No. 15-1027

In the Supreme Court of the United States

BILLY YORK WALKER,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

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

REPLY BRIEF FOR THE PETITIONER

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I. The United States concedes that the decision of the Sixth Circuit rests on erroneous reasoning, and this Court should exercise its GVR authority here.

The United States concedes that the decision of the Sixth Circuit rests on erroneous reasoning:

> Although the court of appeals reached the correct bottom-line conclusion, it rested its decision on the erroneous ground (not advanced by the United States) that the restoration of a felon's full complement of civil rights does not qualify as a restoration of civil rights under Section 921(a)(20) if his conviction deprived him of only one civil right.

(Brief in Opposition, p. 6; *see also id.*, p.11)

Since this case concerns statutory impairment of the exercise of a fundamental right, this Court should reject the Sixth Circuit's incorrect reasoning; the Court should grant Mr. Walker's petition, summarily vacate the decision of the Sixth Circuit, and remand the case for further proceedings. *Cf. generally Lawrence on Behalf of Lawrence v. Chater*, 516 U.S. 163, 166-171 (1996) (discussing reach of GVR power exercised by this Court and noting "this Court's well established practice of GVR'ing based on confessions of error that do not purport to concede the whole case.").[1]

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[1] In *Lawrence*, this Court stated: "In an appropriate case, a GVR order conserves the scarce resources of this Court that might otherwise be expended on plenary consideration, assists the court

II. *United States v. Hefner*, 842 F.2d 731 (4th Cir. 1988), upon which the United States relies in its brief in this Court for the first time, itself relies upon reasoning that is both wrong and runs contrary this Court's decision in *Caron v. United States*, 524 U.S. 308 (1998): restoration of rights does not flow out of subjective 'governmental forgiveness' under either 18 U.S.C. §921(a)(20) or 28 U.S.C. §1865 but rather from a change in the previously convicted person's status.

The alternative theory of the United States, that Petitioner has not had his right to serve on a federal jury restored—advanced by the United States for the first time in the Solicitor General's brief to this Court—is wrong: the entire discussion of "forgiveness" implies a measure of subjectivity not present in the text of either 18 U.S.C. §921(a)(20) nor in 28 U.S.C. §1865(b)(5);[2] instead, both statutes operate upon a

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below by flagging a particular issue that it does not appear to have fully considered, assists this Court by procuring the benefit of the lower court's insight before we rule on the merits, and alleviates the '[p]otential for unequal treatment' that is inherent in our inability to grant plenary review of all pending cases raising similar issues[.]" 516 U.S. at 167. Disagreement exists as to whether the admission by the Solicitor General here constitutes a technical "confession of error," *see* David M. Rosenzweig, *Confession of Error in the Supreme Court by the Solicitor General*, 82 GEO. L.J. 2079, 2080, 2080 n.10 (1994), since the Solicitor General asserts that the result here would not change, but the Solicitor General does assert that the Sixth Circuit made an error in its reasoning.

[2] The United States never raised any of the arguments advanced by the majority decision nor did it ever argue, in any court below,

purely objective inquiry, i.e., whether the previously convicted person's status has changed by virtue of some component of law.

If this Court does not exercise its GVR prerogative, it should grant plenary review for the reasons in the petition filed by Mr. Walker and for the additional reason that the United States advances an interpretation of 28 U.S.C. §1865 and the Sixth Circuit's decision in this case that would have far-ranging implications not only for the right to possess of firearm, but also for the right to serve on a jury in federal court.

The United States asserts that restoration of civil rights for the purpose of serving on a jury in federal court requires some sort of affirmative governmental act, and that act appears to be some sort of subjective "forgiveness": "The basic principle of a restoration of civil rights, like a pardon or expungement, is that the government has extended a measure of forgiveness to the felon."[3] (Brief in Opposition, p. 9) The use of the

that Mr. Walker had not lost his right to vote nor had any of the three relevant civil rights restored. (*See* Motion for Judgment on the Pleadings and Memorandum in Support by United States, District Court Docket Item 15, Page ID #71-79; Response in Opposition to Motion for Summary Judgment by United States, District Court Docket Item 30, Page ID #257-266; Brief of United States in the Sixth Circuit, pp. i, 3, 4-8). In effect, the Sixth Circuit decided this case on grounds never argued by any party, and the United States now asserts those grounds are erroneous.

[3] The United States appears to use terms like "token of forgiveness" and "affirmative act" synonymously, (Brief in Opposition, pp. 7-11 [using "affirmative act" and "forgiveness" alternately and interchangeably]); the United States uses the

subjective concept of forgiveness confuses the inquiry here,[4] and the text of 28 U.S.C. §1865 contains no such requirement:

> (a) The chief judge of the district court . . . shall determine solely on the basis of information provided on the juror qualification form and other competent evidence whether a person is unqualified for, or exempt, or to be excused from jury service. . . .
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> (b) In making such determination the chief judge of the district court shall deem any person qualified to serve on grand and petit juries in the district court unless he—
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> * * * *
>
> (5) has a charge pending against him for the commission of, or has been convicted in a State or Federal court of record of, a crime punishable by imprisonment for more than one year and *his civil rights have not been restored*.

28 U.S.C. §1865(b) (emphasis added).

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asserted interchangeability to argue in favor of an affirmative act of forgiveness requirement under 28 U.S.C. §1865, which it argues Mr. Walker has not met.

[4] "Forgiveness" and "forgive" have unavoidably subjective components that have no place in the present discussion: for example, "to cease to feel resentment against on account of wrong committed" constitutes the primary definition given for forgive. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 891 (2002).

No requirement thus exists in the text of 28 U.S.C. §1865 that a restoration of civil rights be accomplished by any act imparting governmental 'forgiveness.' *Cf. Caron v. United States*, 524 U.S. 308, 313 (1998) (rejecting a similar notion that restoration of civil rights within the meaning of 18 U.S.C. §921(a)(20) required any act of individual 'forgiveness': "Nothing in the text of § 921(a)(20) requires a case-by-case decision to restore civil rights to this particular offender.")

The place in which the "token of forgiveness" language arose, in discussion in *Logan v. United States*, demonstrates that the term "token of forgiveness" was used in that opinion to distinguish between rights returned and rights never removed:

> In § 921(a)(20), the words "civil rights restored" appear in the company of the words "expunged," "set aside," and "pardoned." Each term describes a measure by which the government relieves an offender of some or all of the consequences of his conviction. In contrast, a defendant who retains rights is simply left alone. He receives no status-altering dispensation, no token of forgiveness from the government.

Logan v. United States, 552 U.S. 23, 31-32 (2007) (citations omitted). The "token of forgiveness" language merely restates the 'alteration of status' idea, i.e., points to the eligibility of a person to engage in some act (voting or jury service, for example), that once the person could not do.

The United States derives part of its affirmative act / forgiveness requirement from the Fourth Circuit case of *United States v. Hefner*, which stated:

> The legislative history of this amendment indicates congressional concern that the "pardon or amnesty" requirement unduly limited the potential means by which an individual's civil rights could be restored. H.R. Rep. No. 1652, 95th Cong., 2d Sess., reprinted in 1978 U.S. Code Cong. & Admin. News 5477, 5483. <u>The legislative history does, however, demonstrate congressional intent that an affirmative act is necessary to restore a felon's civil rights.</u> *Id*.
>
> * * * *
>
> We hold that some affirmative act recognized in law must first take place to restore one's civil rights to meet the eligibility requirements of section 1865(b)(5).

United States v. Hefner, 842 F.2d 731, 732-33 (4th Cir. 1988) (footnotes omitted and underlining added).

Hefner's key analytical move says: "The legislative history does, however, demonstrate congressional intent that an affirmative act is necessary to restore a felon's civil rights[,]" *id.* at 732, but the *Hefner* court appears to have proceeded straight to legislative history without determining whether any ambiguity existed in the statutory text. *See id.* The resort to legislative history should not have occurred in *Hefner*, because the text of §1865 contains no ambiguity: the statute does not require an affirmative act to effect a restoration of rights and the inquiry ends there. *Cf. Mohamad v. Palestinian Auth.*, ____ U.S. ____, 132 S. Ct. 1702, 1709 (2012) ("reliance on legislative history is unnecessary in light of the statute's unambiguous language" [internal quotation marks and citation omitted) *and United States v. Woods*, ____ U.S. ____, 134 S. Ct. 557, 567 (2013) ("Whether or not legislative history is ever relevant, it need not be consulted when, as here, the statutory text is unambiguous").

The United States, relying on the Fourth Circuit opinion in *Hefner*, seems to say that since the text of 28 U.S.C. §1865 contains no reference to whether an affirmative act requirement exists for the restoration of civil rights within the meaning of that statute, legislative history can be consulted to determine if an affirmative act requirement *should* exist in the statute, but that assertion is incorrect.[5] *See Hefner*, 842 F.2d at 732 (saying nothing about whether any ambiguity existed, but straightaway turning to the legislative history) *and* Brief in Opposition, pp. 8-9.

The legislative history of the 1978 amendments to 28 U.S.C. §1865 creates, rather than resolves, some ambiguity. *See* H.R. Rpt. 1652, 95th Congress, 2nd Sess., at §3, p. 10, *reprinted in* 1978 U.S. Code Congressional & Admin. News 5477, 5483 (1978) (hereinafter "House Report 95-1652"). The entire text of the relevant section of the legislative history says:

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[5] "[I]t is the statute, and not the Committee Report, which is the authoritative expression of the law, and the statute prominently omits reference to generation. As the Court of Appeals cogently put it: 'Why should we, then, rely upon a single word in a committee report that did not result in legislation? Simply put, we shouldn't.'" *City of Chicago v. Envtl. Def. Fund*, 511 U.S. 328, 337 (1994) (citation omitted).

Section 3: Jury service upon restoration of civil rights.

Section 1865(b)(5) of Title 28 now provides that persons shall be qualified for federal jury service unless, inter alia, they have been convicted or are facing pending charges for a state or federal crime punishable by imprisonment for more than 1 year and their civil rights have not been restored by pardon or amnesty. Section 1869(h) further requires that the juror qualification form mailed to prospective jurors elicit this information. Section 3 of the bill would amend these statutory sections by striking the words 'by pardon or amnesty,' thus making eligible for jury service persons who have been convicted but have later had their civil rights restored in any manner recognized by law. The presence in existing law of the qualifying words 'pardon or amnesty 'creates an ambiguity in the qualifications for jury service. This is so for two reasons. First, the exact meaning of these terms has been the subject of some uncertainty. For example, amnesty has generally been defined as a forebearance of prosecution rather than a restoration of civil rights to an individual previously convicted. Second, the use of these terms is clearly underinclusive as an enumeration of methods for restoring civil rights. There are an increasing number of state statutes providing for the restoration of rights to convicted persons or the expunction of criminal convictions. In addition, there are at least two federal statutes which have this effect: the Youth Corrections Act (18 U.S.C. 5021) and the

> Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 844(b)). The committee finds that this section would be useful in clarifying the qualifications for federal jury service upon restoration of civil rights and would make the applicable statutory sections on this subject congruous with modern legal developments in the restoration of rights to convicted persons.
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> > [12] *See Burdick v. United States*, 236 U.S. 79 (1915) and *Brown v. Walker*, 161 U.S. 591 (1896).

House Report 95-1652, at §3, p. 10.

The reliance in the legislative history upon "the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 844(b)" as an example of restoration or expunction lacks a clear sense in the context of 28 U.S.C. §1865: conviction under the version of 21 U.S.C. §844 effective in 1978, (at the time of House Report 95-1652), made expunction available only to first time offenders, whose conviction was a misdemeanor under the statute. Pub. L. 91-513, Title II, § 404, Oct. 27, 1970, 84 Stat. 1264, *codified at* 21 U.S.C. §844 (1978). Consequently, for those eligible for expunction, no restoration of rights would be necessary as a prerequisite to jury service eligibility, because under the text of the jury service statute, the right to serve on a jury would never have been affected by a misdemeanor conviction: the version of 28 U.S.C. §1865 in effect prior to the 1978 amendments barred from jury service eligibility only those who had "a charge pending" or who had "been convicted in a State or Federal court of record of, a crime punishable by imprisonment for more than one year[.]" 28 U.S.C. §1865(b) (1977). Former 21 U.S.C. §844 thus could not have served as an example of anything related to or within the meaning of 28 U.S.C. §1865.

In addition, neither of the two federal statutes mentioned in the 1978 legislative history could have had the power to categorically restore the right to vote in federal elections, because the constitution specifically reserves that authority to the states. CONSTITUTION OF THE UNITED STATES, Article I, sec. 2, cl. 1; *id.,* AMENDMENT XVII.

The United States does not stop rewriting §1865 with the interjection of a forgiveness requirement; it continues to add to the statute by asserting an implied choice of law clause like the one found in 18 U.S.C. §921(a)(20). The United States asserts that "without such an affirmative act of restoration under federal law, an individual convicted of a felony in federal court may not serve on a federal jury." (Brief in Opposition, p. 8) Such a statement writes *Beecham*'s choice of law analysis into 28 U.S.C. §1865 without any textual basis for such a move whatsoever, simply because the United States thinks that result desirable here; that effort should be rejected.[6] *See, e.g., Ali v. Fed. Bureau of*

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[6] The decision in *Beecham* rested squarely on the actual text of the statute: "Today we construe three provisions of the federal firearms statutes * * * * 'What constitutes a conviction ... shall be determined in accordance with the law of the jurisdiction in which the proceedings were held.' § 921(a)(20) (the choice-of-law clause)" and then said "[t]he choice-of-law clause defines the rule for determining '[w]hat constitutes a conviction.'" *Beecham v. United States*, 511 U.S. 368, 371 (1994). No choice of law clause appears anywhere in the text of 28 U.S.C. §1865.

Prisons, 552 U.S. 214, 228 (2008) ("We are not at liberty to rewrite the statute to reflect a meaning we deem more desirable.")

The United States urges a result that in essence rewrites 28 U.S.C. §1865 to include two items that help reach its desired result, but that appear nowhere in the text of the statute. The text of the jury service eligibility statute, 28 U.S.C. §1865, contains no choice of law provision and no requirement that civil rights be restored by an affirmative act of a government official; neither should be read into the statute.

The argument of the United States in its brief in opposition compounds, rather than resolves, the errors in the majority decision of the Sixth Circuit, and plenary review should be granted to address and correct the errors.

CONCLUSION

A Writ of Certiorari should be granted and this case either vacated and remanded or brought before this Court for plenary review, and the decision of the Sixth Circuit Court of Appeals then should be reversed.

Respectfully submitted,

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