent interpretation of § 922(g)(1) from 1986 to 2019 falls within *Ross*'s second scenario. *See United States v. Moss*, 252 F.3d 993, 1003 (8th Cir. 2001) ("The Supreme Court has never relied on the 'longstanding and widespread practice' exception as a basis for excusing default, but based on its origin, the exception appears inapplicable when the issue has been settled for what is only a mere moment in the time line of lower federal court jurisprudence.").

B

Cause aside, Pollard has not shown actual prejudice.[3] A petitioner who pled guilty is prejudiced if there is "a reasonable probability that, but for the error, he would not have entered the plea." *United States v. Dominguez Benitez*, 542 U.S. 74, 76 (2004). A court cannot consider whether a defendant's decision to go to trial "may have been foolish." *United States v. Monzon*, 429 F.3d 1268, 1272 (9th Cir. 2005) (citation omitted). But a court can consider whether evidence "proved beyond a reasonable doubt that Defendant had the knowledge required by *Rehaif* and that any error" was not prejudicial. *United States v. Benamor*, 937 F.3d 1182, 1189 (9th Cir. 2019).

This evidence can be either direct or circumstantial. *Rehaif*, 139 S. Ct. at 2198 (citing *Staples v. United States*, 511 U.S. 600, 615 n.11 (1994)). And "[i]n a felon-in-possession case where the defendant was in fact a felon when he possessed firearms, the defendant faces an uphill climb" for a simple reason: "If a person is a felon, he ordinarily knows he is a felon." *Greer*, 141 S. Ct. at 2097. Thus, we often consider a defendant's criminal history to determine

[3] Pollard argues a *Rehaif* error is structural. In *Greer*, the Supreme Court rejected that contention. 141 S. Ct. at 2099–2100. Structural errors are a "highly exceptional category." *Id.* at 2100 (citation and internal quotation marks omitted). And "discrete defects in the criminal process—such as . . . the omission of a required warning from a Rule 11 plea colloquy—are not structural because they do not '*necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.'" *Id.* Thus, *Rehaif* errors are never structural, and a habeas petitioner is still required to show actual prejudice. At any rate, a habeas petitioner must show actual prejudice to overcome procedural default, even if an error is structural, when the error does not always result in actual prejudice. *See generally Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017).

whether a *Rehaif* error was prejudicial. *E.g.*, *Benamor*, 937 F.3d at 1189 (finding "no probability" that Benamor did not know of his status after serving multiple years in prison for seven felonies, including a state felon-in-possession conviction); *United States v. Johnson*, 979 F.3d 632, 638–39 (9th Cir. 2020) (three felony convictions and over five years in prison made it "overwhelming and uncontroverted" that Johnson knew of his felon status); *United States v. Tuan Ngoc Luong*, 965 F.3d 973, 989 (9th Cir. 2020) (finding "no reasonable probability" of a different outcome when the defendant was in prison for over a decade with six prior felony convictions). Thus, demonstrating prejudice under *Rehaif* will be difficult for most convicted felons. *See United States v. Door*, 996 F.3d 606, 619 (9th Cir. 2021) ("[A]bsent any evidence suggesting ignorance," the jury can '"infer that a defendant knew that he or she was a convicted felon from the mere existence of a felony conviction' as evidenced by the defendant's stipulation." (citation omitted)).

Given Pollard's criminal history and the record below, there is no probability that he was unaware of his felon status. Before his current conviction, Pollard had served over five years in prison for committing numerous felonies. And like in *Benamor*, Pollard had also been convicted under a state felon-in-possession statute. *See* 937 F.3d at 1189. Pollard's plea colloquy also shows he knew he was a felon. When the district court asked him why he was being convicted, Pollard responded, "I possessed a firearm that I wasn't supposed to have." And after the court asked why Pollard was not supposed to have a gun, Pollard replied, "Because I am a felon and my rights have been—didn't have the right to have it no more." In short, everything in the record shows Pollard was aware of his felon status. Unsurprisingly, Pollard concedes there is little question that

one can reasonably infer from his criminal history that he must have known he had served more than a year in prison for a felony offense.

Still, Pollard argues that the question is not whether a jury would have convicted him (the inquiry in cases like *Benamor*), but whether he personally would have gone to trial despite the uncontroverted evidence of guilt. In essence, Pollard asks us to ignore the writing on the wall and accept his bare assertion on collateral review that he would not have pled guilty. We reject this purely subjective (and potentially post hoc) inquiry as it does not track recent Supreme Court precedent.

In *Lee v. United States*, 137 S. Ct. 1958, 1963 (2017), Lee, a South Korean national living in the United States, was repeatedly assured by his attorney that he would not be deported if he pled guilty. This advice was wrong, Lee pled guilty, and he was ordered deported. *Id.* at 1962–63. He filed a § 2255 motion, asking to vacate his guilty plea as he would not have pled guilty but for his attorney's error. *Id.* The Supreme Court agreed, but not because of Lee's arguments during the habeas proceedings. *Id.* at 1969. Instead, the Court looked to the underlying record. *Id.* at 1968–69. It was clear that "avoiding deportation was *the* determinative factor" and that Lee "would have rejected any plea leading to deportation—even if it shaved off prison time—in favor of throwing a 'Hail Mary' at trial." *Id.* at 1967. Lee repeatedly made this clear throughout his proceedings, stating during his plea colloquy that the possibility of deportation would affect his decision to plead. *Id.* at 1968–69. These indications in the record were enough for Lee to show actual prejudice—i.e., that he would have gone to trial absent the error. *Id.* at 1969.

Lee's analysis reflects a broader principle applicable here. The underlying record must demonstrate a reasonable probability that a defendant would not have pled guilty; assertions raised on habeas review alone are insufficient. True, this is not a purely objective test. Absent the error, a defendant may have decided to throw a "Hail Mary," *id.* at 1967, even if doing so would "have been foolish" to the reasonable defendant, *Monzon*, 429 F.3d at 1272. But neither is it a purely subjective test. Instead, a court must determine whether the underlying record objectively shows that a specific defendant would have not pled guilty absent the allegedly prejudicial error. *See Lee*, 137 S. Ct. at 1967–69. Pollard has not pointed to any objective indications in his underlying criminal proceedings and has therefore failed to show actual prejudice—especially in the face of strong evidence to the contrary.[4]

IV

Pollard fails to show cause for not raising his claim during the underlying criminal proceedings as it was reasonably available to him at the time he pled guilty. Pollard also fails to show actual prejudice from any error as nothing in the record objectively demonstrates that he would

[4] Pollard argues had he known about the knowledge-of-status defense, he would have been "emboldened" to pursue a "quixotic" necessity defense. But a necessity defense is not inherently tied to § 922(g)(1)'s knowledge-of-status element. Instead, this defense is more closely tied to the possession element, an element Pollard was aware of when he decided to plead guilty. Pollard's conclusory assertions do not explain how being informed of the knowledge-of-status element would have emboldened him to raise a defense available to him pre-*Rehaif*.

have not pled guilty had he known of § 922(g)(1)'s knowledge-of-status element.

AFFIRMED.

FORREST, Circuit Judge, concurring in part and concurring in the judgment:

I join the majority's opinion except its conclusion that Pollard cannot show cause for failing to raise his *Rehaif*-based challenge on direct review. There is no need to address the cause prong of the procedural-default analysis in this case because Pollard clearly cannot meet the prejudice prong. I also disagree that Supreme Court precedent dictates the majority's broad futility-can-never-be-cause rule. There is a significant difference between a claim that is futile because it was "'unacceptable to [a] *particular* court at [a] *particular* time,'" *Bousley v. United States*, 523 U.S. 614, 623 (1998) (emphasis added) (quoting *Engle v. Isaac*, 456 U.S. 107, 130 n.35 (1982)), and a claim that was unacceptable in *every* circuit for a sustained period, as the Supreme Court posited in *Reed v. Ross*, 468 U.S. 1, 17 (1984).