No._____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 2022

MICHAEL DeFRANCE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

RACHEL JULAGAY
Federal Defender
***MICHAEL DONAHOE**
Deputy Federal Defender
Federal Defenders of Montana
50 West 14th Street, Suite 1
Helena, MT 59601
Telephone: (406) 449-8381
***Counsel of Record**

SUBMITTED: March 1, 2023

QUESTIONS PRESENTED

WHETHER THE NINTH CIRCUIT CORRECTLY DETERMINED THAT THE ORDERS APPEALED WERE NEITHER FINAL NOR WORTHY OF CONSIDERATION UNDER THE ALL-WRITS ACT 18 USC §1651.

WHETHER THIS COURT'S DECISIONS IN *UNITED STATES v. HAYES*, 555 U.S. 415 (2009) AND *UNITED STATES v. CASTELMAN*, 572 U.S. 157 (2014) ARE IN CONFLICT REGARDING APPLICATION OF THE CATEGORICAL APPROACH TO A PREDICATE DOMESTIC VIOLENCE CONVICTION IN A §922(g)(9) PROSECUTION. AND IF SO, WHICH RULE APPLIES HERE.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **Page No.**

United State Code

Montana Code Annotated

U.S. Constitution

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL DeFRANCE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

Petitioner, Michael DeFrance, petitions for a writ of certiorari, or other appropriate relief, to review the decision of the United States Court of Appeals for the Ninth Circuit in this case.

DECISIONS AND OPINIONS BELOW

1. The dismissal order of the Ninth Circuit Court of Appeals in *United States v. DeFrance*, CA 22-30131, is unreported. A copy of the order is attached in the Addendum to this petition at page 1.

2. The district court's original decision denying pretrial relief under both the categorical approach and the issue preclusion rule under the double jeopardy clause is reported at 577 F.Supp.3d 1085 (2021). A copy of that opinion is attached in the Addendum to this petition at pages 2-20.

3. The district court's order denying petitioner's motion for permission to file for reconsideration of the decision above in ¶2 is set forth in the Addendum at pages 21-24.

JURISDICTION AND TIMELINESS OF THE PETITION

The Ninth Circuit's order dismissing Petitioner's appeal was filed on February 15, 2023. This Court's jurisdiction arises under 28 USC §1254(1) or the All-Writs Act, 28 USC §1651. The Ninth Circuit's rulings finding that the orders appealed were neither final nor within the collateral order exception to the finality rule amounts to a "Case[] in the court of appeals" within the meaning of 28 USC §1254(1). Likewise, the Ninth Circuit's refusal to determine the issues by way of writ also falls within the embrace of §1254(1). *See e.g., Hohn v. United States*, 524 U.S. 236, 241-242 (1998) (application for certificate of appealability is a "case" in the court of appeals sufficient to support jurisdiction under 28 USC §1254(1)).

///

///

Petitioner's petition is timely because it was placed in the United States mail, first class postage pre-paid, on March 1, 2023, within the 90 days for filing under the Rules of this Court (*see* Rule 13, ¶1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> 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 offence to be twice put in jeopardy of life or limb; nor shall 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.

The Sixth Amendment to the United States Constitution provides:

> 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.

///

///

///

STATUTES AND/OR RULES INVOLVED

Federal Statutes:

18 U.S. Code §921(a)(33)(A) - Definitions. (former version)

(a) As used in this chapter—

. . .

(33)(A) Except as provided in subparagraph (C),2 the term "misdemeanor crime of domestic violence" means an offense that—

(i) is a misdemeanor under Federal, State, or Tribal3 law; and

(ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, 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, or by a person similarly situated to a spouse, parent, or guardian of the victim.

18 U.S. Code §921(a)(33)(A) - Definitions. (current version)

(a) As used in this chapter—

. . .

(33)(A) Except as provided in subparagraphs (B) and (C), the term "misdemeanor crime of domestic violence" means an offense that—

(i) is a misdemeanor under Federal, State, Tribal, or local law; and

(ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, 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, by a person similarly situated to a spouse, parent, or guardian of the victim, or by a person who has a current or recent former dating relationship with the victim.

18 U.S. Code §921(a)(37) - Definitions.

(a) As used in this chapter—

. . .

(37)

(A) The term "dating relationship" means a relationship between individuals who have or have recently had a continuing serious relationship of a romantic or intimate nature.

(B) Whether a relationship constitutes a dating relationship under subparagraph (A) shall be determined based on consideration of—

(i) the length of the relationship;

(ii) the nature of the relationship; and

(iii) the frequency and type of interaction between the individuals involved in the relationship.

(C) A casual acquaintanceship or ordinary fraternization in a business or social context does not constitute a dating relationship under subparagraph (A).

18 U.S. Code §922(g)(9) – Unlawful acts.

(g) It shall be unlawful for any person—

(9) who has been convicted in any court of a misdemeanor crime of domestic violence,

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.

Montana State Statute (2011):

45-5-206. Partner or family member assault -- penalty.

(1) A person commits the offense of partner or family member assault if the person:

(a) purposely or knowingly causes bodily injury to a partner or family member;

(b) negligently causes bodily injury to a partner or family member with a weapon; or

(c) purposely or knowingly causes reasonable apprehension of bodily injury in a partner or family member.

(2) For the purposes of Title 40, chapter 15, 45-5-231 through 45-5-234, 46-6-311, and this section, the following definitions apply:

(a) "Family member" means mothers, fathers, children, brothers, sisters, and other past or present family members of a household. These relationships include relationships created by adoption and remarriage, including stepchildren, stepparents, in-laws, and adoptive children and parents. These relationships continue regardless of the ages of the parties and whether the parties reside in the same household.

(b) "Partners" means spouses, former spouses, persons who have a child in common, and persons who have been or are currently in a dating or ongoing intimate relationship with a person of the opposite sex.

(3)(a)

(i) An offender convicted of partner or family member assault shall be fined an amount not less than $100 or more than $1,000 and be imprisoned in the county jail for a term not to exceed 1 year or not less than 24 hours for a first offense.

(ii) An offender convicted of a second offense under this section shall be fined not less than $300 or more than $1,000 and be imprisoned in the county jail not less than 72 hours or more than 1 year.

(iii) Upon a first or second conviction, the offender may be ordered into misdemeanor probation as provided in 46-23-1005.

(iv) On a third or subsequent conviction for partner or family member assault, the offender shall be fined not less than $500 and not more than $50,000 and be imprisoned for a term not less than 30 days and not more than 5 years. If the term of

> imprisonment does not exceed 1 year, the person shall be imprisoned in the county jail. If the term of imprisonment exceeds 1 year, the person shall be imprisoned in the state prison.
> (v) If the offense was committed within the vision or hearing of a minor, the judge shall consider the minor's presence as a factor at the time of sentencing.
>
> . . .
>
> (7) The court may prohibit an offender convicted under this section from possession or use of the firearm used in the assault. The court may enforce 45-8-323 if a firearm was used in the assault.
> (8) The court shall provide an offender with a written copy of the offender's sentence at the time of sentencing or within 2 weeks of sentencing if the copy is sent electronically or by mail.

STATEMENT

1. In 2013 petitioner was charged with and pleaded guilty to partner family member assault (PFMA) in a Montana Justice of the Peace Court for striking his then 17-year-old girlfriend (Addendum at page 26-29). At the time, and even still, the Montana PFMA Statute expressly includes within its reach couples who were dating and/or involved in an intimate relationship. Subsequently petitioner was charged in 2021 with violation of 18 USC §922(g)(9) for possessing firearms as a convicted domestic violence misdemeanant. (Addendum at pages 32-33). Citing both the categorical approach and double jeopardy issue preclusion rules petitioner moved to dismiss the §922(g)(9) charge on the ground that his dating relationship with the victim of his Montana PFMA did not render him a prohibited person under

federal law. In a published opinion the district court denied both of those arguments principally on the ground that this Court's decision in *United States v. Hayes*, 555 U.S. 415 (2009) prohibits application of the categorical approach to evaluate an alleged §922(g)(9) predicate conviction; even if the state statute under consideration included a relationship definition that captured a relationship not covered under federal law.

2. In 2022, Congress amended §922(g)(9) and its surrounding definitional statutes to expressly include dating relationships within the reach of the §922(g)(9) prohibition. (*See* §§921(a)(33) and (37) adding and defining dating relationships now covered by §922(g)(9) on page 4, above). Seeing this is a significant legislative development petitioner requested permission, required by local district court rule, to move for reconsideration. That motion for permission was denied by the district court. (Addendum at pages 21-24). Petitioner filed an interlocutory appeal to the Ninth Circuit and in the alternative sought relief by way of writ. The Ninth Circuit dismissed petitioner's interlocutory appeal (Addendum at page 1) and ruled that petitioner failed to meet the criteria for issuance of any writ.

REASONS FOR GRANTING THE WRIT

Aside from the important questions concerning "finality" and the conflict between this Court's decisions in *United States v. Hayes*, 555 U.S. 415 (2009) (categorical approach does not apply where relationship element missing from state

assault statute) and *United States v. Castleman*, 572 U.S. 157 (2014) (categorical approach applies to force element in state statute of conviction), in addition there are two important contextual considerations that support granting relief in this case.

First, since the Court's decision in *Hayes,* more and more states have enacted assault statutes that specifically cover the domestic violence context. And some of those statutes, like the Montana statute here, include relationships that do not render the convicted defendant a prohibited person under federal law.

Second, is the fact that after his Montana PFMA conviction petitioner was subjected on five (5) occasions to the Brady Handgun Violence Protection Act required NICS check (National Instant Criminal Background Check System); and each of those firearms transactions went forward authorizing petitioner to acquire or redeem his firearms. (*See* ECF No. 28 in D.C. No. CR 21-29-M-DLC; or III-ER-233-254 in U.S.C.A. No. 22-30131).

Thus a broader foundational question emerges here: Whether a particular issue in a federal criminal case is a proper subject for pretrial determination by a Judge; or for resolution by the trier of fact after jeopardy attaches. *Cf. United States v. Nukida*, 8 F.3d 665, 669 (9th Cir. 1993) (motion to dismiss involving question of law is generally to be determined before trial). We, of course, contend that a request for dismissal framed under the categorical approach or issue preclusion rules falls into the first category for determination by a Judge pretrial.

In this connection, the district court's order denying petitioner the opportunity to file a motion for reconsideration regarding application of the categorical approach was appealable to the Ninth Circuit as a "final decision" under 18 USC §1291. Moreover, even if denial of the opportunity to file for reconsideration was not final for appealability purposes, it was nevertheless appealable within the finality rule exception that applies when an order conclusively determines a disputed question, resolves an important issue completely separate from the merits, and is effectively unreviewable on appeal from a final judgment. *Cohen v. Beneficial Loan Corp*., 337 U.S. 541 (1949).

While we would grant that the district court's order denying reconsideration is non-final in the sense that the order states that the court will "RESERVE RULING as to the legal issues raised in the motion". (Addendum at page 23). This is non-finality only in a superficial sense. Because there can be no question there is no basis to conclude that the District Judge contemplated any form or reconsideration *before petitioner's trial*, which is when the categorical analysis must occur. A critical point where the Ninth Circuit errs in its finality analysis.

Looking at the pertinent guilty plea materials any court conducting a categorical analysis of petitioner's PFMA conviction could only conclude that petitioner pleaded guilty to the minimum conduct necessary to complete an offense under Mont. Code Ann. §45-5-206 (2011). This is a legal question which poses,

what does the prior conviction "*necessarily* establish []" *Mellouli v. Lynch*, 575 U.S. 798, 806 (2015). Here the guilty plea record shows that petitioner struck his girlfriend and issue preclusion evidence further shows that petitioner, who was aged 19, and his PFMA victim, who was aged 17, had been dating for about 9 months.

Even assuming without conceding that the district court's order denying the right to move for reconsideration was not final under 28 USC §1291 it would nevertheless be appealable under the *Cohen* exception. Those factors have been articulated as follows:

> To come within the 'small class' of decisions excepted from the final judgment rule by *Cohen*, the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment.
>
> *Cooper & Lybrand*, 437 U.S. 463, 468-469 (1978).

There can be no disagreement here that the district court's order denying permission to even move for reconsideration on the categorical approach issue meets the second and third components of the *Cohen* criteria. An order that simply refuses to adjudicate the merits of a claim squarely presents an issue separate from the merits. Furthermore, the district court's order will be entirely unreviewable if not appealed now. Because once the district court moves forward with petitioner's trial the resolution of petitioner's guilt or innocence will for all intents and purposes

completely overwhelm any legal reason to consider applying the categorical approach or issue preclusion rules to petitioner's prior PFMA conviction.

In other words, exposing petitioner to a guilt-innocence process first, without addressing and deciding the legal question whether petitioner is a prohibited person in the first place, would all but require both the district court and the Ninth Circuit to honor the guilt-innocence determination as *res judicata*. Thereby avoiding entirely the fundamental legal question whether petitioner should have been forced to stand trial at all. *Cf. Jackson v. Virginia*, 443 U.S. 307, 319 (1979) ("the relevant question [post-trial] is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt").

Like the double jeopardy clause, the categorical approach is primarily a legal screening device to evaluate prior predicate convictions. And failure to conduct that screening at the proper time exposes petitioner to a risk for wrongful conviction that could not be undone on a post sentence and judgment direct appeal. Furthermore, both the district court and the Ninth Circuit had the power, and we urge the obligation, to address the merits of petitioner's categorical approach and/or issue preclusion claims under this Court's decision in *United States v. Ruiz*, 536 U.S. 622, 628 (2002) (federal courts always have the power to determine their own jurisdiction and when necessary address the merits in the context of that inquiry).

Insofar as the second question presented is concerned the reason for granting relief is both important and straightforward. The district court holds that regardless whether the state domestic violence statute contains a relationship element/means which does not match up with the federal statute, a defendant must stand re-trial on his predicate conviction. The Court's decisions on this issue appear to be in conflict.

On the one hand, *United States v. Hayes*, 555 U.S. 415 (2009) holds that if the relationship element is missing from the state statute of conviction proof of a qualifying relationship can be put on at the §922(g)(9) federal trial. On the other hand, *United States v. Castleman*, 572 U.S. 157 (2014) applies the categorical approach to a §922(g)(9) predicate conviction if the element is present in the state statute of conviction. Thus, the important reason to grant relief here is to answer whether this case, and others like it, are controlled by *Hayes* (State element/means missing, no categorical analysis); or *Castleman* (State element/means present, categorical analysis applied).

CONCLUSION

WHEREFORE, petitioner prays the Court will grant this petition and set the case down for full briefing and argument, or a minimum, vacate the Ninth Circuit's dismissal order and direct that the government respond to petitioner's opening brief on the merits in the Ninth Circuit Court. (*See* Dkt# 16, U.S.C.A. No. 22-30131).

///

RESPECTFULLY SUBMITTED this 1st day of March, 2023.

/s/ Michael Donahoe
RACHEL JULAGAY
Federal Defender for the District of Montana
***MICHAEL DONAHOE**
Deputy Federal Defender
Federal Defenders of Montana
50 West 14th Street, Suite 1
Helena, MT 59601
Telephone: (406) 449-8381
*Counsel of Record