No. 07-608

In The
Supreme Court of the United States

FEB 19 2008

UNITED STATES OF AMERICA,
Petitioner,

v.

RANDY EDWARD HAYES,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

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Relevant statutory and regulatory provisions are set forth in the appendix to this brief. App., *infra*, 1b – 4b.

STATEMENT OF THE CASE

The Petition at 2 misidentifies the court from which this case originates; Mr. Hayes entered his conditional guilty plea to violating 18 U.S.C. 922(g)(9) in the United States District Court for the Northern District of West Virginia.

Additionally, while Mr. Hayes entered his conditional guilty plea to the predicate State-law misdemeanor battery offense in 1994, the offense actually took place in November 1993. In 1994, West Virginia enacted its domestic-battery statute, W. Va. Code § 61-2-28, which has as an element, a domestic relationship between the accused and the victim.

A knowing violation of § 922(g)(9) is a felony punishable by up to 10 years in prison, a fine of up to $250,000, or both. 18 U.S.C. 924(a)(2); 18 U.S.C. 3571(b)(3).

REASONS FOR DENYING THE WRIT

I. The Existence of a Circuit Split By Itself Is Insufficient Reason for Granting the Writ, Especially Where Subsequent Legislative Developments Have Made This Case Unlikely to Recur.

The Government's main argument is that the Fourth Circuit's ruling conflicts with that of several other circuits. Petition at 8-9. But while differences among the circuits are readily apparent, a mere numerical split has never been sufficient reason, on its own, to warrant the grant of certiorari. It "regularly happens that certiorari is denied in other cases presenting the kind of conflicts singled out by Rule 10." *Beaulieu v. United States*, 497 U.S. 1038 (1990) (White, J., dissenting from denial of certiorari). As Justice White pointed out, in the October 1989 Term alone there were at least 48 instances where a Petition presented a circuit conflict on a point of Federal law sufficiently crystallized to warrant review – yet in each case, this Court nonetheless denied certiorari. In such instances, it is undeniable that "federal law is being administered in different ways in different parts of the country," and that "citizens in some circuits are subject to liabilities or entitlements that citizens in other circuits are not burdened with or entitled to," *Id.* at 1039 – yet certiorari may be denied, and often has been.

If anything, the standard for granting certiorari based on a circuit conflict is even more exacting today, given the 1995 amendment of Rule

10(a) to require that a case involve an "important" matter before certiorari is warranted. "No longer is it enough, if it ever was, to allege a conflict among decisions without demonstrating that the conflict revolves around an 'important' question of federal law." Gressman, Geller et. al., SUPREME COURT PRACTICE (9th ed. 2007) 241.

In this case, no such "important" matter is presented. As the Government must acknowledge, the number of States with domestic-battery statutes containing a domestic-relationship element continues to grow. Although the Government cites 2002 figures showing 17 States (and Puerto Rico) with such statutes, Petition at 13, as of this writing nearly half of the States (24) have enacted such laws.[1] Even if the Fourth Circuit's rationale is

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[1] Ala. Code § 13A-6-132 (2007); Ariz. Rev. Stat. Ann. § 13-3601 (2007); Ark. Code Ann. § 5-26-305 (2007); Colo. Rev. Stat. § 18-6-800.3 (2007); Haw. Rev. Stat. § 709-906 (2007); Idaho Code Ann. § 18-918 (2007); 720 Ill. Comp. Stat. 5/12-3 (2008); Ind. Code Ann. § 35-42-2-1.3 (2007); Iowa Code § 708.2A (2006); Mich. Comp. Laws. § 750.81 (2007); Minn. Stat. § 609.2242 (2007); Miss. Code Ann. § 97-3-7 (2007); Mo. Rev. Stat. § 565.074 (2007); Mont. Code Ann. § 45-5-206 (2005); N.J. Stat. Ann. § 2C:25-19 (West 2007); N.M. Stat. Ann. § 30-3-12 (2007); N.C. Gen. Stat. § 14-33 (2007); Ohio Rev. Code Ann. § 2919.25 (LexisNexis 2008); Okla. Stat. tit. 21, § 644 (2007); S.C. Code Ann. § 16-25-20 (2006); Tenn. Code Ann. § 39-13-111 (2007); Vt. Stat. Ann. tit. 13, § 1042 (2007); Va. Code Ann. § 18.2-57.2 (2007); W. Va. Code § 61-2-28 (2007).

incorrect – which it is not, as discussed below – it will have no impact whatsoever in those States. Domestic abusers can and will be charged and convicted of an offense that has as an element a domestic relationship between the accused and victim, and which will thus constitute a "misdemeanor crime of domestic violence" under any circuit's interpretation of 18 U.S.C. 921(a)(33)(A). They will be subject to liability under § 922(g)(9) for unlawfully possessing a firearm, regardless of which reading of the statute is used.

For that matter, the Fourth Circuit's ruling, even if incorrect, will have little or no impact in four of the five States of that circuit. As the Government concedes, Virginia, West Virginia, North Carolina and South Carolina each have enacted misdemeanor domestic-battery statutes containing a domestic-relationship element. Petition at 19; *see also* fn 2, *supra*. In those States, domestic abusers will be charged under those statutes, and, if convicted, plainly will forfeit their firearm-possession rights.

Indeed, legislative developments subsequent to Mr. Hayes's misdemeanor offense in 1993 have made it extremely unlikely that this particular controversy would arise today even in West Virginia. The predicate offense forming the basis for Mr. Hayes's conviction under 18 U.S.C. 922(g)(9) was his guilty plea in Marion County Magistrate's Court to a misdemeanor battery count under W. Va. Code § 61-2-9, arising from a November 1993 incident. In 1994, though, West Virginia enacted W. Va. Code § 61-2-28, "domestic violence – criminal acts." 1994, c. 45. That statute makes it a misdemeanor for anyone

to "unlawfully and intentionally make[ ] physical contact of an insulting or provoking nature with his or her family household member or unlawfully and intentionally cause[ ] physical harm to his or her family or household member." It unquestionably meets the definition of "misdemeanor crime of domestic violence" set forth in § 921(a)(33)(A)(ii), under the construction given that term by any of the circuit courts. Accordingly, the controversy presented here is unlikely to recur often in the future – and in all likelihood, would not even recur today in West Virginia. Certainly, it does not present enough of an important, recurring issue to warrant review by this Court.

Finally, the Government's stated concern for avoiding potential "confusion" among domestic-violence offenders who relocate to another State, Petition at 19, is misplaced. "All persons are charged with knowledge of the provisions of statutes and must take note of the procedure adopted by them...." *Texaco, Inc. v. Short*, 454 U.S. 516, 531-32 & n.5 (1982), *quoting North Laramie Land Co. v. Hoffman*, 268 U.S. 276, 283 (1925). "It is elementary that every one is presumed to know the law of the land, whether that be the common law or the statutory law...." *Blumenthal v. United States*, 88 F.2d 522, 530 (8th Cir. 1937), *citing*, *inter alia*, *Shevlin-Carpenter Co. v. Minnesota*, 218 U.S. 57 (1910). Even assuming the Fourth Circuit's ruling will result in a patchwork of legal obligations among the States beyond that which Congress authorized in enacting §§ 922(g)(9) and 921(a)(33)(A) (see *infra*), it will create no meaningful burden on individuals who relocate interstate. Determining his or her ability to

possess firearms lawfully will be just one more thing an individual will need to learn with regard to his or her new State, along with its sales-tax rate, motor-vehicle laws, child-immunization requirements and myriad other rules.[2]

The Fourth Circuit's ruling simply does not have the far-reaching implications required to support the grant of certiorari. As Justice Harlan noted nearly a half-century ago,

> even where a "true" conflict may be said to exist, certiorari will sometimes be denied where it seems likely that the conflict may be resolved as a result of future cases in the Court of Appeals, or where the impact of the conflict is narrowly confined and is not apt to have continuing future consequences, as where a statute which has given rise to conflicting interpretations has been repealed or amended. [J. Harlan, *Some Aspects of the Judicial Process in the*

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[2] The Government's unsupported assertion that the Fourth Circuit ruling will burden officials charged with ensuring compliance with the Brady Handgun Violence Prevention Act, 18 U.S.C. 922(s)-(t) (2000 & Supp. V 2005), Petition at 18-19, is likewise without merit. Variances among the States' laws regarding "the use or attempted use of physical force, or threatened use of a deadly weapon" already impose on those officials some duty of analysis, that the ruling below in no way increases.

Supreme Court of the United States, 33 Austl. L.J. 108 (1959)].

That is precisely the case here. In addition to being correct, the Fourth Circuit's ruling will not cause the type of dire consequences the Government predicts.

II. The Fourth Circuit's Ruling Creates No Greater Risk of Inconsistent Application of 18 U.S.C. 922(g)(9) Than Congress Intended.

The Government asserts that the Fourth Circuit's ruling "will result in the inconsistent application of a firearms prohibition intended to apply uniformly nationwide," Petition at 19-20. Henceforth, it claims, a convicted individual's ability to possess firearms legally will depend on his State of residence. *Id.* at 8-9. But that risk of inconsistency has existed since enactment of 18 U.S.C. 922(g)(9) in 1996. Congress did not intend § 922(g)(9)'s gun-possession ban to be applied identically in all 50 States, because it deliberately tethered its definition of "misdemeanor crime of domestic violence" to State law – a common and acceptable legislative practice that, as this Court has recognized, virtually guarantees that different standards will apply in different States. *Logan v. United States*, 128 S.Ct. 475, 483 (2007) (construing 18 U.S.C. 921(a)(20)). The lack of nationwide uniformity that the Government decries thus was not caused by the Fourth Circuit, but rather was baked into § 922(g)(9) and § 921(a)(33)(A)(ii) by Congress. The ruling below does not create any

threat of inconsistency greater than that which Congress intended.

In *Logan*, this Court recently noted that a similar lack of uniformity exists with regard to 18 U.S.C. 921(a)(20). Following this Court's ruling in *Dickerson v. New Banner Institute*, 460 U.S. 103 (1983), Congress reacted by amending § 921(a)(20) to make the restoration of offenders' civil rights contingent upon the happening of various events – expungement, pardon and the like – that all are defined by State, not Federal, law. As this Court observed in *Logan*,

> Congress' decision to have restoration triggered by events governed by state law insured anomalous results. The several states have considerably different laws governing pardon, expungement, and forfeiture and restoration of civil rights. Furthermore, states have drastically different policies as to when and under what circumstances such discretionary acts of grace should be extended....*Anomalies generated by § 921(a)(20) are the inevitable consequence of making access to the exemption depend on the differing laws and policies of the several states.* [128 S. Ct. at 483, *quoting McGrath v. United States*, 60 F.3d 1005, 1009 (2d Cir. 1995) (emphasis added; internal quotations and brackets omitted)].

The same holds true for 18 U.S.C. 922(g)(9). Congress could have guaranteed the nationwide uniformity the Government desires, simply by drafting § 921(a)(33)(A) to itself define the conduct that would disqualify one from owning firearms. Instead, Congress deliberately chose to tie the statutory definition to State law. Because laws governing "the use or attempted use of physical force, or threatened use of a deadly weapon" inevitably vary from State to State – even if only slightly – the goal of nationwide uniformity that the Government seeks effectively is unattainable. The Government's stated concern about "inconsistent application of a firearms prohibition intended to apply uniformly nationwide," Petition at 19-20, does not withstand scrutiny, and does not justify the grant of certiorari.

III. Even If the Issue Is Worthy of Addressing, the Court Should Await a Case from One of the Several Circuits That Have Erred in Construing § 922(g)(9).

Although the certiorari stage typically is not the place to debate a case's merits, the procedural context of this matter warrant brief discussion of this case's merits. Given that Mr. Hayes's status as a potential felon hangs in the balance, and given that a clear majority of circuit courts to have addressed the issue have erred, it would be more appropriate for this Court to let pass the Fourth Circuit's correct ruling, and instead choose as its vehicle for addressing 18 U.S.C. 922(g)(9), a future case from one of those other circuits.

1. The Fourth Circuit was correct in concluding that § 921(a)(33)(A) requires the predicate offense to have as an element, the use of force committed by a person in a domestic relationship with the victim. Adhering to the settled doctrine that the starting point for statutory interpretation is the plain statutory text, the court properly noted that the semicolon between subsections (i) and (ii) is significant: the lack of a similar grammatical break within subsection (ii) indicates that the definition does not truncate before the words "committed by," but rather includes *all* the language of subsection (ii) in describing the element that the predicate offense must have. (Pet. App. 8a-9a). As the court correctly noted, had Congress chosen to set the phrase "committed by a current or former spouse, parent or guardian of the victim" apart in a separate clause, the Government's reading of the statute would be plausible – but Congress did not. (*Id.* at 9a).

Indeed, the Department of Justice itself has decided that Congress's chosen language does not define "misdemeanor crime of domestic violence" in the manner that the Petition asserts. In its 1998 implementing regulations, the Bureau of Alcohol, Tobacco, Firearms and Explosives rewrote the statutory language in the precise manner cited by the Fourth Circuit – to segregate the domestic-relationship requirement from that portion setting forth the element(s) that the predicate offense must have:

Sec. 478.11 Meaning of terms.

* * *

Misdemeanor crime of domestic violence. (a) Is a Federal, State or local offense that:

(1) Is a misdemeanor under Federal or State law or, in States which do not classify offenses as misdemeanors, is an offense punishable by imprisonment for a term of one year or less, and includes offenses that are punishable only by a fine. (This is true whether or not the State statute specifically defines the offense as a ``misdemeanor'' or as a ``misdemeanor crime of domestic violence.'' The term includes all such misdemeanor convictions in Indian Courts established pursuant to 25 CFR part 11.);

(2) Has, as an element, the use or attempted use of physical force (e.g., assault and battery), or the threatened use of a deadly weapon;

and

(3) Was committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the

> victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, (e.g., the equivalent of a ``common law'' marriage even if such relationship is not recognized under the law), or a person similarly situated to a spouse, parent, or guardian of the victim (e.g., two persons who are residing at the same location in an intimate relationship with the intent to make that place their home would be similarly situated to a spouse) [27 C.F.R. 478.11 (63 Fed. Reg. 35,520 (1998))].

Thus, the BATF deliberately chose to separate the "committed by" language from the rest of clause (ii), to make plain its view that a domestic relationship between the accused and the victim is not an element of the predicate offense. Of course, Congress could have drafted § 921(a)(33)(A) in that manner as well, but it did not. BATF's regulation should be read as a tacit admission by the Department of Justice that the Fourth Circuit's interpretation of § 921(a)(33)(A) is correct.[3]

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[3] Mr. Hayes does not assert that the BATF's regulation is worthy of deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); he simply cites it as proof that the statute as enacted by Congress does not say what the petition maintains it does – because the BATF obviously felt compelled to rewrite it. Indeed, the Government itself has acknowledged that the

2. The Fourth Circuit also correctly applied other tenets of statutory construction in reaching its conclusion. It properly recognized that the legislative history in general – and Sen. Lautenberg's comment in particular – is an "unreliable guide," in the face of the plain statutory language to the contrary. (Pet. App. 19a-20a). (Indeed, the importance that the Petition places on Sen. Lautenberg's isolated comment from among the legislative history, pp 15-17, renders it a textbook example of the dubious practice that this Court has dismissed as "an exercise in 'looking over a crowd and picking out your friends.'" *ExxonMobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) (Kennedy, J.), *citing* Patricia M. Wald, Some Observations on the Use of Legislative History in the 1981 Supreme Court Term, 68 IOWA L. REV. 195, 214 (1983)).

The Fourth Circuit also correctly found, as did Judge Sentelle in his dissent from *United States v. Barnes*, 295 F.3d 1354, 1369 (D.C. Cir. 2002), that Congress's use of the singular rather than the plural

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regulation is not entitled to *Chevron* deference. *United States v. Orellana*, 405 F.3d 360, 396 & n. 63 (5th Cir. 2005); *see also United States v. Gayle*, 342 F.3d 89, 93 & n. 4 (2d Cir. 2004) ("We requested briefing from the Government and the defendant on the import of 27 C.F.R. § 478.11, and both parties agreed that ATF's interpretation of a criminal statute is not entitled to deference under *Chevron*...even if the statute were ambiguous") (internal brackets omitted).

form of "element" was "largely meaningless," since the true issue is what that singular element includes. (Pet. App. 14a-15a). And the court correctly held – again, agreeing with Judge Sentelle – that proper application of the rule of the last antecedent compels adoption of Mr. Hayes's reading of the statute, not the Government's. (Pet. App. 10a-13a).

3. The number of circuits that have erred in construing § 921(a)(33)(A), when juxtaposed with the correct analyses of the Fourth Circuit majority and of Judge Sentelle, ordinarily might argue in favor of certiorari. But the clear applicability of the rule of lenity to this case means the Court should pass over this matter, because the ultimate outcome of the case will not be changed. "Imprecision and indeterminacy are particularly inappropriate in the application of a criminal statute." *James v. United States*, 127 S. Ct. 1586, 1602 (2007) (Scalia, J., dissenting). ""In various ways over the years, [this Court] has stated that when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before [choosing] the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *United States v. Bass*, 404 U.S. 336, 347 (1971). The rule of lenity requires that an ambiguous criminal statute be construed in favor of the accused, and applies where, "after seizing everything from which aid can be derived, the Court is left with an ambiguous statute." *Staples v. United States*, 511 U.S. 600, 619 n. 17 (1994) (citations and internal quotation marks omitted). The fact that several circuits have analyzed the identical statutory

language and come to diametric conclusions, certainly meets the test of *Staples*. It compels application of the rule of lenity so as to absolve Mr. Hayes of criminal liability under § 922(g)(9).

Even where a clear circuit conflict exists, certiorari may be denied where resolution of the conflict would be irrelevant to the ultimate outcome of the case. *Sommerville v. United States*, 376 U.S. 909 (1964) (certiorari denied despite Government's concession that a live conflict existed as to whether Federal or State law controlled; petitioner would be liable under Federal or State law regardless of how conflict was resolved). Even if the Court granted certiorari in this case, and adopted any of the many varying rationales on which the circuits that disagree with the Fourth Circuit have based their construction of § 921(a)(33)(A), the outcome of this case should not change: Mr. Hayes's conviction must be set aside based on the rule of lenity.

Rather than make Mr. Hayes go through an extended period of uncertainty over whether he will spend the rest of his life as a convicted felon, this Court should instead wait for a decision from one of the circuits that have misinterpreted § 921(a)(33)(A) and affirmed a conviction under 18 U.S.C. 922(g)(9). In such a case, unlike this one, this Court's ruling will be outcome-determinative.

IV. An Alternate Basis Exists For Affirming Dismissal of the Superseding Indictment.

Even if the Fourth Circuit erred in analyzing § 921(a)(33), an alternate basis exists to affirm

dismissal of the superseding indictment. In determining whether the predicate offense meets the criteria of § 921(a)(33)(A), a court "is typically restricted to looking at 'the fact of conviction and the statutory definition of the prior offense.'" *United States v. Webb*, 2007 U.S. Dist. LEXIS 90541, *7 (N.D. Iowa 2007), *quoting Taylor v. United States*, 495 U.S. 575, 600 (1990). Where (as here) conviction on the predicate offense was obtained via guilty plea, the only admissible evidence is the statement of factual basis for the charge, as shown by a transcript of plea colloquy or by written plea agreement presented to the court, or by a record of comparable findings of fact adopted by the defendant upon entering the plea. *Webb* at **8-9, *quoting Shepard v. United States*, 544 U.S. 13, 20 (2005).

None of those were presented in this case. At the plea hearing held in the district court, the Government offered testimony from Special Agent Kenneth Grace of the BATF, who testified that Mr. Hayes was convicted in 1994 of simple battery, and that the victim, Mary Ann Hayes, at that time was his wife. Special Agent Grace reached that conclusion after obtaining the couple's marriage license from the Marion County (W. Va.) Clerk's Office. (4th Cir. J.A. 145). Special Agent Grace also testified that Mr. Hayes and Mary Ann Hayes had a child in common and had lived together at the time of the 1993 battery, information that he obtained from interviewing Ms. Hayes. *Id.* However, no transcript of a plea colloquy or plea agreement from Marion County Magistrate Court, where Mr. Hayes entered his plea in 1994, ever was produced. Nor was there produced a record of any finding of fact

adopted by Mr. Hayes. None of Special Agent Grace's testimony was conclusively validated in any prior proceeding. *See, United States v. Washington*, 404 F.3d 834, 840 (2005), *citing Shepard*, 544 U.S. at 21-23, 125 S.Ct. at 1260-61 (sentencing court addressing 18 U.S.C. 924(e) cannot consider items from the record of a prior conviction that were not conclusively validated in the earlier proceeding).

Allowing extrinsic evidence of the prior conviction would undercut what is at the heart of this Court's decision in *Taylor*: "that respect for congressional intent and avoidance of collateral trials require that evidence of generic conviction be confined to records of the convicting court approaching the certainty of the record of conviction in a generic crime State." *Shepard*, 544 U.S. at 23. Thus, the district court erred in allowing the Government to introduce extrinsic evidence to prove the elements of § 922(g)(9). "*Taylor* is clear that any enquiry beyond statute and charging document must be narrowly restricted to implement the object of the statute and avoid evidentiary disputes." 544 U.S. at 23 n 4.

Mr. Hayes fully briefed and argued this issue below, but the Fourth Circuit felt it unnecessary to address, given its ruling on the § 921(a)(33)(A) issue. (Pet. App. 23a fn 13). But the issue constitutes alternate grounds to affirm dismissal of the superseding indictment, and thus regardless of how § 921(a)(33)(A) is construed, the outcome of this case will not change. Certiorari should be denied. *Somerville*, 376 U.S. at 909.

CONCLUSION

The Petition raises no compelling reason for review, and it should be denied.

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