

No. 07-608

In the Supreme Court of the United States

UNITED STATES OF AMERICA

v.

RANDY EDWARD HAYES

*ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT*

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED: NOV. 7, 2007
CERTIORARI GRANTED: MAR. 24, 2008

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IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF WEST VIRGINIA

Criminal No. 1:05 CR 3
Violations: 18 USC § 922(g)(9)

UNITED STATES OF AMERICA, PLAINTIFF

v.

RANDY EDWARD HAYES, DEFENDANT

SUPERSEDING INDICTMENT

The Grand Jury charges that:

COUNT ONE

On or about January or February 2004, at or near Mannington, Marion County, West Virginia, within the Northern District of West Virginia, the defendant, **RANDY EDWARD HAYES**, having been convicted in a court of a misdemeanor crime of domestic violence, that is to say, on or about February 24, 1994, defendant, **RANDY EDWARD HAYES**, was convicted in the Magistrate Court of Marion County, West Virginia, in case number 93M-2638 of Battery; did knowingly possess in and affecting interstate commerce a firearm, that is, a Marlin rifle, model 17V, .17 caliber, serial number 97637601; in violation of Title 18, United States Code, Sections 922(g)(9) and 924(a)(2).

COUNT TWO

On or about March 24, 2004, at or near Mannington, Marion County, West Virginia, within the Northern District of West Virginia, the defendant, **RANDY EDWARD**

HAYES, having been convicted in a court of a misdemeanor crime of domestic violence, that is to say, on or about February 24, 1994, defendant, **RANDY EDWARD HAYES**, was convicted in the Magistrate Court of Marion County, West Virginia, in case number 93M-2638 of Battery; did knowingly possess in and affecting interstate commerce three (3) firearms, that is, a Marlin rifle, model 17V, .17 caliber, serial number 97631100, a Marlin rifle, model 17V, .17 caliber, serial number 97630997, and a Rossi S.A. rifle, model M4117S, .17 caliber, serial number AP022493; in violation of Title 18, United States Code, Section[s] 922(g)(9) and 924(a)(2).

COUNT THREE

On or about July 25, 2004, at or near Mannington, Marion County, West Virginia, within the Northern District of West Virginia, the defendant, **RANDY EDWARD HAYES**, having been convicted in a court of a misdemeanor crime of domestic violence, that is to say, on or about February 24, 1994, defendant, **RANDY EDWARD HAYES**, was convicted in the Magistrate Court of Marion County, West Virginia, in case number 93M-2638 of Battery; did knowingly possess in and affecting interstate commerce a firearm, that is, Winchester rifle, model 94, .30-30 caliber, serial number 4046910; in violation of Title 18, United States Code, Sections 922(g)(9) and 924(a)(2).

NOTICE OF ADDITIONAL FACTORS

The Grand Jury further charges that:

1. Defendant **RANDY EDWARD HAYES**' February 24, 1994 Battery conviction, as referenced in Counts One, Two and Three of this Superseding Indictment, constituted a misdemeanor crime of domestic violence because:

a. Battery is a misdemeanor under State law in West Virginia;

b. Battery has, as an element, the use and attempted use of physical force;

c. Defendant **RANDY EDWARD HAYES** committed the offense of Battery against the victim:

i. who was his current spouse; and

ii. who was a person with whom he shared a child in common; and

iii. who was cohabiting with and had cohabited with him as a spouse.

2. Defendant **RANDY EDWARD HAYES** was convicted of Battery on February 24, 1994, as referenced in Counts One, Two and Three of this Superseding Indictment, because:

a. He was represented by counsel in the case; and

b. Having the right to a jury trial in the jurisdiction in which the case was tried, he knowingly and intelligently waived the right to have the case tried by a jury, by guilty plea and otherwise; and

c. This conviction has not been expunged and set aside; and

d. This conviction is not an offense for which he has been pardoned; and

e. This conviction is not an offense for which he has had civil rights restored.

A true bill,

/s/ _____
Grand Jury Foreperson
(Signature on file)

THOMAS E. JOHNSTON
UNITED STATES ATTORNEY

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF WEST VIRGINIA

Criminal Action No. 1:05CR3

UNITED STATES OF AMERICA, PLAINTIFF

v.

RANDY EDWARD HAYES, DEFENDANT

July 5, 2005

11:35 a.m.

TRANSCRIPT PROCEEDINGS OF PLEA HEARING,
BEFORE THE HONORABLE IRENE M. KEELEY,
CHIEF JUDGE, CLARKSBURG, WEST VIRGINIA

* * * * *

DIRECT EXAMINATION

BY MS. MORGAN:

Q. Special Agent Grace, where do you work?

A. With the Bureau of Alcohol, Tobacco, Firearms and
Explosives.

Q. Did you have occasion to investigate alleged fire-
arms possession by Randy Edward Hayes?

A. Yes, I did.

Q. What caused you to become involved in this investigation?

A. In the early morning hours of July the 25th, 2004 I was contacted by the Marion County Sheriff's Department relative to an arrest they had just made involving a domestic disturbance. I came to that location and met with the deputies and at that time was advised that they had arrested Mr. Hayes, who had been in possession of a firearm.

Q. And is that the firearm that's listed in Count One, the Marlin rifle?

A. No, it is not.

Q. Can you explain how you were able to learn that he actually possessed the Marlin rifle that's listed in Count One?

A. Upon further investigation I found that January or February 2004, Mr. Hayes had sold a Marlin rifle, model 17V, .17 caliber, serial number 97637601 to a Larry Orloft in Mannington.

Q. Were you able to determine whether Randy Edward Hayes had a conviction for Battery?

A. Yes. I went to the Marion County Clerk's Office and found where Mr. Hayes had been convicted February 24th, 1994 in case number 93-M-2638 of Battery.

Q. I'll ask you some questions regarding that Battery conviction in a few moments, but can you tell me what you were able to learn about the operability of the Marlin rifle that's referenced in Count One?

A. Yes. The Marlin rifle had been traded from Mr. Orloft to a Federal Firearms Licensee who had in turn sold

it to someone else. I interviewed that person. Her name is Donna Barr, I believe. It was a gift for her son. I went and interviewed her, looked at the firearm. Because it was a gift for her son, we did not seize the firearm from her but left it in her possession with the understanding she would keep custody of it in case we would need it for trial. During her interview she told me that the firearm did function, she has seen her son fire that particular firearm on several occasions.

Q. Were you able to ascertain whether or not that firearm was in and affecting interstate commerce?

A. Yes. Special Agent Greg Perry conducted interstate nexus research on this firearm and found that it was not manufactured in the State of West Virginia.

Q. Did you search records to determine whether Mr. Hayes' Battery conviction from Marion County ever was expunged or whether he received a pardon?

A. I did search records and received a certificate of no pardon from the Secretary of State and there was no documentation of any pardon of that conviction.

Q. I'd like to ask you some questions regarding the 1994 Battery conviction. Can you tell me who the victim of that offense was?

A. Mary Ann Hayes, now Mary Carnes.

Q. And was Mary Hayes in relation to Randy Hayes at the time of the 1994 Battery offense?

A. His wife.

Q. How were you able to confirm that Mary Ann Hayes was Randy Edward Hayes' wife in 1994?

A. I went to the Marion County Clerk's Office and obtained the marriage license between Mr. Hayes and Mary Ann Carnes.

Q. Were you able to determine whether Mary Ann Hayes and Randy Edward Hayes also shared a child in common in 1994?

A. Yes. I interviewed Ms. Carnes and she said that they did have a child in common.

Q. Were you able to determine whether the two of them were cohabiting or had cohabited as spouses at that time?

A. Yes. She—during the interview of Ms. Carnes she stated that they lived as husband and wife from October the 15th, 1988, the day that they were married, until sometime in May of 1995.

Q. Were you able to determine whether, in the underlying Battery case, defendant Hayes was represented by counsel?

A. Yes, he was.

Q. And how were you able to determine that?

A. When I—it's a standard practice. Anytime someone is prohibited from possessing firearms due to a misdemeanor crime of domestic violence, we get all the documentation from the Clerk's Office, which includes a signed form that he had an attorney.

Q. And were you able to determine whether he had the right to a jury trial in that jurisdiction in Marion County Magistrate Court and waived that right?

A. Yes. One of the same forms is also initialed by Mr. Hayes.

Q. And were Mr. Hayes' civil rights ever restored to him following this Battery conviction in 1994?

A. No, they were not.

Q. With respect to the Marlin rifle referenced in Count One, can you describe how that was packaged at the time that it was sold? Did Mr. Orloft relate that information to you?

A. I believe it—it appeared to be in a box and probably new because I specifically remember talking to Ms. Barr that—and the FF—the Federal Firearms Licensee who took it in, saying that it looked brand new in the box.

Q. You have referenced a Winchester firearm that the defendant possessed on the night that he was arrested that led you to become involved in this case?

A. Yes.

Q. Can you please relate for the Court the information regarding where that firearm came from?

A. From—I believe—according to Mr. Hayes during our interview that it was given to him from his father.

Q. Can you describe the age of that firearm as represented to you by Mr. Hayes that night?

A. I believe his exact words were an old rust bucket and had some question about whether it would even fire or not or operate or not.

* * * * *

Q. Can you explain what Mary Ann Hayes told you about what caused her to call 911 that night?

A. Yeah. She was called on the telephone by her son, which is also Mr. Hayes' son, and said that Mr. Hayes and his now girlfriend were in some type of domestic disturbance and wanted to come home. Ms. Mary Ann Hayes Carnes told me that she got on the phone with Ms. Oldaker, Misty Oldaker, which was Mr. Hayes' current girlfriend, and said that—and Misty told her that Mr. Hayes was threatening her with a gun. At that time Ms. Carnes contacted the police and then according to the Marion County Sheriff's Department dispatch record, she met with a police unit at the Mannington Exxon—with a Deputy at the Mannington Exxon.

Q. And Ms. Mary Ann Hayes then proceeded to the residence shared by the defendant and his now girlfriend, Misty Oldaker?

A. My understanding is she stayed there because there was mention of a firearm being present, so she stayed there and the deputies responded to the house.

Q. So Ms. Hayes, Mary Ann Hayes, now Mary Ann Carnes, never actually was physically present at the residence?

A. To be honest, I'm not sure if at some point she did come up to actually get her son or someone brought her son to her. I'm very unclear on exactly what transpired after that.

Q. So your information regarding the defendant's alleged possession of firearms this night comes from the police department and their records and the seizure of the firearm and from the information given to you by Mary Ann Hayes, now Carnes?

A. That's correct.

MS. MORGAN: No further questions, Your Honor.

* * * * *

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF WEST VIRGINIA

Criminal No. 1:05CR3
(Judge Keeley)

UNITED STATES OF AMERICA, PLAINTIFF

v.

RANDY EDWARD HAYES, DEFENDANT

**ORDER FOLLOWING PLEA HEARING AND
SCHEDULING SENTENCING HEARING**

On the 5th day of July, 2005, came the United States of America and Thomas Johnston, United States Attorney for the Northern District of West Virginia, by Shawn A. Morgan, Assistant United States Attorney, and also came the defendant in person and by his attorney, Troy Giatras.

The Court confirmed that the defendant had received and reviewed with his attorney the Superseding Indictment in this matter. After the Court read Count One of the Superseding Indictment to the defendant, counsel for the United States advised the Court that it had entered into a conditional plea agreement with the defendant, which the Government then summarized for the Court. As a condition to that agreement, the defendant will retain his appellate rights regarding the denial of his motion to dismiss the Superseding Indictment. The defendant will also retain his appellate rights regarding any cross reference that may be applied by the Court at sentencing. The defendant stated in open court that he fully understood and

agreed with the terms of this plea agreement, and that there are no other agreements between his and the Government. The Court noted that since the plea agreement contains certain nonbinding recommendations pursuant to Fed. R. Crim. P. 11(e)(1)(B), the Court cannot accept or reject the plea agreement and the recommendations it contains until the Court has had an opportunity to receive and review a presentence report. The Court advised the parties that it is not bound by the stipulations contained in the plea agreement, and will defer action on the stipulations until receiving and reviewing the presentence report.

The Court **ORDERED** the plea agreement filed.

The Court advised the defendant of the maximum sentence for Count One, to which the proposes to enter a conditional plea of guilty. The Court also advised the defendant that, as part of the fine, he could be required to pay the costs of imprisonment, community confinement, or supervision. The Court also informed the defendant of the mandatory special assessment applicable to this case, and that restitution is not an issue in this case.

The Court informed the defendant that certain Sentencing Guidelines apply to this case in an advisory capacity. The Court explained that the sentencing range established by the Guidelines is one of several factors that the Court will consider before imposing sentence. 18 U.S.C. § 3553(a); *United States v. Booker*, 125 S. Ct. 738 [(2005)]. The defendant stated that he had reviewed the various sentencing factors with his attorney. The Court also noted that it is not bound by the recommendations or stipulations in the plea agreement and that, should the sentence ultimately imposed be more severe than that expected, defendant would not have the right to withdraw his plea of guilty.

The Court noted that paragraphs eleven and twelve of the plea agreement provide:

11. The defendant understands that the United States Sentencing Guidelines are now advisory and no longer mandatory. It is therefore understood that the sentencing court may ascertain and impose a sentence below or above the applicable Guideline range, so long as that sentence is reasonable and within the statutory maximum specified in Title 18 of the United States Code for the particular offense of conviction.
12. The above paragraph notwithstanding, the defendant will retain the appellate rights with respect to (a) the denial of his motion to dismiss the Superseding Indictment; (b) the applicability of a cross-reference under § 2K2.1(b)(2); (c) any sentence imposed above the applicable Guideline range at an adjusted offense level 17 or higher. This reservation of rights is designed to ensure that the United States and the defendant retain the benefits of the plea agreement. It is not intended to represent the defendant's estimation of what an appropriate or reasonable sentence would or should be. Nor does this reservation of rights prevent the defendant from arguing for a sentence below the aforementioned adjusted Guideline offense levels. the United States also will retain its appellate rights with respect to any sentence imposed below the applicable Guideline range at an adjusted offense level 5 or lower (if a cross-reference under § 2K2.1(b)(2) is applied) or with respect to any sentence imposed below the applicable Guideline range at an adjusted offense level

5 or lower (if a cross-reference under § 2K2.1(b)(2) is applied. Aside from these limited exceptions, the defendant waives his right to appeal and also waives his right to challenge his sentence or the manner in which it was determined in any collateral attack, including, but not limited to, a motion brought under Title 28, United States Code, Section 2255. The parties have the right during any appeal to argue in support of the sentence.

The Court reviewed with the defendant all of the rights he would forfeit by tender of a plea of guilty, including his right to plead not guilty and maintain that plea during a trial before a jury of his peers. The Court also informed the defendant of his right to be represented by counsel during trial, his right not to testify and to have the Government prove its case beyond a reasonable doubt. The Court also noted that the jury's verdict must be unanimous, and that the defendant would forfeit his rights to vote, to hold public office and to bear arms by pleading guilty. The defendant stated in open court that he understood all of these rights and understood that he would be giving up all of these right by entering a conditional plea of guilty. The defendant and his counsel stated that the defendant understood all of the consequences of pleading guilty.

The Government then called Special Agent Kenneth Grace of the Bureau of Alcohol, Tobacco and Firearms ("ATF") to present a factual basis for the plea. Special Agent Grace testified that on July 25, 2004, the Marion County Sheriff's Department contacted him regarding a domestic dispute involving the arrest of the defendant and the possession of a firearm. The July 25, 2005 domestic dispute that gave rise to the current legal dispute involved an argument between the defendant and a girlfriend that

somehow involved a Winchester firearm. According to the Marion County Sheriff, the defendant stated that the Winchester was given to him by his father. The defendant also referred to the firearm as “an old rusty bucket” that would likely not even fire.

During the ATF’s investigation, Special Agent Grace discovered that the defendant had also been in the possession of additional firearms. The firearm described in Count One of the indictment is a Marlin rifle that was sold by the defendant to Larry Orloft, a registered firearms retailer. The final purchaser of the firearm stated that the rifle was functional and appeared new.

Special Agent Greg Perry performed an interstate nexus check on the firearm, discovered that it was not manufactured in West Virginia and, therefore, had traveled in interstate commerce. Through police and court records, Special Agent Grace confirmed that defendant was convicted of a charge of battery on February 24, 1994; that this prior conviction had not been expunged; and that defendant’s civil rights have not been restored. The 1994 conviction involved Mary Ann Hayes, defendant’s wife at that time. The couple were married and co-habited from October 15, 1988 until sometime in May, 1995 and had one child in common. Special Agent Grace also confirmed that the defendant had counsel at the 1994 conviction and had waived his right to jury trial.

Defendant then moved the Court for permission to withdraw his plea of NOT GUILTY to Count One of the Superseding Indictment and enter a conditional plea of GUILTY. The defendant stated that he was in fact guilty of the crime charged in Count One of the Superseding Indictment.

The defendant stated that the plea was not a result of any threat, coercion or harassment and that the plea was not the result of any promise except those contained in the plea agreement.

The defendant further stated that his attorney had adequately represented him in this matter. Outside those defenses reserved by the conditional plea, the defendant also stated that neither he nor his attorney had found an adequate defense to the charges contained in Count One of the Superseding Indictment.

Based upon the defendant's statements and the testimony of Special Agent Grace, the Court finds that the plea is freely and voluntarily given, that the defendant is aware of the nature of the charges against him and the consequences of his plea, and that a factual basis exists for the tendered plea. The Court accepted the defendant's plea of GUILTY of the crime charged in Count One of the Superseding Indictment.

Pursuant to Fed. R. Crim. P. 11(e)(2) and U.S.S.G. § 6B1.1(c), acceptance of the proposed plea agreement, stipulations and nonbinding recommendations are deferred until the Court has received and reviewed the presentence report prepared in this matter.

Pursuant to § 6A1 et seq. of the United States Sentencing Guidelines, it is hereby **ORDERED** that:

1. The Probation Office shall undertake a presentence investigation of **RANDY EDWARD HAYES** and prepare a presentence report for the Court;
2. **The Government and the defendant are to provide their versions of the offense to the probation officer by July 20, 2005;**

3. The presentence report is to be disclosed to the defendant, defense counsel, and the United States on or before **August 22, 2005**; however, the Probation Officer is directed not to disclose the sentencing recommendations made pursuant to Fed. R. Crim. P. 32(b)(6)(A);

4. Counsel shall file **WRITTEN OBJECTIONS** to the presentence report and may file a **SENTENCING MEMORANDUM** that evaluates sentencing factors the parties believe to be relevant under 18 U.S.C. § 3553(a) (including the sentencing range under the advisory Guidelines) and explains any proposed sentence, on or before **September 6, 2005**;

5. The Office of Probation shall submit to the Court the presentence report with addendum on or before **September 20, 2005**; and

6. Sentencing is set for **September 28, 2005 at 2:00 p.m.**

7. The Court continued defendant's unsecured personal recognizance bond in order to ensure his appearance before this Court at such times and places as the Court may direct with the standard conditions of bond and the special conditions restricting travel and requiring the defendant to be drug tested.

The Clerk is directed to transmit certified copies of this Order to counsel of record and the defendant.

DATED: July 7, 2005.

/s/ IRENE M. KEELEY
IRENE M. KEELEY
United States District Court