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In the Supreme Court of Wisconsin

Scot Van Oudenhoven,

Petitioner-Appellant-Petitioner,

v.

Wisconsin Department of Justice,

Respondent-Respondent

Appeal No. 2023AP000070

Appeal from the Judgment of the Winnebago County Circuit Court, The Hon. Teresa S. Basiliere

Reply Brief of Petitioner

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Argument

Respondent Department of Justice ("Department") argues that Petitioner Scott Van Oudenhoven's ("Van Oudenhoven") first brief explores the intent of the legislature rather than the plain language of the statute at issue in this case. This argument seems dangerous for the Department, because an insistence on relying ***only*** on the plain language of the statute makes Van Oudenhoven the clear winner.

As an initial matter, "The foremost rule is that our purpose is to ascertain and give effect to the intent of the legislature." *Tahtinen v. MSI Ins. Co.,* 122 Wis.2d 158, 166 (1985). The question is not ***whether*** to ascertain the intent of the legislature (in this case, Congress), but ***how*** to do so. *Id.* ("If the meaning of the statute is clear and unambiguous on its fact, it is improper to employ extrinsic aids to determine the meaning intended.")

The federal statute, 18 U.S.C. § 921(a)(33)(B)(ii) provides that a conviction under state law for a misdemeanor crime of domestic violence ("MCDV") does not count as a conviction for purposes of 18 U.S.C. § 922(g)(9) if the conviction has been expunged. Van Oudenhoven's conviction has been expunged, so under a "plain

meaning" approach he has not been convicted of a MCDV for federal gun prohibition purposes.

Only if one concludes that § 921(a)(33)(B)(ii) is ambiguous is it necessary to look beyond the words of the statute. The Department's position is that expunged does not mean expunged. Therefore the Department's total dependence on looking beyond the words of the statute completely undermines the Department's position that the Court should not look beyond the words of the statute.

Van Oudenhoven, on the other hand, believes the statute to be clear and unambiguous. Congress said that an expunged conviction does not count. Van Oudenhoven's conviction was expunged, so it does not count.

Van Oudenhoven argues in the alternative, however, that if the Court finds the statute to be ambiguous, the Court still must find in Van Oudenhoven's favor. That is the crux of the dispute between the parties.

The Department's argument is depending on lumping "expunged" with "set aside." The Department never explains why it is necessary to do this. As a reminder, 18 U.S.C. § 921(a)(33)(B)(ii) says:

> A person shall not be considered to have been convicted of a[MCDV] if the conviction has been expunged or set aside, or is an offense for which the person has been pardoned or has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense) unless the pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

That is, the statute provides for four distinct ways a conviction may not count: if it has been 1) expunged; 2) set aside; 3) pardoned; or 4) subject to a restoration of rights. Everywhere in its brief where the Department mentions expunged, it is always "expunged or set aside." This is because the Department's argument is dependent on "expunged" being synonymous with "set aside," but (inexplicably) not with "pardoned" or subject to a "restoration of rights."

The Department argues that Congress included "expunged" only to address issues where states might say "expunged" when they really meant "set aside." Expunged, the Department argues, just means the same as "set aside" and not really "expunged." That is, under the Department's argument, "expunged" means the same as "set aside"

It is difficult to take the Department's argument to its logical conclusion. Say a hypothetical state has a provision for expungement of convictions. Those expungements completely nullify the convictions, so

that the convictions no longer have any effect. And Congress's concern was that if the statute only referred to convictions that are set aside, this hypothetical state that had "expunged" a conviction for a MCDV would say, "Oh, sorry, you can't have a gun because your conviction was not set aside (which means completely undone) but instead was only expunged (which also means completely undone)."

The Department of course is engaging in rather speculative divining of legislative intent when it just declares, without support, that Congress must have decided to throw in another word that means the same thing as "set aside." Congress did this, according to the Department, just in case an obtuse state expunges convictions (completely) yet denies setting them aside.

The Department's interpretation violates multiple established provisions for interpreting legal texts. First, the Department makes "expunged" redundant with "set aside." Under the "Surplusage Canon," "it is no more the court's function to revise by subtraction than by addition." *Reading Law,* Scalia, A. & Garner, B., p. 174 (2012). "The courts must lean in favor of a construction which will render every

word operative , rather than one which may make some idle and nugatory." *Id.*

Moreover, if there is a choice between 1) a meaning that gives one provision the same effect as another provision and 2) a meaning that givens both provisions some independent effect, the latter is preferred. *Id.,* p. 176.

The Department's reading, of course, renders "expunged" idle and nugatory, because, the Department says, it means the same thing as (and is therefore redundant with) "set aside." The Department explains that Congress chose to include "expunge" with "set aside" as a "gap filler." As Scalia and Garner point out, however, "general language – not redundancy – is the accepted method for covering 'unforeseen gaps.'" *Id.,* p. 179. Only when the drafter of a legal text "has engaged in the retrograde practice of stringing out synonyms and near-synonyms (e.g., *transfer, assign, convey, alienate, or set over*), the bad habit is so easily detectable that the canon (of surplusage) can be appropriately discounted." *Id.,* p. 179 [emphasis in original].

The present case is not one where Congress engaged in a practice of stringing out synonyms and near-synonyms, and the Department

does not even make that claim. Indeed, the Department scrupulously avoids bringing pardons and restorations of rights into the discussion. Instead, the Department makes this case ***only*** be about expungements and set asides. The Department's argument is therefore dependent on Congress's sticking two synonymous terms (expunged and set aside) into a list with two other nonsynonymous terms (pardoned and rights restored). The Department has not provided a single example of that particular method of legislative drafting (either with or without approval).

Indeed, Scalia and Garner state that the surplusage canon is well known, so that statutes should be carefully drafted and nothing included "for no good reason at all." *Id.,* p. 179. They thus eschew attempts to interpret statutes by assuming the drafters used a "belt and suspenders" approach. *Id.*

That the four separate terms were intended to have four separate meanings is supported by the fact that their ordinary meanings have differences:

- Expunge – The act of physically destroying information – including criminal records – in files, computers, or other depositories.

- Set aside – To reverse, vacate, cancel, annul, or revoke a judgment, order, etc.
- Pardon – An executive action that mitigates or sets aside punishment for a crime.

Black's Law Dictionary, Sixth Ed.

- Restoration– An act of bringing back to a former condition; reinstatement.

Merriam-Webster.

Two observations can be made from the ordinary definitions of these words. First, "set aside" is more closely synonymous with "pardoned" than it is with "expunged." Second, all four terms have distinct enough meanings that one would not readily conclude that Congress was stringing out synonyms and near synonyms.

We also have the benefit the Supreme Court of the United States' thoughts on state expungement of convictions. In *Dickerson v. New Banner Institute, Inc.,* 460 U.S. 103, 103 S.Ct. 986, 74 L.Ed.2d 845 (1983), the Court ruled, "expunction under state law does not alter the historical fact of the conviction…." and "expunction does not alter the legality of the previous conviction and does not signify that the defendant was innocent of the crime…." 460 U.S. at 115. Nevertheless, the Department insists that an expungement ***must*** "alter the historical fact of the conviction" and "alter the

legality of the previous conviction" for it to count as an expungement under 18 U.S.C. § 921(a)(33)(B)(ii).

The Department's argument cannot be squared with *Dickerson.* *Dickerson* had just ruled that an expungement ***does not*** completely remove a conviction, so an expunged conviction still counts. Then Congress passed a bill saying that an expunged conviction ***does not*** count, knowing full well that an expungement does not completely undo a conviction. If Congress intended to for expunge to mean "completely undo a conviction," it chose a very strange way of doing it.

The canon of surplusage requires courts to interpret a statute so as to give effect to every word if possible. The canon has been adopted in Wisconsin and is well established. *State v. Matasek,* 2014 WI 27, ¶ 12 ("Statutes are interpreted to effect to each word and to avoid surplusage."); *Landis v. Physicians Ins. Co. of Wis., Inc.,* 2001 WI 86, ¶ 16 ("[I]n interpreting a statute, courts must attempt to give effect to every word of a statute, so as not to render any portion of the statute superfluous."); *Anderson v. Aul,* 2015 WI 19, ¶ 49 ("We read statutes as a whole and give effect to each word in the statute to avoid surplusage."); *Hubbard v. Messer,* 2003 WI 145, ¶ 9 ("Each word should be looked at so as not to render any portion of the statute superfluous.").

Moreover, "When the legislature chooses to use two different words, we generally consider each separately and presume that different words have different meanings. ***The use of different words joined by the disjunctive connector 'or' normally broadens the coverage of the statute to reach distinct, although potentially overlapping sets.***" *Mueller v. TL90108, LLC,* 2018 WI App 52, ¶ 22 [emphasis supplied].

Finally, the Supreme Court of the United States also has adopted the canon of surplusage. *Loughrin v. United States,* 573 U.S. 351, 358 (2014) (Noting "the cardinal principal of interpretation that courts must give effect, if possible, to every clause and word of a statute.") Of course, this Court is bound by the instructions of the U.S. Supreme Court in how to interpret a federal statute.

Despite the widespread adoption of the canon of surplusage, the Department (without even mentioning the canon) urges this Court to abandon it. The Department argues that "expunged" and "set aside" mean exactly the same thing, so that "expunged" is surplusage. The Department also turns its back on *Mueller,* declining to attempt to assign different meanings to words connected with the disjunctive "or." The only argument advanced by the Department for doing so is that other courts, whose decisions are not binding on this Court, came to that conclusion. It would

be wholly inconsistent for Congress to pass a law saying an expungement does not count as a conviction The Department is arguing that *Dickerson* went on to observe that expungement statutes in the states vary widely in their scope and effects. 460 U.S. at 121 ("Over half the states have enacted one or more statutes that may be classified as expunction provisions that attempt to conceal prior convictions or to remove some of their collateral or residual effects. These statutes differ, however, in almost every particular…. The statutes also differ in their actual effect.")

Conclusion

Van Oudenhoven has not been convicted of a MCDV because his battery conviction was expunged. Van Oudenhoven requests the Court reverse the decision of the Court of Appeals with an order requiring the Department to approve the transfer and not to consider Van Oudenhoven's 1994 conviction to be a MCDV for any future purposes.

Electronically signed by: John R. Monroe

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Certificate of Service

I certify that this Brief is being filed electronically and a notice of filing will be sent automatically to:

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Certifications:

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) as modified by the court's order for a brief and appendix produced with a proportional serif font. The length of this brief is 3,084 words.

Electronically signed by: John R. Monroe