No. 10-3164

In The
United States Court of Appeals
for the Eighth Circuit

DELROY FISCHER,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States District Court
for the District of Nebraska

APPELLANT'S PETITION FOR REHEARING EN BANC

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

PETITION FOR REHEARING EN BANC

FRAP RULE 35(b)(1)(A) STATEMENT

The panel decision in United States v. Fischer, No. 10-3164 (hereinafter "Slip. Op."), 2011 U.S. App. LEXIS 12239 (8th Cir. June 17, 2011), conflicts with prior decisions of this Court in United States v. Howell, 531 F.3d 621 (8th Cir. 2008) and United States v. Smith, 171 F.3d 617 (8th Cir. 1999), and the decision of the U.S. Supreme Court in United States v. Hayes, 555 U.S. 415 (2009). Consideration by the full Court is therefore necessary to maintain uniformity of the Court's decisions within the Eighth Circuit, as well as to maintain conformity of this Court's decisions with those of the U.S. Supreme Court.

STATEMENT OF THE CASE

Appellant, Delroy Fischer, was indicted under 18 U.S.C. § 922(g)(9)[1] for possession of a firearm after having been convicted of a misdemeanor crime of domestic violence ("MCDV"). Twice, Fischer moved to dismiss the indictment on the ground that the Nebraska misdemeanor of which he had been convicted — attempted assault in the third degree[2] — did not "ha[ve] as an element, the use or

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[1] 18 U.S.C. § 922(g)(9) reads, in pertinent part: "It shall be unlawful for any person — who has been convicted in any court of a [MCDV], to ... possess in or affecting commerce, any firearm...."

[2] Neb. Rev. Stat. § 28-310(1) reads in full: "A person commits the offense of assault in the third degree if he: (a) Intentionally, knowingly, or recklessly causes bodily injury to another person; or (b) Threatens another in a menacing

attempted use of physical force, or the threatened use of a deadly weapon," as required by 18 U.S.C. § 921(a)(33)(A)(ii).[3]

According to the panel opinion, the district court found that the state court record showed that Fischer (i) had pled no contest to the attempted assault charge, and (ii) had "stipulated that the court would take judicial notice of the factual allegations in the arrest warrant and affidavit...." Slip. Op., p. 2. Further, the panel found that the district court had based its ruling on the **factual record** — "[r]elying on the arrest warrant and supporting affidavit which described Fischer's **violent conduct**" — to "conclude[] that Fischer's prior [misdemeanor] conviction did fit the definition [of an MCDV], and den[y] his motion to dismiss." *Id.*, p. 2 (emphasis added).

Affirming the district court ruling, two members of the panel found Fischer's misdemeanor conviction "indistinguishable from" the predicate conviction in United States v. Amerson, 599 F.3d 854 (8th Cir. 2010), and, consequently, concluded that "Amerson controls" because Fischer, like the

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manner."

[3] 18 U.S.C. § 921(a)(33) reads in pertinent part: "[T]he term "**misdemeanor crime of domestic violence** means an offense that (i) is a misdemeanor under ... State law; and (ii) has, **as an element**, the use or attempted use of physical force, or the threatened use of a deadly weapon...." (Emphasis added.)

defendant in Amerson, had "'assented to **factual findings** that satisfy the force requirement of 18 U.S.C. § 921(a)(33)(ii)....'" Slip. Op., p. 5 (emphasis added).

Circuit Judge Colloton concurred. Finding "no material distinction between this case and [Amerson,]" he "agree[d] that [the] panel **must affirm** Delroy Fischer's conviction **based on circuit precedent**." *Id.*, p. 6 (Colloton, J., concurring) (emphasis added). But, Judge Colloton continued, "*Amerson* is **probably wrong** ... and Fischer is **likely entitled to dismissal** of the indictment under the governing statutes." *Id.*, p. 6 (emphasis added).

Indeed, Amerson was wrongly decided. Moreover, both it and Fischer conflict with two of this Circuit's prior opinions — United States v. Howell[4] and United States v. Smith[5] — and both Amerson and Fischer are inconsistent with the U.S. Supreme Court's decision in United States v. Hayes, 555 U.S. 415 (2009).

ARGUMENT

I. FISCHER, AND AMERSON BEFORE IT, WERE WRONGLY DECIDED.

The Nebraska statute under which Fischer was convicted was not an MCDV-type statute. Thus, the district court's inquiry into the facts of his

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[4] 531 F.3d 621 (8th Cir. 2008).

[5] 171 F.3d 617 (8th Cir. 1999).

conviction was wrong as a matter of law. 18 U.S.C. § 921(a)(33)(A)(ii) requires proof that the predicate MCDV "has, as an **element**" either "the use or attempted use of physical **force**, or the threatened use of a deadly weapon." (Emphasis added.) In Smith, this Court correctly ruled that "[w]hen statutory language dictates that predicate offenses contain enumerated **elements**, we must look **only** to the **predicate offense rather than** to the **defendant's underlying acts** to determine whether the required **elements** are present." *Id.*, 171 F.3d at 620 (emphasis added). The Smith court further stated that "[w]e may **expand our inquiry** under this categorical approach to review the charging papers and jury instructions, if applicable, **only** to determine under **which portion** of the [predicate Iowa] statute Smith was convicted." *Id.*, 171 F.3d at 620-21 (emphasis added).

Likewise, in Howell, this Court — applying Smith — examined the charging document to ascertain under which portion of the five-part predicate misdemeanor statute Howell had been convicted. *See* Howell, 531 F.3d at 622-23. After identifying the relevant position by looking at the prior record, the issue before the Howell court was whether subsection (4) of the Missouri statute "**requires** as an **element** either 'the use or attempted use of **force**' or 'the threatened use of a deadly weapon.'" *Id.*, 531 F.3d at 623 (emphasis added). The

Government urged the Howell Court to rely on the state court record which indicated that defendant had "wav[ed] a loaded gun" at his victim and, thereby, to find that the element requirement of 18 U.S.C. § 921(a)(33)(A)(ii) was satisfied. *Id.*, 531 F.3d at 624. However, based on Smith, the Howell Court declined the Government's invitation, concluding that the charging papers were irrelevant. Instead, the court determined that "[b]y the **plain meaning of the words of the statute**, subsection (4) does **not require** as an **element** either the use or attempted use of physical force, or the threatened use of a deadly weapon." *Id.* (emphasis added). Thus, it concluded that "Howell's predicate conviction was not for a [MCDV]." *Id.*

Although Fischer and Amerson purported to follow the "categorical approach" of Howell and Smith, neither did. Instead, both Fischer and Amerson erred, **conflating** the **factual evidence** of the use of **physical force** in the court record with the **legal elements** of the predicate misdemeanor in the statute. In Amerson, the court did not limit its examination of the state trial record to determine **only** under which specific portion of the Nebraska misdemeanor statute Amerson had been convicted (Neb. Rev. Stat. § 28-323).[6] Rather, the court

[6] In pertinent part, Neb. Rev. Stat. § 28-323 reads: "(1) A person commits the offense of domestic assault in the third degree if he or she (a) Intentionally and knowingly causes bodily injury to his or her intimate partner; (b) Threatens an

erroneously inquired into that record to ascertain whether the **evidence** in that record "satisf[ied] the force requirement of 18 U.S.C. § 921(a)(33)(A)(ii)":

> During Amerson's plea hearing, the state judge adopted the factual recital that he and his girlfriend "got into an argument over the child and the defendant slapped her and pushed her head into the wall." Amerson repeatedly states he did not "assent to" or "confirm" this factual basis. But his counsel stated that he had "no objection" after the recital of facts. Thus, he assented to **factual findings** that satisfy the force requirement of 18 U.S.C. § 921(a)(33)(A)(ii). [Amerson, 599 F.3d at 855 (emphasis added).]

As concurring Judge Colloton in the Fischer panel decision observed:

> The difficulty with *Amerson* is the court's holding that "the force requirement of 18 U.S.C. § 921(a)(33)(A)(ii)" was satisfied by "factual findings" in the defendant's prior state court proceedings that the defendant used force against his girlfriend.... [Slip. Op., p. 6 (Colloton, J., concurring) (italics original).]

Then, Judge Colloton zeroed in on the only issue in this case:

> The **dispositive question** under § 921(a)(33)(A)(ii) is not whether the defendant *actually used force* in committing a misdemeanor offense, but whether the offense of conviction, "*has, as an element,* the use or attempted use of physical force." [*Id*. (italics original, bold added).]

Although the Fischer panel correctly phrased the question to be "whether the crime for which Fischer was convicted 'has, as an element, the use or

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intimate partner with imminent bodily injury; or (c) Threatens an intimate partner in a menacing manner."

attempted use of physical force,'"[7] it did not decide the case on that basis. After correctly citing both Howell and Smith — that the court could inquire into the state trial record for the limited purpose of determining the precise section of the predicate misdemeanor statute to which Fischer had pled no contest[8] — the majority panel in Fischer then reached the same erroneous conclusion as Amerson, again looking to the state record to determine actual conduct:

> [T]he present case is indistinguishable from *Amerson*. The statute at issue there, Neb. Rev. Stat. § 28-323(1)(a), contains nearly the same language as § 28-310(1)(a). Both statutes prohibit conduct that "causes bodily injury" to another person and therefore encompass a wide range of conduct.... Like Fischer, the defendant in Amerson did not object to a state court's **recitation of the facts establishing his use of physical force** at his guilty plea hearing.... In doing so, he "assented to **factual findings** that satisfy the force requirement of 18 U.S.C. § 921(a)(33)(A)(ii)." [Slip. Op., p. 5 (emphasis added).]

Because he was bound by the Amerson precedent, Judge Colloton concurred, but he noted in his concurrence that counsel for defendant at oral argument had called the Court's attention to cases demonstrating that the third degree assault misdemeanor to which Fischer had pled no contest — "Intentionally, knowingly, or recklessly causes bodily injury to another person" — **could have been violated without proof of "physical force,"** that is "by guile,

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[7] *See* Slip. Op., p. 4.

[8] *Id.*, pp. 5-7.

deception, or deliberate omission." *Id.*, p. 7. Thus, Judge Colloton concluded that the offense of which Fischer had been convicted "does **not** appear to have, *as an **element***, the use or attempted to use of **physical force**, because the State can establish that the offense was committed without proving a use or attempted use of force." Slip. Op., p. 7 (Colloton, J., concurring) (italics original, bold added).

In sum, both Fischer and Amerson were wrongly decided, and as demonstrated herein and in Part II following, both decisions conflict with United States v. Howell, 531 F.3d 621 (8th Cir. 2008) and United States v. Smith, 171 F.3d 617 (8th Cir. 1999), creating confusion within the Circuit.

II. THE FISCHER PANEL DECISION CONFLICTS WITH PRIOR OPINIONS OF THIS COURT.

Purporting to rely on Howell and Smith, the panel was preoccupied with the **facts** surrounding Fischer's conviction on the ground that such an inquiry was "warranted" because Fischer was convicted of a violation of a "criminal statute [which] reaches a 'broad range of conduct.'" *See* Slip. Op., p. 4. However, as Judge Colloton pointed out in his concurrence, "[t]he federal court should use the **judicial record** of the defendant's prior conviction in state court **only** to determine ***which offense*** under state law was the offense of conviction." *Id.*, pp. 6-7, Colloton, J., concurring (italics original; bold added). In support of this

limitation, Judge Colloton found Howell persuasive:

> If the predicate statute **reaches a broad range** of conduct, this court may expand the inquiry to review the charging papers and jury instructions, **but *only* to** determine **which part** of the statute the defendant violated. [*Id.*, 531 F.3d at 622-23 (italics original; bold added).]

"Once the **offense** of conviction is identified," Judge Colloton continued in agreement with Howell, "the court's analysis must focus on the **elements** of that offense." Slip. Op., p. 7 (emphasis added).

That is precisely what the Howell court did. After identifying the subsection of a Missouri misdemeanor third degree assault statute as the predicate statute, the court **examined** the **statute** to determine whether "the use or attempted use of physical force" was an element of the identified subsection. The Court did **not** search **the record** to find factual evidence of the use of use of force. *Id.*, 531 F.3d at 623-624.

In contrast, the Fischer panel (i) abandoned the Howell statutory inquiry altogether, and (ii) mistakenly following the lead of Amerson, concluded that — if the **facts** in the state court record demonstrated a use or attempted use of physical force — those "facts" alone are sufficient to establish the existence of the requisite

predicate misdemeanor, as prescribed by 18 U.S.C. § 921(a)(33)(A)(ii).[9] *See* Slip. Op., p. 6. Hence, the panel opinion directly conflicts with the "categorical approach" adopted earlier in Howell and Smith that, "when a statute dictates that the predicate offense have **enumerated elements,** this court must 'look **only** to the predicate **offense**, rather than to the defendant's underlying acts to determine whether the required elements are present.'" Howell, 531 F.3d at 622, citing Smith, 171 F.3d at 620 (emphasis added).

Howell and Smith, in turn, conform with the rulings of other federal courts of appeals, including United States v. Nason, 269 F.3d 10, 15-19 (1st Cir. 2001), United States v. White, 606 F.3d 144, 148-56 (4th Cir. 2010), United States v. Shelton, 325 F.3d 553, 538 (5th Cir. 2003), United States v. Belless, 338 F.3d 1063, 1067-69 (9th Cir. 2003), United States v. Hays, 526 F.3d 674, 676-81 (10th Cir. 2008), and United States v. Griffith, 455 F.3d 1339 (11th Cir. 2006). Of these

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[9] In essence, the rulings in Fischer and Amerson would take a **factual issue** from the jury, transform it into a **legal question** for the judge and, thereby, enable the prosecution to obtain a conviction of a violation of 18 U.S.C. § 922(g)(9) without having to prove beyond a reasonable doubt that Fischer had ever used or attempted to use physical force. Even assuming that the **force** "element" is a fact issue, then, like the **domestic relation** issue, the Government would be required to meet that higher standard of proof to the jury, not a lower standard to the court. *See* United States v. Hayes, 555 U.S. 415, 129 S.Ct. 1079, 1082 (2009) ("We hold that the domestic relationship ... must be established beyond a reasonable doubt in a § 922(g)(9) firearms prosecution....").

cases, the opinion in Griffith is especially instructive. In Griffith, the state court records of the predicate misdemeanor established that the defendant had hit his wife and dragged her across the floor. *Id.*, 455 F.3d at 1340. Nonetheless, the court ruled that:

> The question is **not** whether the actual **conduct** that led to Griffith's prior conviction involved physical force or worse.... Wife beating and dragging is conduct that involves physical force under any definition of that term. The § 921(a)(33)(A)(ii) definition, however, does **not** turn on the actual **conduct** underlying the conviction but on the **elements** of the state crime. [*Id.*, 455 F.3d at 1341 (emphasis added).]

In support of this proposition, the Griffith court relied, *inter alia*, on this Court's opinion in Smith. *Id.* In sum, by following Amerson, the Fischer panel put itself in direct conflict with both Smith and Howell in this circuit, as well as with the decisions of the courts of appeal for the 1st, 4th, 5th, 9th, 10th, and 11th Circuits.

III. THE PANEL DECISION CONFLICTS WITH THE SUPREME COURT OPINION IN UNITED STATES v. HAYES.

In United States v. Hayes, 555 U.S. 415, 129 S.Ct. 1079 (2009), the Supreme Court stated that "all agree" that the definition of the predicate offense in 18 U.S.C. § 921(a)(33)(A)(ii) "imposes two requirements":

> First, [it] must have, "as an **element**, the use or attempted use of **physical force**, or the threatened use of a deadly weapon." Second, it must be "committed by" a person who has a specified **domestic relationship** with the victim. [*Id.*, 129 S.Ct. at 1084 (emphasis

added).]

The issue before the Court in Hayes related to the second requirement:

> [W]hether the language of § 921(a)(33)(A) calls for a further limitation: Must the statute describing the predicate offense include, as a **discrete element**, the existence of a **domestic relationship** between the offender and victim? [*Id.* (emphasis added).]

On the **relationship** issue, the High Court concluded "that § 921(a)(33)(A) does not require a predicate-offense statute of that specificity," believing that "in a § 922(g)(9) prosecution, it **suffices** for the Government to charge and prove a prior conviction that was, **in fact**, for 'an offense ... committed by' the defendant against a spouse or other domestic victim." *Id.* (emphasis added).

Thus, the Supreme Court distinguished between (i) "the offender's **relationship** with the victim" — which need not be proved as an element, but only as a matter of fact in each case, and (ii) "the **manner** in which the offender **acts**" — which is subject to the "further requirement" that must be shown to be an **element** of the predicate misdemeanor offense in every case. *See* Hayes, 129 S.Ct. at 1084-85, citing Black's Law Dictionary definition of "element." In Fischer, concurring Circuit Judge Colloton expounded on this distinction: "[T]he rule of § 921(a)(33)(A)(ii) is that a **qualifying** offense **must have** the use or attempted use of **physical force** 'as an **element**,' which by definition means that **proof of**

that fact is required in every case." Slip. Op., p. 8 (Colloton, J., concurring) (emphasis added).

The Supreme Court's survey of the legislative history of the MCDV prohibition in Hayes reinforces Judge Colloton's conclusion. Justice Ginsburg noted that Congress deliberately "revise[d] the language of § 921(a)(33)(A) to spell out the use-of-force requirement":[10]

> The **proposed** legislation initially described the predicate domestic-violence offense as a "crime of violence ... committed by" a person who had a domestic relationship with the victim. 142 Cong. Rec. 5840. The **final** version replaced the unelaborated phrase "crime of violence" with the phrase "has, as an **element**, the use or attempted use of physical force, or threatened use of a deadly weapon." [Hayes, 129 S.Ct. at 1088 (emphasis added).]

As Judge Colloton observed, "the decision of Congress to define the scope of Section 922(g)(9) by reference to elements rather than underlying facts means that **some persons may actually use force** while committing a misdemeanor against a spouse or intimate partner, yet **remain outside that provision's criminal prohibition**[;] [nevertheless] [t]he courts ... must apply the statutes as written...." Slip. Op., pp. 8-9 (Colloton, J., concurring) (emphasis added).

Neither Amerson nor Fischer is faithful to the statutory text. To the

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[10] Hayes, 129 S.Ct. at 1088.

contrary, both opinions are written as if the element — "use or attempt to use physical force or threatened use of a deadly weapon" — had never been adopted, leaving the undefined phrase "crime of violence" in its original place. While the Supreme Court described the inclusion of the phrase — "has, as an element the use or attempted use of physical force" — as a "last-minute insertion,"[11] the phraseology is comparable to congressional descriptions of predicate offenses in other contexts. *See, e.g.,* 18 U.S.C. § 923(e)(2)(B).[12] In such cases, the courts have consistently understood "that Congress intended the ... court to look **only** to the fact that the defendant had been convicted of **crimes falling within certain categories**, and **not** to the **facts underlying the prior convictions**." Taylor v. United States, 495 U.S. 575, 600 (1990) (emphasis added). *See also* Leocal v. Ashcroft, 543 U.S. 1, 7 (2004) ("[T]he statute directs our focus to the 'offense' of conviction ... defining a crime of violence as 'an offense that has as an element the use ... of physical force against the person or property of another'.... This

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[11] Hayes, 129 S.Ct. at 1088.

[12] The term "physical force" under Section 923(e)(2)(B) may not have exactly the same meaning as that in Section 921(a)(33)(A)(ii), but the two definitions are closely related. *See* Johnson v. United States, __U.S. __, 130 S.Ct. 1265, 1273 (2010). And they call for the same "categorical approach" addressing the **elements** of the predicate statute, **not** the underlying **facts** upon which a defendant was convicted. *See id.*, 130 S.Ct. at 1268-1273.

language requires us to look to the **elements** and the nature of the offense of conviction, **rather than** to the particular **facts** relating to petitioner's crime." (Emphasis added.)) This Court has no power to define what constitutes an MCDV-type crime more broadly than Congress has specified.

CONCLUSION

If the panel decision in this case were allowed to stand, it would cause further confusion throughout the Eighth Circuit with respect to the mode of analysis applicable to determining the existence of the predicate misdemeanor offense required by 18 U.S.C. § 921(a)(33)(A)(ii) in a prosecution for a violation of 18 U.S.C. § 922(g)(9). Arguably compelled by Amerson, the panel decision conflicts with decisions in other circuits as well, including decisions relying upon the Eighth Circuit opinions in Smith and Howell, with which the panel decision is in conflict. Further, the panel opinion is in conflict with the reasoning of the U.S. Supreme Court in Hayes. Finally, and of profound importance in the proper administration of criminal justice, if allowed to stand, the panel decision would permit the conviction of a person who is rightfully entitled to the dismissal of the indictment against him. *See* Slip. Op., pp. 6-9 (Colloton, J., concurring.)

For the reasons stated herein, the petition for rehearing *en banc* should be granted, and the panel opinion vacated.

Respectfully submitted,

/s/ Herbert W. Titus

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July 15, 2011

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED:

I electronically filed the foregoing petition with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system, this 15th day of July, 2011.

/s/ Herbert W. Titus
Herbert W. Titus

Dated: July 15, 2011