

INTRODUCTION

On April 3, 2019, this Court found Mr. NAME guilty of being a felon in possession of a firearm, in violation of 18 U.S.C. §922(g)(1). *See Exhibit A, Stipulations for Bench Trial; see also United States v. CLIENT NAME*, CR 18-00xxx CRB, Docket Entry # 28. The finding of guilt followed a stipulated fact bench trial. *Id.*

At this trial, there was evidence before the Court that Mr. NAME had been convicted of a crime punishable by a term of imprisonment of more than one year. *See Exh. A*, at 1 ¶ 5 (“Prior to May 6, 2018, NAME was convicted of a crime punishable by a term of imprisonment of more than one year.”) There was no evidence introduced in this trial, however, that Mr. NAME knew at the time of the possession of the gun that he had been convicted of a felony offense. *See id.*

On the date of this filing, June 21, 2019, the Honorable Justice Breyer wrote for the Supreme Court in *Rehaif v. United States*, __U.S. __, 2019 WL 2552487 (June 21, 2019). In a thoughtful analysis Justice Breyer explained, “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.” *Id.* at * 2.

In Mr. NAME’s case, the government did not show at trial that Mr. NAME “knew he had the relevant status when he possessed” the firearm. Because the government “failed to present any evidence of the crime . . . there was insufficient evidence to support the conviction.” *United States v. James*, 987 F.2d 648, 652 (9th Cir. 1993). Mr. NAME’s conviction must, therefore, be reversed on appeal. *See id.*

The *Rehaif* reversal that awaits Mr. NAME’s case is a “substantial question of law . . . likely to result in – reversal.” 18 U.S.C. § 3143(b)(1)(B). This Court should accordingly grant bail pending appeal.

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BACKGROUND

On August 8, 2018, Mr. NAME was indicted with a single count of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). *See* Docket Entry # 1. Notably, the indictment failed to allege that Mr. NAME *knew* he was a felon at the time he possessed the .45 caliber pistol on May 6, 2018. *See Exhibit B, Indictment.*

Mr. NAME filed a motion to suppress, which was denied by this Court without an evidentiary hearing. *See Docket Entry # 22 (Order Denying Motion to Suppress).*

Because the government declined Mr. NAME's request for a conditional plea, the defense explained to the Court that it would be forced to proceed by way of a stipulated facts bench trial to preserve the motion to suppress. *See Docket Entry #25.* As the Court may recall, at that March 20, 2019 appearance it (presciently) questioned the government's wisdom in its refusal to offer conditional plea agreements, but agreed to proceed by way of a stipulated facts bench trial.

The *government* drafted the stipulated facts which it wished to be before the Court at trial. *See Exhibit A, Stipulations for Bench Trial (on USAO letterhead).*

The case went to trial on April 3, 2019, and was completed on that date. *See Docket Entry #28.* The only facts before the Court, on the trial record, was the Stipulations for Bench Trial. *See Exhibit A.* The Court made a finding of guilt.

On June 19, 2019, the Court sentenced Mr. NAME to eighteen months of custody and two years of supervised release. *See Docket Entry #33.* The Court issued the order of Judgment and Commitment on June 21, 2019. *See Docket Entry #34.*

ARGUMENT

Because Mr. NAME's conviction must be reversed on appeal, this Court should grant bail pending appeal. Mr. NAME will then be released onto pending state detainers, and will deal with allegations in two Northern California counties while his appeal proceeds.

I. Standard for Bail Pending Appeal

To qualify for release pending appeal, a defendant must satisfy the conditions established by 18 U.S.C. § 3143(b)(1). Section 3143(b)(1) provides for release pending appeal if the judicial officer finds:

- (A) by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released . . . ; and
- (B) that the appeal is not for the purposes of delay and raises a substantial question of law or fact likely to result in—
 - (i) *reversal*;
 - (ii) an order for new trial;
 - (iii) a sentence that does not include a term of imprisonment; or
 - (iv) a reduced sentence to a term of imprisonment less than the total time already served plus the expected duration of the appeal process.

18 U.S.C. § 3143(b)(1) (emphasis added); *see also United States v. Handy*, 761 F.2d 1279, 1283 (9th Cir. 1985).

A “substantial” question for the purposes of bail is one about which reasonable jurists could differ – that is, one which is “fairly debatable.” *See Barefoot v. Estelle*, 463 U.S. 880, 892-93 (1983); *Handy*, 761 F.2d at 1283. The defendant does not need to show a likelihood of success on appeal. The term “likely to result in reversal or an order for a new trial” defines the “type of question that must be presented.” *Handy*, 761 F.2d at 1283. In the Ninth Circuit, an appellant need not establish that he will probably prevail on appeal to qualify for release pending appeal. *Id.*

As set forth *supra*, Justice Breyer’s recent decision in *Rehaif* will compel reversal of Mr. NAME’s conviction. Importantly, jeopardy attached when this Court began to receive evidence in Mr. NAME’s trial. *See United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569 (1977) (“This state of jeopardy attaches when a jury is empaneled and sworn, or, *in a bench trial, when the judge begins to receive evidence.*”) (emphasis added). There can be no dispute that the *trial record* is bare as to the defendant’s knowledge of his status as a felon at the time of the possession of the firearm. *See Exhibit A, Stipulated Facts*. Finally, it is a matter of hornbook law that a failure to prove an element at trial is fatal to a conviction. *See James*, 987 F.3d at 652. Mr. NAME’ easily satisfies the “substantial question” component of the “bail pending appeal” analysis.

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II. There is Clear and Convincing Evidence that Mr. NAME Will Not Be Likely to Flee or Pose a Danger to the Safety of the Community

Mr. NAME poses no danger of flight, and no danger to the community, because he has *two* active detainers in different counties and will not be released from custody if granted bail in federal court. As reported in the PSR, Mr. NAME has active detainers for, “Failure to Appear, Sacramento Police Department, #SA03321374, Sacramento, CA; Failure to Appear, Oakland Police Department, #18-001557, Oakland, California.” *See PSR* at 2. If this defendant is released from federal custody, he will then wend his way through the laborious process of state appearances and – if convicted – state custodial time: all while incarcerated in county jails.

The government cannot fairly assert that California state jails are not a secure environment. Indeed, in the present federal case the United States Marshal is *currently* housing Mr. NAME in the Alameda County jail at Santa Rita –likely the selfsame facility in which Mr. NAME will remain while dealing with the Oakland prosecution.¹

To find that Mr. NAME presents a risk of flight or danger while held in state custody on active detainers, the government would have to concede that the district’s *federal* prisoners are not secure while in custody in the same Santa Rita facility – an illogical premise.

Because he will remain in state custody on two active detainers, Mr. NAME meets all of the requirements of Section 3143(b)(1). This Court should accordingly grant bail pending appeal.

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¹ In Oakland, charges of Second Degree Burglary, Possession of Burglary Tools, and Receiving Stolen Property await Mr. NAME. *See PSR* at 20 ¶ 43. There is an active detainer issued after Mr. NAME failed to make a court appearance. *Id.*

In Sacramento, Charges of Battery with Serious Battery Injury, Assault with a Deadly Weapon not a Firearm, Great Bodily Injury Likely, and Inflict Corporal Injury, await Mr. NAME. *See PSR* at 21 ¶ 44. There is an active detainer issued after Mr. NAME failed to make a court appearance. *Id.*

CONCLUSION

The trial record in Mr. NAME's case is devoid of any evidence of an essential element: the defendant's knowledge of his prohibited status at the time of the possession of a firearm. This Court should accordingly grant bail pending appeal, to permit Mr. NAME to resolve his state matters while the appeal, and very likely reversal, goes forward in the Ninth Circuit.