# NO. 18-9631

# In the Supreme Court of the United States

ERICKSON CAMPBELL,

**PETITIONER-APPELLANT**,

*v.*

UNITED STATES OF AMERICA,

**RESPONDENT-APPELLEE.**

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE ELEVENTH CIRCUIT*

## PETITION FOR REHEARING

JONATHAN R. DODSON
Fl. Bar No. 50177
*Counsel of Record
Federal Defenders of the
Middle District of Georgia, Inc.
440 Martin Luther King, Jr. Boulevard, Suite 400
Macon, Georgia 31201
Tel: (478) 743-4747
Fax: (478) 207-3419
E-mail: jonathan_dodson@fd.org

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## PETITION FOR REHEARING

Pursuant to Supreme Court Rule 44.1, Erickson Campbell respectfully petitions for rehearing of the Court's per curiam decision denying his petition for writ of certiorari on October 7, 2019. *Campbell v. United States*, No. 18-9631, __S.Ct.__, 2019 WL 4922214 (Oct. 7, 2019). He files this petition for rehearing within 25 days of this Court's decision in this case.

1.) After Petitioner submitted his petition for writ of certiorari, this Court decided *Rehaif v. United States*, 139 S.Ct. 2191 (2019). That decision construed 18 U.S.C. §§ 924(a)(1) and 922(g) to require that the government prove, as an element, that the defendant knew of his status as a person prohibited from possessing a firearm at the time of his offense. Petitioner's indictment did not charge this element, and in pleading guilty he was not informed of and did not admit the element. Petitioner thus raises the following question, based on an "intervening circumstance[] of a substantial or controlling effect[,]" and on A "substantial ground[] not previously presented":

> whether this Court should grant certiorari, vacate the judgment below, and remand for reconsideration in light of *Rehaif*.

2.) The following additional facts are relevant to the *Rehaif* issue he raises here. Mr. Campbell's indictment stated: "having been convicted of a crime punishable by imprisonment for a term exceeding one (1) year, [he] did knowingly receive and possess a firearm . . . ; all in violation of Title 18, United States Code, Sections

922(g)(1) and 924(a)(2)." R1[1]. After the district court denied his motion to suppress, he entered a conditional plea agreement, based on Fed. Rule of Crim. P. 11(a)(2), reserving his right to appeal that ruling. R47; R45 at 4. As part of this guilty plea, the parties attached a written factual stipulation. *Id.* at 8; R48. It reads:

> Deputy McCannon stopped a grey Nissan Maxima traveling on I-20 in Green County, Georgia. Mr. Campbell was the driver. Deputy McCannon and Sgt. Paquette searched the Nissan Maxima and located a black and grey Michael Jordan bag under the carpet. The bag contained a Highpoint, model C-9, 9mm caliber firearm[,] serial # P1585705[,] along with a mask and a stocking hat. Mr. Campbell had previously been convicted of a felony. The gun was manufactured in Ohio. The Government and Mr. Campbell stipulate that the weapon had moved in interstate commerce.

R48. The government recited this stipulation verbatim during the district court's Rule 11 colloquy, to provide a factual basis for his guilty plea. R68 at 6-7. It did not recite the essential elements of his offense. The court found Mr. Campbell was fully competent, that he was aware of the nature of his charges and that his guilty plea

[1] Appellant cites to the electronic record on direct appeal, available through CM/ECF, as "R[document number] at [page number]."

was knowing and voluntary, and "supported by an independent basis in fact containing each of the essential elements of the offense." *Id.* at 13.

3.) Title 18, section 922(g)(1) prohibits felons from possessing a firearm, and section 924(a)(2) criminalizes "knowingly violat[ing]" section 922(g). In *Rehaif*, 139 S. Ct. at 2194, this Court clarified that the "knowingly" mens rea of 924(a)(2), applies not only to the possession element of 922(g), but also to the status element of 922(g)(1). This decision implicates two issues with Mr. Campbell's conviction. *First*, to adequately charge Mr. Campbell with the offense to which he entered his guilty plea, the government had to allege that, when he possessed the firearm, he knew he had been convicted of a crime punishable by over a year of imprisonment that triggered a bar on his possessing a firearm. *Second*, for his guilty plea to be knowing and voluntary, he had to know that he was admitting to *Rehaif* knowledge by entering the plea. In other words, he had to voluntarily stipulate that he knew, when he possessed the firearm, that an offense for which he was previously convicted was punishable by over a year, and that this circumstance barred him from possessing the firearm.

4.) As to the first issue, in light of *Rehaif*, Mr. Campbell's indictment failed to state an offense, in violation of his Fifth Amendment right to be charged based on a grand jury finding of probable cause of the essential *Rehaif* element, and his Sixth Amendment right to fair notice of the element. *See, e.g.*, *Ex parte Bain*, 121 U.S. 1, 9 (1887); *Stirone v. United States*, 361 U.S. 212, 217 (1960)). In his indictment, the word "knowingly" modified "possess," but did not modify the preceding, independent

"having been convicted" clause. The conduct it alleged was indifferent to his knowledge of his unlawful status, and the citations to 18 U.S.C. §§ 924(a)(2) and 922(g)(1), in light of then controlling Eleventh Circuit case law, *see United States v. Jackson*, 120 F.3d 1226 (11th Cir. 1997), would not have caused the grand jury to consider whether Mr. Campbell knew of his unlawful status. Nor would these citations have fairly noticed Mr. Campbell that the government had to prove this element to obtain a conviction.

Because, as argued below, Mr. Campbell's guilty plea was involuntary, it was void and could not waive his indictment challenge. *See McCarthy v. United States*, 369 U.S. 459, 466 (1969) (a guilty plea that is not "knowing, . . . has been obtained in violation of due process and is therefore void.") Nor could he forfeit an issue that was not reasonably available to him. *Cf. Reed v. Ross*, 461 U.S. 1, 17 (1984). Additionally, under Eleventh Circuit case law, the indictment error was arguably jurisdictional. *See United States v. Izurieta*, 710 F.3d 1176, 1179 (11th Cir. 2018) ("This Court's post-*Cotton* jurisprudence, however, has refused to find that *Cotton* altered our established precedent recognizing that the failure to allege a crime in violation of the laws of the United States is a jurisdictional defect.") (referencing *United States v. Cotton*, 535 U.S. 625, 630-31 (2002)). The Eleventh Circuit may address on remand this and any other possible procedural obstacles to relief.

5.) As to the second issue, Mr. Campbell's guilty plea was constitutionally involuntary, because it was not supported by his knowing stipulation to an essential element. "[T]he first and most universally recognized requirement of due process,"

*Smith v. O'Grady*, 312 U.S. 329, 334 (1941), is that a voluntary guilty plea requires that the defendant be "informed of both the nature of the charge to which he is pleading guilty and its elements." *Gaddy v. Linahan*, 780 F.2d 935, 943 (11th Cir. 1986). Hence, in *Bousley v. United States*, 523 U.S. 614, 618-619 (1998), this Court held that a guilty plea would be "constitutionally invalid," if Mr. Bousley proved his claim that he did not, at the time he entered his plea, understand the "use" element of 18 U.S.C. § 924(c)(1) – an element which this Court had clarified five years after his guilty plea, in *Bailey v. United States*, 516 U.S. 137, 144 (1995). *See Bousley*, 523 U.S. at 616.

*Bousley* should control this case. In both, this Court clarified an essential element of the offense to which the defendants pleaded guilty after they entered their guilty pleas. The only difference is that Mr. Bousley raised the issue for the first time on a collateral attack of his conviction and Mr. Campbell raises it for the first time in this petition for rehearing, which is prior to the court of appeals' issuance of a mandate in his direct appeal.

Nothing in Mr. Campbell's plea colloquy, plea agreement, or stipulation of facts indicates he understood the *Rehaif* element. It would be surprising if he or his counsel did divine the element, as controlling case law at the time rejected the existence of the element. *See Jackson*, 120 F.3d 1226. He is therefore entitled to have his guilty plea reversed.

Constitutionally involuntary guilty pleas (as opposed to run-of-the-mill Rule 11 violations), are per se reversible under *Boykin v. Alabama*, 395 U.S. 238 (1969).

There, the Court held that the record must affirmatively show that a defendant's guilty plea was knowing and voluntary. *Id.* at 243. In *United States v. Dominguez Benitez*, 542 U.S. 74, 84, n.10 (2004), when this Court articulated the showing of prejudice necessary to satisfy the prejudice prong of a plainly erroneous Rule 11 violation, it distinguished errors that made the guilty plea *constitutionally* involuntary. Such errors "must be reversed." *Id.* at 84. The court of appeals, of course, may address this, and any other procedural issues on remand.

6.) After this Court decided *Rehaif*, it has granted a number petitions for certiorari, vacated the judgments below, and remanded for reconsideration in light of *Rehaif*. *See, e.g., Reed v. United States*, 18-7490, __ S. Ct. __, 2019 WL 318317 (June 28, 2019); *Allen v. United States*, 18-7123, __ S. Ct. __, 2019 WL 2649798 (June 28, 2019); *Hall v. United States*, 17-9221, __ S. Ct. __, 2019 WL 2649770 (June 28, 2019); *Moody v. United States*, 18-9071, __ S. Ct. __, 2019 WL 1980311 (June 28, 2019); *Thomas v. United States*, 19-5025, __S.Ct.__, 2019 WL 5150461 (Oct. 15, 2019).

7.) Moreover, this Court has granted motions for rehearing in the same posture as this case – that is, when this Court issued a dispositive decision after the petition for writ of certiorari was filed, but before it was denied. *See, e.g., Friend v. United States*, 517 U.S. 1152 (1996) (granting rehearing and vacating the 22 January 1996 denial of petition for a writ of certiorari, based on *Bailey*, 516 U.S. 137 (Dec. 6, 1995)); *Adams v. Evatt*, 511 U.S. 1001 (1994) (granting rehearing and vacating 14 June 1993 denial of petition for writ of certiorari based on *Sullivan v. Louisiana*, 508 U.S. 275 (June 1, 1993)); Aaron-Andrew P. Bruhl, *When Is Finality . . . Final? Rehearing and*

*Resurrection in the Supreme Court*, 12 J. App. Prac. & Process 1, 21-24 (2011) (chart listing cases in which this Court has granted petitions for rehearing based on intervening decisions, and specifying relevant dates). In light of the foregoing, the same result is warranted here.

## CONCLUSION

For the foregoing reasons, this Court should grant this petition for rehearing, vacate the judgment below, and remand for reconsideration in light of *Rehaif*.

JONATHAN R. DODSON
Fl. Bar No. 50177
*Counsel of Record
Federal Defenders of the
Middle District of Georgia, Inc.
440 Martin Luther King, Jr. Boulevard, Suite 400
Macon, Georgia 31201
Tel: (478) 743-4747
Fax: (478) 207-3419
E-mail: jonathan_dodson@fd.org

## CERTIFICATE OF COUNSEL

I hereby certify that this petition for rehearing is based on an intervening circumstance of a substantial or controlling effect and on a substantial ground not previously presented, and is presented in good faith and not for delay.

Jonathan Dodson,
Assistant Federal Defender,
Federal Defenders of the
Middle District of Georgia, Inc.

## CERTIFICATE OF WORD COUNT

I hereby certify that the number of words in this petition for rehearing, as count by the Microsoft Office Word 2017-processing system, is **1,697** words, which is less than the 3,000 allowed for rehearing petitions by Supreme Court Rule 33(g)(xv).

Jonathan Dodson,
Assistant Federal Defender,
Federal Defenders of the
Middle District of Georgia, Inc.

IN THE
SUPREME COURT OF THE UNITED STATES
NO. 18-9631

ERICKSON CAMPBELL,
Petitioner-Appellant

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

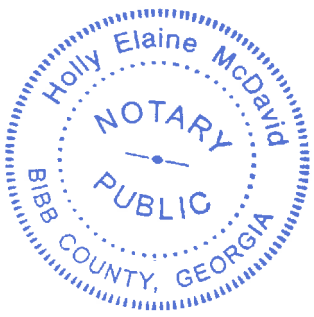
**PROOF OF SERVICE**

I, Jonathan R. Dodson, do swear or declare that on this 1st day of November, 2019; pursuant to Supreme Court Rules 15.8, 12.2, 39 and 44.1, that I have served the attached *Petition for Rehearing* on each party in the above-captioned proceeding, or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States, properly addressed to each, with first-class postage prepaid.

The name and address of those served are as follows:

The Honorable Noel Francisco, Solicitor General of the United States
Room 5616, Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

Subscribed and sworn to
before me this 1st day of
November, 2019.




JONATHAN R. DODSON- Affiant

Holly McDavid, Notary Public