

20-7502

IN THE SUPREME COURT OF THE UNITED STATES

VAUGHN ALEXANDER CROPPER

Petitioner

v.

ORIGINAL

UNITED STATES OF AMERICA

Respondent

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

PETITION FOR WRIT OF CERTIORARI
(PRO SE)

Vaughn Alexander Cropper

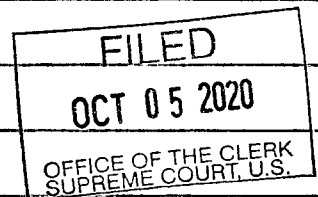
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(Incarcerated)



QUESTIONS PRESENTED FOR REVIEW

1a) Did the U.S. Court of Appeals for the Eleventh Circuit violate Petitioner's Fifth Amendment right to due process of law by failing to evaluate his as-applied Second Amendment challenge to 18 U.S.C. § 922(g)(1) under the necessary two-step analytical framework adopted by the Eleventh Circuit for evaluating Second Amendment claims?

1b) Is the Government required to prove the constitutionality of 18 U.S.C. § 922(g)(1) under some form of heightened scrutiny upon an as-applied Second Amendment challenge to the statute?

2a) Is Petitioner entitled to a reversal of his conviction or a new trial due to errors made plain by *Rehaif v. United States*, which prejudiced (i) Petitioner's Fifth and Sixth Amendment rights, and (ii) Petitioner's ability to put on a meritorious mistake-of-law defense at trial that could have absolved him of criminal liability to 18 U.S.C. § 922(g)(1)?

2b) Is Petitioner criminally liable for a violation of 18 U.S.C. § 922(g)(1) when he misunderstood the full significance of possessing a firearm due to a mistaken impression concerning the legal effect of his prior felony convictions at the time he possessed the firearm?

LIST OF RELEVANT PROCEEDINGS

In the U.S. District Court for the Northern District of Alabama (Southern Division);
Case No. 2:17-cr-030; UNITED STATES OF AMERICA v. VAUGHN ALEXANDER CROPPER.

(i) 01/25/2017 - Indictment filed by Government;

(ii) 04/10/2017 - First Day of Trial;

(iii) 04/11/2017 - Second Day of Trial (verdict of guilty as to Count One);

(iv) 08/10/2017 - Sentencing Proceeding (188 months imprisonment, 60 months supervised release);

(v) 08/11/2017 - Notice of Appeal filed by CROPPER.

In the U.S. Court of Appeals for the Eleventh Circuit; Appeal No. 17-13619;
UNITED STATES OF AMERICA v. VAUGHN ALEXANDER CROPPER.

(vi) 06/17/2019 - Appellant's Brief filed by CROPPER;

(vii) 07/11/2019 - Appellee's Brief filed by Government;

(viii) 08/22/2019 - Reply Brief filed by CROPPER;

(ix) 11/08/2019 - ORDER directing both parties to file supplemental briefs;

(x) 11/18/2019 - Appellant's Supplemental Brief filed by CROPPER;

(xi) 11/26/2019 - Appellee's Supplemental Brief Filed by Government;

(xii) 02/03/2020 - Supplemental Reply Brief Filed by CROPPER;

(xiii) 03/02/2020 - MOTION to take judicial notice Filed by CROPPER;

(ixv) 05/04/2020 - Judgment entered and Opinion issued as to CROPPER.

Decision: Affirmed. Opinion type: Non-published. Opinion method: Per Curiam.

CROPPER's Motion to take judicial notice **DENIED**;

(xv) 05/22/2020 - Petition for Rehearing En Banc Filed by CROPPER;

(xvi) 07/10/2020 - Petition for Rehearing En Banc **DENIED**.

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"B" - Eleventh Circuit's Order denying Petition for Rehearing En Banc (1 page).

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CITATION TO OPINION

A copy of the Opinion of the Eleventh Circuit Court of Appeals, dated May 4, 2020, is attached as Appendix "A." Petitioner's case was not published in the Federal Reporter.

JURISDICTIONAL STATEMENT

The date of the Opinion sought to be reviewed is May 4, 2020. The date of the Order denying the Petition for Rehearing En Banc is July 10, 2020, and is attached as Appendix "B."

As Petitioner requests this Honorable Court's review of a matter arising from the U.S. Court of Appeals for the Eleventh Circuit, this Honorable Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

U.S. Constitution, Amendment II:

A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.

U.S. Constitution, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Constitution, Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

18 U.S.C. § 922(g)(1). Unlawful Acts.

(g) It shall be unlawful for any person --

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition, or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce. [X]

18 U.S.C. § 924(a)(2). Penalties:

(a)(2) Whoever knowingly violates subsection (a)(b), (d), (g), (h), (i), (j), or (o) of section 922 [18 U.S.C. 922] shall be fined as provided in this title, imprisoned not more than 10 years, or both.

Federal Criminal Procedure, Rule 7(c). The Indictment and the Information(c) Nature and Contents.

(1) In General. The indictment or information must be a plain, concise, and definite written statement of the essential facts constituting the offense charged and must be signed by an attorney for the government. It need not contain a formal introduction or conclusion. A count may incorporate by reference an allegation made in another count. A count may allege that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means. For each count, the indictment or information must give the official or customary citation of the statute, rule, regulation, or other provision of law that the defendant is alleged to have violated. For purposes of an indictment referred to in section 3282 of title 18, United States Code, for which the identity of the defendant is unknown, it shall be sufficient for the indictment to describe the defendant as an individual whose name is unknown, but who has a particular DNA profile, as that term is defined in that section 3282.

(2) Citation Error. Unless the defendant was misled and thereby prejudiced, neither an error in a citation nor a citation's omission is a ground to dismiss the indictment or information or to reverse a conviction.

STATEMENT OF THE CASE

• Course of Proceedings

On January 25, 2017, Petitioner CROPPER was indicted for one count of being a felon-in-possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). See Doc. 1. CROPPER proceeded to trial which began on April 10, 2017. On April 11, 2017, the jury found CROPPER guilty as to Count One. See Doc. 47; Doc. 77 at paragraph 4.

On August 10, 2017, CROPPER was sentenced to a term of 188 months imprisonment and 60 months supervised release as an Armed Career Criminal. See Doc. 79. On August 11, 2017, CROPPER filed a Notice of Appeal expressing his intent to appeal both his conviction and his sentence. See Doc. 81.

On June 17, 2019, CROPPER filed the Appellant's Brief (ApI.T. Br.) in the U.S. Court of Appeals for the Eleventh Circuit. See Appeal No. 17-13619. On July 11, 2019, the Appellee's Brief (ApI.E. Br.) was filed by the Government. On August 22, 2019, CROPPER filed a Reply Brief (CR.R.Br.).

On November 8, 2019, the Eleventh Circuit issued an Order directing both parties to file simultaneous supplemental briefs limited to addressing the impact of the U.S. Supreme Court's opinion in *Rehaif v. United States*, 139 S.Ct. 2191 (2019), on CROPPER's appeal. On November 18, 2019, the Appellant's Supplemental Brief (CR.Sup.) was filed by CROPPER. On November 26, 2019, the Appellee's Supplemental Brief (Gov.Sup.) was filed by the Government. On February 3, 2020, CROPPER filed a Supplemental Reply Brief (CR.SRB). On March 2, 2020, a Motion to take judicial notice (JNM) was filed by CROPPER.

On May 4, 2020, the CROPPER panel, The Honorable Circuit Judges Pryor, Grant, and Luck (hereinafter "The Panel"), entered judgment and issued its unpublished per curiam opinion, affirming CROPPER's conviction and sentence. See Appendix A. Also, CROPPER's Judicial Notice Motion was denied. On May 22, 2020, CROPPER filed a Petition for Rehearing En Banc (PREB). On July 10, 2020, the Eleventh Circuit denied CROPPER's Petition for Rehearing En Banc. See Appendix B.

• Statement of Facts

On September 25, 2016, CROPPER was arrested by police officers who were on duty for the City of Birmingham, Alabama, for possessing a gun without having a pistol permit. See Doc. 77 at paragraph 8. CROPPER was released on his own recognizance later that day, on the condition that he meet with a Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) Task Force Officer on September 26, 2016. After being read and waiving his Miranda-rights, CROPPER was interviewed by ATF and Birmingham Police officer, Ed Hull. See Doc. 77 at paragraph 9. During the interview, CROPPER admitted to possessing a firearm and explained that he had the gun "only for protection." *Id.*

CROPPER was a convicted felon at the time of the incident. It was later determined that the gun that CROPPER possessed had traveled in interstate commerce as it was manufactured outside of the State of Alabama. See *id.* Subsequently, CROPPER was federally indicted. CROPPER proceeded to trial, got convicted, and is currently serving a term of 188

months imprisonment with 60 months supervised release. CROPPER suffers from a sentence

enhancement under the Armed Career Criminal Act, as it was determined by the sentencing court that CROPPER had three prior drug convictions that trigger an enhancement pursuant to

18 U.S.C. §§ 924(c)(1) and (e)(2)(A). All of CROPPER's predicate convictions are marijuana-related, involving small-quantity possession and distributions of marijuana.

During his closing arguments at trial, CROPPER expressed to the jury that "the [U.S.]

Constitution does [not] mention a prohibition forbidding convicted felons of [the] Second Amendment

right to bear arms. See Doc. 62 at 32. Prior to CROPPER's sentencing hearing, the U.S. Probation

Office filed a Presentence Investigation Report (PSR), to which CROPPER made several objections,

many of which were embarrassingly misguided and frivolous. However, CROPPER's PSR objections did

relevantly contend that 18 U.S.C. § 922(g)(1) "is repugnant to the [C]onstitution because it

clearly conflicts with the Second Amendment," and that § 922(g)(1) "is not applicable to

[CROPPER]." Doc. 66 at 6 (page 4). CROPPER's Second Amendment contentions against § 922(g)(1)

were preserved for appellate review. See Doc. 98 at 26-28.

On appeal, CROPPER argued that 18 U.S.C. § 922(g)(1) is unconstitutional as applied to

him. See *Apl. T. Br.* at 25-34 (pages 14-23). The Government argued that CROPPER's as-applied

Second Amendment challenge to § 922(g)(1) should be precluded pursuant to

United States v. Rozier, 598 F.3d 768 (11th Cir. 2010). See *Apl. E. Br.* at 17-19 (pages 9-11).

CROPPER's reply brief argued, among other things, that *Rozier* should not control because: (i) it was

decided upon a rational-basis test, which was deemed an insufficient level of scrutiny for Second

Amendment challenges; and (ii) it conflicts with other Eleventh Circuit precedent and thus

en banc consideration was necessary to overrule *Rozier*. See *CR. RBr.* at 21-24 (pages 13-16).

The Panel agreed with the Government, concluding that CROPPER's as-applied challenge to

§ 922(g)(1) was foreclosed by *Rozier*. See *Appendix, A* at 8-9.

Furthermore, CROPPER also argued on appeal that he is entitled to either a vacation of

his instant conviction or a new trial due to errors made plain by the Supreme Court's opinion in

Rehaif v. United States, 139 S.Ct. 2191 (2019). See *CR. Sup.* at 8-15 (pages 3-10). The

Government conceded that plain errors occurred, but argued that CROPPER was not entitled to

relief under *Rehaif* because the plain errors did not affect CROPPER's substantial rights. See

Gov. Sup. at 8-14 (pages 3-9). CROPPER's Supplemental Reply Brief counters by clarifying why the plain errors did, in fact, have a prejudicial effect on CROPPER's substantial rights. See CR.SRB. at 4-8 (pages 1-5).¹ The Panel ultimately agreed with the Government, concluding that the plain errors did not affect CROPPER's substantial rights and thus the errors need not be reversed. See Appendix, A at 11-14.

CROPPER subsequently filed a Petition for Rehearing En Banc. See PREB. The Eleventh Circuit denied CROPPER's petition for an en banc rehearing. See Appendix, B. CROPPER now petitions for this Honorable Court's review.

¹ Petitioner has cited page numbers as they were filed, i.e., at #, and as they were originally drafted, i.e., (page #), unless both are the same.

REASONS FOR GRANTING PETITION

1) The Eleventh Circuit erred by failing to properly evaluate Petitioner CROPPER's as-applied Second Amendment challenge to 18 U.S.C. § 922(g)(1).

The Supreme Court's opinion in *District of Columbia v. Heller* (*Heller I*), 554 U.S. 570 (2008), establishes a two-step analytical framework for courts to employ when evaluating Second Amendment challenges to a statute. Under *Heller*'s two-step approach, a court must first examine whether the challenged statute "burdens conduct that falls within the scope of the Second Amendment right, as historically understood." *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012). If it does not, then the inquiry is complete. *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010). If it does, then a court must move to the "second step" which involves "applying the appropriate level of scrutiny" to the challenged statute. *Ezell v. City of Chicago*, 651 F.3d 684, 701-704 (7th Cir. 2011). "If the [statute] passes muster under the standard applied, it is constitutional. If it fails, it is invalid." *Binderup v. Attorney General*, 836 F.3d 336, 346 (3d Cir. 2016) (en banc).

Excluding the Eighth Circuit, every other sister circuit has adopted *Heller*'s two-step analytical framework for evaluating Second Amendment claims. See *Gould v. Morgan*,

907 F.3d 659, 668-677 (1st Cir. 2018) (adopting *Heller*'s two-step approach to evaluate a Second Amendment challenge to a Massachusetts firearm licensing statute, ultimately applying intermediate scrutiny); *United States v. Jimenez*, 895 F.3d 228, 232-238 (2d Cir. 2018) (same with respect to 18 U.S.C. § 922(g)(6)); *United States v. Chester*, 628 F.3d 673, 680-683 (4th Cir. 2010) (same with respect to 18 U.S.C. § 922(g)(9)); *NRA v. BATFE*, 700 F.3d 185, 194-211 (5th Cir. 2012) (same with respect to 18 U.S.C. §§ 922(b)(1) and (c)(1)); *United States v. Chovan*, 735 F.3d 1127, 1136-1142 (9th Cir. 2013) (same with respect to § 922(g)(9)); *United States v. Reese*, 627 F.3d 792, 800-805 (10th Cir. 2010) (same with respect to 18 U.S.C. § 922(g)(8)); *Georgia Carry, Inc. v. Georgia*, 687 F.3d 1244, 1260 n.34 (11th Cir. 2012) (adopting *Heller*'s two-step analytical framework to evaluate a Second Amendment challenge to a Georgia state statute that banned gun possession in a place of worship); *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1251-1258 (D.C. Cir. 2011) (same with respect to D.C. gun-registration laws).

In *Georgia Carry, Inc. v. Georgia*, *supra*, the Eleventh Circuit acknowledged, for the first time, that when evaluating a Second Amendment claim, "a two-step inquiry is appropriate." First, [the Court] ask[s] if the restricted activity is protected by the Second Amendment in the first place; and then, if necessary, [the Court] would apply the appropriate level of scrutiny." 687 F.3d at 1260 n.34. The Eleventh Circuit also recognized that "courts must read the challenged statute in light of the historical background of the Second Amendment" when applying the two-step inquiry. *Id.*, at 1261.

Thus, the *Georgia Carry, Inc. v. Georgia* Court adopted *Heller I*'s two-step analytical framework as the method for evaluating Second Amendment claims in the Eleventh Circuit.

Therefore, due process requires the Eleventh Circuit to apply, at least, the first step of the two-

step inquiry to all Second Amendment claims, including CROPPER's as-applied Second Amendment challenge

to 18 U.S.C. § 922(g)(1). See *id.*, at 1260 n.34 (applying only the first step of the two-step inquiry, concluding that it was unnecessary to go beyond the first step in that case).

However, The Panel failed to apply any part of the two-step inquiry to CROPPER's as-applied challenge

to § 922(g)(1), thus violating CROPPER's Fifth Amendment right to due process of law and conflicting with

the authoritative opinions of its sister circuits cited hereinabove. See ante at 7-8.

Instead of applying the necessary two-step inquiry, The Panel, at the Government's request,

simply ruled that CROPPER's as-applied challenge was foreclosed by *United States v. Rozier*,

598 F.3d 768 (11th Cir. 2010), which was decided more than two years prior to the Eleventh

Circuit's adoption of the two-step inquiry in *Georgia Carry, Inc., Inc., supra*. The Rozier Court also

failed to employ Heller I's two-step approach when evaluating an as-applied challenge to § 922(g)(1).

The fact that Rozier failed to apply the necessary two-step analytical framework, as that case was

decided before the Eleventh Circuit adopted it, is enough reason for Rozier to not control in

The Rozier Court stated that "the motive behind [a felon's] possession of [a] handgun is irrelevant" and found "18 U.S.C. § 922(g)(1) to be constitutional, even if a felon possesses a firearm purely for self-defense." 598 F.3d at 770. See Appendix, A at 9. Those statements clearly conflict with the *Heller I* opinion, which makes clear that "the inherent right of self-defense [is] central to the Second Amendment right," 554 U.S. at 628, and a handgun is a weapon that falls within the scope of Second Amendment protection. *Id.*, at 629. To substantiate its position, the Rozier Court relied upon the Supreme Court's statement that "nothing in [the *Heller I*] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons...." *Heller I*, 554 U.S. at 626; see *Rozier*, 598 F.3d at 771.

The Rozier Court misinterpreted that language as "suggest[ing] that statutes disqualifying felons from possessing a firearm under any and all circumstances do not offend the Second Amendment." *Id.* (emphasis added)

The Rozier Court's misinterpretation is clearly erroneous as it suggests no possibility of a justification defense, which conflicts with the Eleventh Circuit's antecedent opinion in

United States v. Deleveaux, 205 F.3d 1292 (11th Cir. 2000). The defense of justification is an

affirmative defense that may be available to a § 922(g)(1) charge and the burden is on the defendant to prove that defense by a preponderance of the evidence. *Id.*, at 1295-1297. Because *Rozier* conflicts with both *Deleveaux* and *Georgia Carry, Inc.*, *Rozier* should not be controlling in the Eleventh Circuit.

Furthermore, just before expressing its view that § 922(g)(1) can bar all felons "from possessing a firearm under any and all circumstances [without] offend[ing] the Second Amendment," the *Rozier* Court contradictorily implied that felons are entitled to some (albeit a diminished) degree of Second Amendment protection.

"[A felon's] Second Amendment right to bear arms is not weighed in the same manner as that of a law-abiding citizen.... While felons do not forfeit their constitutional rights upon being convicted, their status as felons substantially affects the level of protection those rights are accorded." *Rozier*, 598 F.3d at 771.

In other words, *CROPPER*, being a convicted felon, is not entitled to the same level of Second Amendment protection as a law-abiding citizen, but *CROPPER* is entitled to some lesser level of Second Amendment protection nonetheless. Even the guarantee of a diminished level of Second Amendment protection is still a long way away from being barred from firearm possession

"under any and all circumstances." *Id.* ^[11] Therefore, the *Rozier* opinion is a contradiction in and of

itself. However, this view, that a convicted felon is entitled to some degree of Second Amendment

protection as opposed to none at all, does not conflict with *Heller I*, as the *Heller I* opinion does not "allude[] to any historical evidence that the right to keep and bear arms did not extend to

felons." *Chester*, 628 F.3d at 679.

In fact, the *Heller I* Court referred to "longstanding prohibitions on the possession of firearms by felons" as "presumptively lawful regulatory measures." *Heller I*, 554 U.S. at 626-627 n.26. Multiple

circuit courts of appeal have interpreted *Heller I*'s "presumptively lawful" language to mean that felon

disarmament statutes, such as 18 U.S.C. § 922(g)(1), are not automatically constitutional "under any

and all circumstances." *Rozier*, 598 F.3d at 771.

"By describing the felon disarmament ban as 'presumptively' lawful, the Supreme Court implied that the presumption may be rebutted." *United States v. Barton*, 633 F.3d 168, 173 (3d Cir. 2011).

"*Heller*'s 'presumptively lawful' language does not suggest that a presumption of constitutionality attaches to [a prohibition on the possession of firearms]. An equally valid, if not better, reading of the language is that the Court presumed that it would find [a prohibition on the possession of firearms] constitutional after applying some analytical framework."

Tyler v. Hillsdale County Sheriff's Department, 775 F.3d 308, 324 (6th Cir. 2014).

"Heller referred to felon disarmament bans only as 'presumptively lawful,' which, by implication, means that there must exist the possibility that the ban could be unconstitutional in the face of an as-applied challenge." *United States v. Williams*, 616 F.3d 685, 692 (7th Cir. 2010); see *Chester*, 628 F.3d at 679.

The *Rozier* Court leaned on *Heller I*'s "presumptively lawful" language while finding 18 U.S.C. § 922(g)(1) to be a "presumptively lawful longstanding prohibition." *Rozier*, 598 F.3d at 771.

The *Rozier* Court rejected an as-applied Second Amendment challenge to § 922(g)(1) based on that finding alone. However, in *Barton*, the Government conceded that "Heller's statement regarding the presumptive validity of felon gun dispossession statutes does not foreclose [an appellant's] as-applied challenge." 633 F.3d at 173. The Government's concession in *Barton* should make clear and convincingly evident the erroneousess of the *Rozier* opinion and The Panel's reliance on *Rozier* to foreclose *CROPPER*'s as-applied Second Amendment challenge to § 922(g)(1).

The *Barton*, *Tyler*, *Williams*, and *Chester* interpretations of *Heller I*'s "presumptively lawful" language are strongly corroborated by the fact that the *Heller I* Court developed a methodology for determining the classes of people, weapons, and conduct that fall within and

outside the scope of the Second Amendment. *Heller I*'s methodology, which encompasses the

two-step analytical framework adopted by the Eleventh Circuit in *Georgia-Carry, Dry, Inc.*, *supra*, is

designed to resolve an "initial question [of] whether one is qualified to possess a firearm." *Rozier*, 598 F.3d at 770.

Moreover, the two-step analytical framework is designed to put the Government to its burden of

proving the constitutionality of statutes that hinder Second Amendment rights, on more than just

a rational basis. However, without applying any of *Heller I*'s methodology, the *Rozier* Court

concluded that "statutory restrictions of firearm possession, such as § 922(g)(1), are a constitutional

avenue to restrict the Second Amendment right of certain classes of people." *Id.*, at 771.

Therefore, the *Rozier* Court came to its conclusion by employing a method equivalent to a

rational-basis test, which is an insufficient level of scrutiny for "evaluat[ing] the extent to

which a legislature may regulate a specific, enumerated right." *Heller I*, 554 U.S. at 629. Because

the right to keep and bear arms is enumerated in the U.S. Constitution, courts cannot subject

laws that burden it, such as § 922(g)(1), to more rational-basis review. *Id.*, at 628 n.27.

"[A] categorical limit on the possession of firearms can[not] be justified under the national-basis test, which deems a law valid if any justification for it may be imagined." *United States v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010) (en banc).^[14]

When considering that fact, in conjunction with *Heller I*'s "presumptively lawful" language and the analytical framework developed by the *Heller I* Court, it becomes clearly evident that, in cases like *CROPPER*'s, the *Heller I* Court intended to have the Government prove the constitutionality of statutes like § 922(g)(1) under some form of heightened means-end scrutiny.

"[T]he Government does not get a free pass simply because Congress has established a 'categorical ban,' it still must prove that the ban is constitutional, a mandate that flows from *Heller* itself... [P]utting the Government through its paces in proving the constitutionality of § 922(g)(1) is only proper." *Williams*, 616 F.3d at 692.

"[W]hen faced with an as-applied Second Amendment challenge, ... some form of heightened scrutiny is appropriate after it has been determined that the law in question burdens protected conduct." *Binderup*, 836 F.3d at 344.

CROPPER merely possessed a firearm, which is conduct that is protected by the Second Amendment, but barred by 18 U.S.C. § 922(g)(1). The firearm that *CROPPER* possessed was a handgun, which is a weapon that falls within the scope of Second Amendment protection. Therefore, in applying the first step of the two-step inquiry adopted in *Georgia Carry, Inc., supra*, to *CROPPER*'s as-applied Second Amendment challenge to § 922(g)(1), the Eleventh Circuit would

have to examine historical data to determine whether *CROPPER*, who is a felon, "is qualified to

possess a firearm." *Kozier*, 598 F.3d at 770. However, the historical evidence and academic writing on

the subject of whether felons (especially, non-violent felons) were protected by the Second

Amendment at the time of its ratification "is inconclusive at best." *Williams*, 616 F.3d at 698 (quotations omitted); see *Chester*, 628 F.3d at 679.

Thus, *CROPPER's* as-applied challenge resulting in the application of heightened scrutiny to § 922(g)(1)

is inevitable.

CROPPER does not argue, here, which level of heightened scrutiny the Eleventh Circuit

must apply to his as-applied Second Amendment challenge to § 922(g)(1). However, multiple courts

have satisfied due process by applying intermediate scrutiny when evaluating as-applied Second

Amendment challenges to § 922(g)(1). See *Barton*, 633 F.3d at 172-175; *Bindrup*, 836 F.3d at 353-356; *Williams*, 616 F.3d at 692-694; *Schrader v. Holder*, 704 F.3d 980, 988-991 (D.C. Cir. 2012).

The Government has failed to carry its burden of proving the constitutionality of § 922(g)(1),

against *CROPPER's* as-applied Second Amendment challenge, under any level of heightened scrutiny.

CROPPER's as-applied challenge to § 922(g)(1) "rebut[es] the presumption that he lacks

Second Amendment rights." *Bindrup*, 836 F.3d at 339. See *Ap/I.T. Br.* at 25-34 (pages 14-23).

"[A] person who did not commit a serious crime retains his Second Amendment rights" because "being convicted of a non-serious crime does not demonstrate a lack of 'virtue' that disqualifies an offender from exercising those rights." *Binderup*, 836 F.3d at 349. CROPPER did not serve any prison time for his prior felony convictions, only serving probationary sentences. See *Ap'l T. Br.* at 44-81 (*Ap'l T. Br.* at Appx, Exhibits B thru E).

"[S]evere punishments are typically reserved for serious crimes." *Binderup*, 836 F.3d at 352. "With not a single day of jail time" the probationary sentences that CROPPER served for his prior felony convictions "reflect the sentencing judge[s] assessment of how minor the violations were." *Id.*

Furthermore, CROPPER has no violence on his record and none of his prior drug offenses would constitute a "serious drug felony" pursuant to 21 U.S.C. § 802 (58) because CROPPER did not serve "a term of imprisonment of more than 12 months." 21 U.S.C. § 802 (58)(A). Thus, CROPPER can show, via his as-applied challenge to 18 U.S.C. § 922(g)(1), that he is "a felon convicted of a minor, non-violent crime... [who] is no more dangerous than a typical law-abiding citizen." *Barton*, 633 F.3d at 174. Because CROPPER's as-applied challenge shows how he

is "a person who did not commit a serious crime" and thus he "retains his Second Amendment

rights," *Guidenup*, 836 F.3d at 349, the Government's failure to carry its burden of proving the

constitutionality of § 922(g)(1) under the appropriate analytical framework has prejudicially affected CREPPER's Fifth Amendment right to due process of law.

In closing, CREPPER has proved herein that the Eleventh Circuit's opinion in *Rozier*, *supra*,

should not control as it conflicts with itself, other Eleventh Circuit precedent, authoritative opinions in

all but one of its sister circuits, and the Supreme Court's opinion in *Heller I*. Thus, CREPPER has

proved that The Panel's opinion in his appeal, as it pertains to his as-applied Second Amendment

challenge to 18 U.S.C. § 922(g)(1), is also erroneous for its reliance on *Rozier*. CREPPER has also

proved that the Eleventh Circuit has prejudiced his Fifth Amendment right to due process of law

by: (i) failing to properly evaluate CREPPER's as-applied Second Amendment challenge to

§ 922(g)(1) under the two-step analytical framework adopted in *Georgia-Carry, Inc., Inc., supra*, and

(ii) failing to put the Government to its burden of proving the constitutionality of § 922(g)(1)

under some form of heightened scrutiny. For all of these reasons, this Honorable Court should

grant this petition to mend the errors of the lower court with a mandate ordering the review

of CROPPER's as-applied Second Amendment challenge to § 922(g)(1) under the proper analytical framework.

2) Petitioner CROPPER's defective indictment warrants reversal of his conviction as the indictment's plain error misled Petitioner and thereby prejudiced his substantial rights and his trial.

Pursuant to *Rehaif v. United States*, 139 S.Ct. 2191 (2019), the term "knowingly," found in the statutory language of 18 U.S.C. § 924(a)(2), applies to the status element of 18 U.S.C. § 922(g)(1), and thus the Government is required to prove a defendant's mens rea with respect to his status at the time he possessed the firearm, in order to obtain and sustain a conviction under § 922(g). See *Rehaif*, 139 S.Ct. at 2194.

"[T]he word 'knowingly' applies both to the defendant's conduct and to the defendant's status. To convict a defendant [under § 922(g)], 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.*

In CROPPER's case, two errors were made plain by *Rehaif*. The first error occurred when the indictment failed to allege that CROPPER knew of his status as a convicted felon when he possessed the firearm. See Doc. 1. The second error occurred when the district court failed to

instruct the trial jury to determine whether the Government had proven that CROPPER had a

culpable mental state regarding his status as a convicted felon. See Doc. 46, Dec. 62 at 43-56. The

Government conceded, and The Panel acknowledged, that these failures were plain errors under ^(pg. 4) Rehlf. See Gov. Sup. at 9, Appendix, A at 12.

Nevertheless, the Government argued that these plain errors did not affect CROPPER's

substantial rights because: (i) "the indictment tracked the language of 39A22(g)(1)", Gov. Sup. at 9, ^(pg. 4)

and (ii) the record contains overwhelming evidence of CROPPER's knowledge of his prior felony

convictions at the time he possessed the gun and thus he would not have had a meritorious

defense that could have resulted in a different outcome at trial had there been no error.

See Gov. Sup. at 12-14 (pages 7-9).

Agreeing with the Government, The Panel concluded as follows:

"Because there is ample evidence in the record showing that Cropper knew of his status as a convicted felon when he possessed the firearm, there is no reasonable likelihood that the outcome of his trial would have been different but for the errors in the indictment and the jury instructions. Thus, CROPPER cannot establish that his substantial rights were affected by the errors." Appendix, A at 14 (citing *United States v. Reed*, 941 F.3d 1018, 1022 (11th Cir. 2019)).

The Panel's conclusion is erroneous because: (i) The Panel overlooked CROPPER's meritorious mistake-

of-law claim; (ii) *Reed*, supra, is inapplicable; and (iii) the plain errors are reversible.

• CROPPER's meritorious mistake-of-law defense was ignored by The Panel.

The "ample evidence" that The Panel's decision is based on consists of parts of the record

where: (i) CROPPER failed to object to the prior felony convictions listed in his Presentence

Investigation Report at sentencing; and (ii) CROPPER made stipulations and statements before trial,

during trial, and in briefs on appeal, admitting to the fact of being convicted of felony offenses

prior to possessing the firearm, as opposed to admitting mens rea regarding his status at the time

he possessed the firearm. See Gov. Sup. at 10-12. All of the stipulations, statements, and failures

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to object occurred after CROPPER was arrested for possessing the firearm, as opposed to the

relevant time, which is, "when he possessed [the firearm]." *Rehaif*, 139 S.Ct. at 2194. CROPPER

countered the Government by asserting a meritorious mistake-of-law defense, which he was unable

to do at trial because he was "misled and thereby prejudiced" by the inadequacy of the indictment.

See *F.R.Cr.P. 7(c)(2)*.

The *Rehaif* Court makes clear that "a mistake of law is a defense if the mistake

negates the knowledge required to establish a material element of the offense." 139 S.Ct. at 2198.

(quotations omitted).

In asserting his mistake-of-law defense, CROPPER claims that when he possessed the gun, he was aware of the existence of his prior felony convictions but: (i) was under the impression that all felonies over seven years old were obsolete, see C.R. SRB. at 7, ^(pg. 4) also see Doc. 91 at 17; and (ii) the youthful offender status, in conjunction with the concurrent probationary sentences associated with his prior felony convictions, caused him to believe that his social status would be restored to that of a law-abiding citizen upon completion of the probationary sentences and thus he misunderstood the legal effect of his prior felony convictions and the full significance of his conduct - possessing a firearm. See C.R. Sup. at 10-11 (pages 5-6); C.R. SRB. at 6-8 (pages 3-5). According to Rehaif, such a mistake of law would absolve CROPPER of criminal liability to 18 U.S.C. § 922(g)(1).

"[W]here 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, [that mistake] negate[s] an element of the offense." Rehaif, 139 S.Ct. at 2198.

However, The Panel failed to take into consideration CROPPER's mistake-of-law claim, and the fact that the indictment's plain error hindered CROPPER's ability to put on such a defense

As explained hereinabove, the evidence referenced by the Government and The Panel consists

of events that occurred subsequent to CROPPER's arrest for possessing the firearm and involves his

admissions to the fact that his predicate felony convictions existed, as opposed to confessions of

having a culpable mental state regarding his status as a convicted felon "when he possessed [the

firearm]." *Rehail*, 139 S.Ct. at 2194. Therefore, that evidence has no bearing on whether CROPPER

misunderstood the legal effect of his prior felony convictions and the significance of his

conduct "when he possessed [the firearm]." *Id.* In fact, the only evidence on record that

actually shows CROPPER at the time he possessed the firearm supports his mistake-of-law claim.

At trial, the jury viewed two videos that were admitted into evidence as Exhibits G-2

and G-3, which both show CROPPER at the time he possessed the firearm. See Doc. 61 at 147-158 and 164-170.

Neither of the two videos suggest that CROPPER had a culpable mental state regarding his status

as a convicted felon, nor does either video refute CROPPER's mistake-of-law claim in any way.

Both videos corroborate CROPPER's mistake-of-law claim as they evince CROPPER's honesty toward

the arresting officers with respect to his ^[23]possession of the gun and where the gun was located on

his person. Also, both corroborating videos evince CROPPER's non-resistant and non-hesitant cooperation with the officers as the gun was confiscated. Therefore, the Government has not made the requisite showing that CROPPER had mens rea regarding his status as a convicted felon "when he possessed [the firearm]. *Rehail*, 139 S.Ct. at 2194.

At the time CROPPER possessed the firearm, he had already successfully completed all of the probationary sentences that he received for his prior felony convictions without serving any time in prison, and over eight (8) years had passed since those convictions were finalized. Therefore, it would be reasonable for jurors to conclude that CROPPER truly "misunderst[ood] the full significance" of his subsequent gun possession and thus lacked a culpable mental state regarding his status as a convicted felon, which would negate the status element of 18 U.S.C. § 922(g)(1). *Rehail*, 139 S.Ct. at 2198.

Whether CROPPER's mistake of law absolves him of criminal liability to § 922(g)(1) is a question that must be decided by a trial jury upon being properly instructed to decide whether the Government proved the essential "mens rea of status" element of § 922(g)(1), making the jury instructions'

plain error a significant one.

"The Sixth Amendment provides that those 'accused' of a 'crime' have the right to a trial 'by an impartial jury.' This right, in conjunction with the Due Process Clause, requires that each element of a crime be proved to the jury beyond a reasonable doubt." *Alleyne v. United States*, 570 U.S. 99, 104, 133 S.Ct. 2151, 2156 (2013).

Clearly, CROPPER's mistake-of-law claim is a meritorious defense. However, because

the indictment (Doc. 1) failed to allege that CROPPER had mens rea regarding the status element of

18 U.S.C. § 922(g)(1), CROPPER was unable to foresee and assert his mistake-of-law defense at

trial. Therefore, there is a "reasonable likelihood that the outcome of [CROPPER's] trial would

have been different [had there been no] errors in the indictment and the jury instructions."

Appendix, A at 14.

**United States v. Reed* does not preclude Petitioners from obtaining relief under *Rehaff*.

The Panel repeatedly cited *United States v. Reed*, 941 F.3d 1018 (11th Cir. 2019),

to substantiate its finding that *Rehaff* did not afford CROPPER relief under the plain error

standard. See Appendix, A at 12-14. Like CROPPER, *Reed* established that errors in his indictment

and jury instructions were made plain by *Rehaff*. See *Reed*, 941 F.3d at 1021. However, *Reed*

could not prove that the plain errors affected his substantial rights or the fairness, integrity,

or public reputation of his proceedings, because: (i) Reed had been convicted of eight prior felonies and admitted to serving at least 18 years in prison before possessing the firearm in his case; (ii) Reed stipulated that he had prior felony convictions and that he never had any of his civil rights restored; and (iii) Reed testified at trial that he knew he was not supposed to have a gun. See *Reed*, 941 F.3d at 1020-1022. Thus, the record in *Reed* showed that Reed had mens rea with respect to the status element of 18 U.S.C. § 922(g)(1).

Unlike Reed, CROPPER never admitted that he knew he was prohibited from possessing a gun. Furthermore, as explained hereinbefore, CROPPER never served any prison time for his prior felonies, only serving probationary sentences. See ante at 17. CROPPER moved The Panel to take judicial notice of the judicial records pertaining to his prior felony convictions. See JNM. However, CROPPER's 'Judicial Notice Motion' was denied. See Appendix, A at 10 n.3. Nonetheless, The Panel acknowledged the fact that CROPPER serving "no time in prison could suggest that he was unaware of his status as a convicted felon." *Id.*, at 13.

Moreover, as explained hereinabove, CROPPER only stipulated the fact of his prior

convictions. See ante at 21 and 23. CROPPER's stipulation does not affect his mistake-of-law claim.

Reed's circumstances did not afford him the possibility of a mistake-of-law defense as Reed served more than 18 years in prison and also confessed mens rea during his testimony at trial.

Because Reed's circumstances could not have possibly afforded him the luxury of the type of mistake-of-law defense that CROPPER asserted on appeal, Reed, *supra*, is inapplicable to CROPPER's appeal for relief under *Rehaif*.

• The plain errors are reversible.

To obtain relief under the plain error standard, CROPPER must establish that any error was: (i) plain; (ii) affected his substantial rights; and (iii) "seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States v. Diano*, 507 U.S. 725, 732 (1993).

The Fifth Amendment against: (i) being "held to answer for a.... crime, unless on a[n] indictment of a grand jury"; and (ii) being "deprived of life, liberty, or property, without due process of law." U.S. Constitution, Amendment V. Those who are accused in criminal prosecutions

are guaranteed the Sixth Amendment right to be adequately "informed of the nature and cause

of the accusation." U.S. Constitution, Amendment VI. These Fifth and Sixth Amendment rights are substantial rights to which CROPPER is entitled.

Rule 7(c) of the Federal Rules of Criminal Procedure, which governs the nature and content of an indictment, is established in accordance with the Fifth and Sixth Amendments of the U.S. Constitution.

"The indictment... must be a plain, concise, and definite written statement of the essential facts constituting the offense charged." F.R.Cr.P. 7(c)(1)

CROPPER's indictment (Doc. 1) fails to cite 18 U.S.C. § 924(a)(2) and omits the essential "mens rea of status" element of 18 U.S.C. § 922(g)(1), thus violating CROPPER's substantial Fifth Amendment rights to due process of law and adequate indictment of a grand jury, as well as CROPPER's substantial Sixth Amendment right to be adequately informed of the nature and cause of the accusation against him.

Because CROPPER's indictment failed to allege that CROPPER had a culpable mental state regarding his status as a convicted felon, CROPPER was unable to foresee and assert

a mistake-of-law defense that would absolve him of criminal liability to § 922(g)(1). In that

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way, the indictment's plain error not only prejudiced CROPPER's substantial rights, but also

prejudiced the fairness, integrity, and public reputation of CROPPER's trial. *Olaad, supra.*

Because the indictment's plain error "misled and thereby prejudiced" CROPPER's substantial rights

and trial, the indictment should be dismissed and CROPPER's conviction should be reversed. See F.R. Cr.P. 7(c)(2).

"[I]f the defendant was misled and thereby prejudiced, [] an error in a citation [or] a citation's omission is a ground to dismiss the indictment... or to reverse a conviction." *Id.*

"[A]n indictment must set forth each essential element of an offense in order for a resulting conviction to stand." *United States v. Italiano*, 837 F.2d 1480, 1482 (11th Cir. 1988).

In the alternative, a new trial based upon the jury instructions' plain error would suffice.

Therefore, this Honorable Court should grant this petition to mend the errors of the lower courts accordingly.

Respectfully submitted, this 4th day of October, 2020.

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