STATE OF WISCONSIN

IN SUPREME COURT

No. 2023AP0070-FT

SCOT VAN OUDENHOVEN,

Petitioner-Appellant,

v.

WISCONSIN DEPARTMENT OF JUSTICE,

Respondent-Respondent.

RESPONSE TO PETITION FOR REVIEW

JOSHUA L. KAUL
Attorney General of Wisconsin

BRIAN P. KEENAN
Assistant Attorney General
State Bar #1056525

Attorneys for Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-0020
(608) 294-2907 (Fax)
keenanbp@doj.state.wi.us

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INTRODUCTION

Scot Van Oudenhoven was convicted of misdemeanor battery against the mother of their child. This is a misdemeanor crime of domestic violence under federal law and prevents him from possessing a firearm. 18 U.S.C. § 922(g)(9). The Wisconsin Department of Justice therefore denied Van Oudenhoven's attempt to purchase a handgun.

This federal bar does not apply to convictions that have been "expunged or set aside." 18 U.S.C. § 921(a)(33)(B)(ii). While Van Oudenhoven had the record of his conviction expunged under Wisconsin law, federal courts interpret this provision to require that the expungement completely remove the effects of the conviction. Because this Court has held that an expungement under Wisconsin law does not remove all effects of the conviction, *State v. Braunschweig*¸ 2018 WI 113, ¶ 22, 384 Wis. 2d 742, 921 N.W.2d 199, Van Oudenhoven's conviction still prevents him from purchasing firearms.

This case does not meet the criteria for review. The central issue is one of federal law, and the court of appeals applied the rule the federal courts apply when confronted with this issue. The court of appeals' decision is not contrary to United States Supreme Court precedent nor is there is a conflict among the federal courts. The cases he relies upon involve a different statutory provision. If this Court adopts Van Oudenhoven's position, it would create a split with the federal courts' interpretation of federal law (and some state courts), which would not provide any clarity or harmony.

STATEMENT OF THE CASE

I. Van Oudenhoven was convicted of misdemeanor battery against the mother of his child, the record of which was later expunged.

On September 15, 1994, Van Oudenhoven was convicted of misdemeanor battery under Wis. Stat. § 940.19(1), case no. 94-CM-119 in Calumet County Circuit

Court. (R. 8:15.) The police report indicated that he and the victim "have a baby (four weeks old together)." (R. 8:41.)

In 2019, the circuit court ordered "the clerk . . . to expunge the court's record of the conviction." (R. 10:3.)

II. Van Oudenhoven attempts to purchase a firearm, but DOJ blocks the sale due to his conviction.

In May 2022, Van Oudenhoven attempted to purchase a firearm. (R. 8:10.) DOJ denied the purchase. (R. 8:7, 10.) Van Oudenhoven appealed the denial through DOJ's administrative process. (R. 8:7.)

DOJ sustained the denial, concluding that his conviction for battery was a misdemeanor crime of domestic violence under 18 U.S.C. § 922(g)(9). (R. 8:6.) Van Oudenhoven appealed DOJ's upholding of the denial under Wis. Admin. Code JUS § 10.08, arguing that DOJ erred in treating his expunged conviction as a conviction. (R. 8:4.)

DOJ again affirmed the denial. (R. 8:2–3, App. 33–34.) It first noted that a misdemeanor battery conviction when the victim is the mother of the perpetrator's child qualifies as a misdemeanor crime of domestic violence. (R. 8:2, App. 33.) It then explained that an expunged conviction did not restore the right to possess a firearm because the Wisconsin Supreme Court holds that an expunction does not invalidate the underlying conviction. (R. 8:2–3, App. 33–34 (citing *Braunschweig*, 384 Wis. 2d 742, ¶ 22).)

III. The circuit court and court of appeals affirm the denial.

After briefing by the parties (R. 13; 15–16), the circuit court affirmed DOJ's denial of the firearm purchase in a written decision (R. 18, App. 29–32). The court first determined that Van Oudenhoven's conviction was a misdemeanor crime of domestic violence. (R. 18:2–3, App. 30–31.) It then held that "since the Wisconsin expungement

procedure does not completely remove the consequence of the conviction, it appears to fall outside the expungement exception to the firearm restriction." (R. 18:4, App. 32.)

Van Oudenhoven appealed, and the court of appeals affirmed in an opinion recommended for publication. As relevant to the issue in Van Oudenhoven's petition, the court held that Oudenhoven was barred from possessing a firearm under federal law even despite the expungement. (*Van Oudenhoven v. DOJ*, No. 2023AP0070-FT, 2024 WL 2828422, ¶¶ 23–44 (Wis. Ct. App. June 4, 2024), App. 15–26.) The court of appeals followed the decisions of other federal and state courts, which "have consistently construed 'expunged' and 'set aside' synonymously so as to require the 'state procedure to completely remove all effects of the conviction at issue.'" (*Van Oudenhoven*, 2024 WL 2828422, ¶ 27, App. 18.) Given that Wisconsin expungements do not remove all the effects of a convictions under *Braunschweig*, it affirmed the DOJ's denial of the firearm purchase. (*Van Oudenhoven*, 2024 WL 2828422, ¶ 44, App. 26.)

REASONS THE PETITION SHOULD BE DENIED

The Court should deny the petition because it does not present an opportunity to "help develop, clarify or harmonize the law. *See* Wis. Stat. (Rule) § 809.62(1r)(c). The court of appeals decided this case in accordance with federal precedent, which holds that an expungement must remove all the consequences of a conviction. Thus, in granting Van Oudenhoven's petition, this Court could only reiterate the court of appeals' decision or create a conflict with federal precedent (and other state courts). This would not "help develop, clarify or harmonize the law. *See* Wis. Stat. (Rule) § 809.62(1r)(c). Instead, it would make Wisconsin an outlier among the federal and state courts.

In addition, Van Oudenhoven contends that the court of appeals' decision conflicts with a United States Supreme Court decision and other federal cases. There is no conflict because these involved different issues.

I. The court of appeals followed federal court precedent on this issue of federal law.

Expungements under Wisconsin law do not meet the definition of an "expungement" necessary to restore firearm rights under federal law.

Federal law provides that someone "shall not be considered to have been convicted of such an offense for purposes of this chapter if the conviction has been *expunged or set aside*." 18 U.S.C. § 921(a)(33)(B)(ii). In defining "expunged or set aside," federal courts hold that "that Congress intended both terms equivalently to require that a state procedure completely remove the effects of the conviction in question." *Wyoming ex rel. Crank v. United States*, 539 F.3d 1236, 1245 (10th Cir. 2008); *Jennings v. Mukasey*, 511 F.3d 894 (9th Cir. 2007). State courts have agreed with this interpretation. *Bergman v. Caulk*, 938 N.W.2d 248, 251 (Minn. 2020); *Pennsylvania State Police v. Drake*, 304 A.3d 801, 807 (Pa. Commw. Ct. 2023),

In the Tenth Circuit case, the State of Wyoming challenged ATF's interpretation of the term "expunged" in section 921(a)(33)(B)(ii). *Crank*, 539 F.3d at 1238–39. The court, conducting a de novo review of the ATF interpretation, began by noting that "[t]here are two possible interpretations for the phrase 'expunged or set aside.'" *Id.* at 1244. One was that "that Congress intended the two terms to have separate meanings," while the other was that Congress "intended the two terms to have the same meaning and used separate terms merely to avoid potential issues of terminology created by the varying language used in the different laws of the States." *Id.* at 1245. The court concluded that "Congress intended both

terms equivalently to require that a state procedure completely remove the effects of the conviction in question." *Id.*

The court offered two plain language reasons for its interpretation. First, dictionary definitions indicated that both terms "require a complete removal of the effects of a conviction." *Id.* Second, the structure of the statute "suggests that Congress intended the terms to be interpreted equivalently." *Id.* The first part of subsection 921(a)(33)(B)(ii) lists four state actions that remove disability: expunging, setting aside, pardoning, or restoring civil rights. *Id.* The second part, however, only uses three terms: pardoning, expunging, or restoring civil rights. *Id.* This showed that Congress intended the term "expunging" to include both expunging and setting aside and thus they both have the same meaning. *Id.*

The Tenth Circuit relied on the Ninth Circuit's *Jennings* decision, in which a firearms licensee challenged the ATF's denial of his renewal application based on a misdemeanor crime of domestic violence that had been expunged under California law. 511 F.3d at 896. The Ninth Circuit relied on a California decision that held the relevant statute "does not, properly speaking, 'expunge' the prior conviction." *Id.* at 898 (quoting *People v. Frawley*, 98 Cal. Rptr. 2d 555, 559 (Cal. Ct. App. 2000)). The California "statute does not purport to render the conviction a legal nullity" and provided that it "is ineffectual to avoid specified consequences of a prior conviction." *Id.* (quoting *Frawley*, 98 Cal. Rptr. 2d at 559). As a result, the Ninth Circuit held that the relief the dealer obtained under California law "did not expunge his conviction for purposes of 18 U.S.C. § 922(g)(9)." *Id.* at 899.

The court of appeals faithfully applied this federal precedent to the issue of federal law, and this Court's precedent on the state-law effect of expungements. In

Braunschweig, this Court held that an expunged conviction is still a conviction, just with the record of that conviction removed from court files. *Braunschweig*, 384 Wis. 2d 742, ¶¶ 19–24. Therefore, the person still has been "convicted" of the crime even if it has been expunged from the court records.

Braunschweig reasoned that the expunction statute has the effect of "expunging the record," *id.* ¶ 19 (quoting Wis. Stat. § 973.015(1m)(b)), which means "the clerk of court seals the case and destroys the court records." *Id.* The court contrasted that outcome with a sentence that is vacated, which "unlike expunction, removes the fact of conviction." *Id.* ¶ 21. The court concluded: "Vacatur invalidates the conviction itself, whereas expunction of a conviction merely deletes the evidence of the underlying conviction from court records. Expunction, unlike vacatur, does not invalidate the conviction." *Id.* ¶ 22. In *Braunschweig*, that holding meant that the defendant's prior expunged conviction would be considered for purposes of sentencing for a subsequent offense. *Id.* ¶ 2.

Under *Braunschweig*, Van Oudenhoven's expungement does not completely remove the effects of his conviction under Wisconsin law. The conviction is still valid; the records have merely been removed from the court files. As a result, his expungement does not satisfy the federal requirement that an expungement "completely remove the effects of the conviction in question." *Crank*, 539 F.3d at 1245.

II. The court of appeals' decision is not in conflict with other federal authority.

The court of appeals relied on federal authority that is directly on point. Van Oudenhoven, in contrast, relies on cases that do not address the question at issue here. They involve a different subsection of section 921 and do not involve expungements. Thus, there is no conflict between the court of appeals' decision and federal case law.

Van Oudenhoven claims that the decision is contrary to *Logan v. United States*, 552 U.S. 23 (2007), but this case does not support Van Oudenhoven's position. In dicta, the *Logan* court characterized the phrase "conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored" in section 921(a)(20)[1] as involving actions that relieve an offender "from some or all of the consequences of his conviction." *Id.* at 26, 28. The Court did not say that "some" covered all four categories—nor could it when some of the actions relieve all consequences—or that the reference to "some" applied to expungement. In any event, that passage was not relevant to the case's holding because none of the convictions at issue "ha[d] been expunged or set aside." *Id.* at 26. This dicta is neither on point nor binding, which is clear from the fact that the Tenth Circuit decided *Crank* after *Logan*.

Van Oudenhoven points to other authority applying section 921(a)(20), which has slightly different language and relates to the definition of a "felony conviction." But even if the two provisions were identical, the cases he cites applying section 921(a)(20) don't support his premise. To the contrary, *United States v. Erwin*, 902 F.2d 510, 512 (7th Cir. 1990), supports DOJ's decision here.

In *Erwin*, the Seventh Circuit held that "[w]hen state law deems a person convicted, that is dispositive for federal purposes," and "a federal court [need not] disregard the state's definition of a conviction just because the state has restored

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[1] Section 921(a)(20) provides, "What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms."

any one civil right." *Erwin*, 902 F.2d at 512. The court explained that the second sentence in section 921(a)(20) applies only when "the state sends the felon a piece of paper implying that he is no longer 'convicted' and that all civil rights have been restored." *Id.* (emphasis omitted). In contrast, when "the state sends no document granting pardon or restoring rights, there is no potential for deception, and the question becomes whether the particular civil right to carry guns has been restored by law." *Id.* at 513.

Here, Van Oudenhoven received no document purporting to restore his civil rights or saying he was no longer convicted. Instead, he obtained an order stating that the court's record of conviction would be expunged. (R. 10:3.) At the time of the expungement in 2019, this Court had made clear that this did not remove the fact of conviction and any attendant consequences. *Braunschweig*, 384 Wis. 2d 742, ¶¶ 21–22. Under state law, he is still considered convicted, therefore the exception in section 921(a)(33)(B)(ii) does not apply.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for review.

Dated this 1st day of July 2024.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

Brian P. Keenan
BRIAN P. KEENAN
Assistant Attorney General
State Bar #1056525

Attorneys for Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-0020
(608) 294-2907 (Fax)
keenanbp@doj.state.wi.us

FORM AND LENGTH CERTIFICATION

I hereby certify that this response conforms to the rules contained in Wis. Stat. §§ (Rules) 809.19(8)(b), (bm) and 809.62(4) for a response produced with a proportional serif font. The length of this response is 2302 words.

CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 1st day of July 2024.

Electronically signed by:

Brian P. Keenan
BRIAN P. KEENAN
Assistant Attorney General