In The Supreme Court of Virginia

Record No. 102398

RUSSELL ERNEST SMITH,
***Appellant*,**

v.

COMMONWEALTH OF VIRGINIA,
***Appellee*.**

BRIEF AMICUS CURIAE OF
GUN OWNERS OF AMERICA, INC. AND
GUN OWNERS FOUNDATION
IN SUPPORT OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Regulations

Cases

Other Authorities

INTEREST OF THE AMICI CURIAE[1]

Gun Owners Foundation and Gun Owners of America, Inc. are nonprofit educational organizations, exempt from federal taxation under §§ 501(c)(3) and 501(c)(4) of the Internal Revenue Code, respectively, and each is dedicated, *inter alia*, to the correct construction, interpretation and application of the law, with particular emphasis on firearms statutes and constitutional guarantees related to firearm ownership and use. In the past, each of the amici has filed numerous amicus curiae briefs in federal litigation involving such issues.

STATEMENT OF THE CASE

Russell Ernest Smith walked into a Virginia pawnshop on November 15, 2007, intending to buy a firearm. App. 41. Smith was handed an **ATF Firearm Transaction Record** ("Form 4473") to complete which asked, among other things, if he was currently under indictment for any felony charge. App. 52. Smith answered "no" to this question, completely unaware that, only two days prior, a Grand Jury had handed down a felony indictment charging him with marijuana possession stemming from an arrest that had occurred 17 months prior. App. 52, 60. Prior to the

[1] Counsel for the parties have consented to the filing of this brief.

marijuana arrest, Smith had never been in any trouble with the law. App. 31.

Smith was arrested and charged under Virginia **state** law for making a false statement on a **federal** Form 4473.[2] App. 1. The Commonwealth claimed that Smith "willfully and intentionally" made a false statement. After a bench trial, Smith was convicted and sentenced to three years imprisonment, which was suspended with conditions. App. 66. The trial court made no express finding of willfulness, finding only that "I think the evidence shows that [Smith] knew what was going on." App. 49.

A panel of the Court of Appeals affirmed, one judge dissenting. App., p. 67-76. Subsequently sitting *en banc*, the Court of Appeals affirmed the panel opinion with a second opinion. App. 77-85.

ASSIGNMENT OF ERROR

The assignment of error, as characterized by Appellant, is as follows: "The trial court erred in finding Smith guilty beyond a reasonable doubt of

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[2] The Virginia Code also provides for the completion of a "Virginia Firearms Transaction Record," or Form SP-65. Virginia Code § 18.2-308.2:2 This form asks the same questions as does the Form 4473, making the Form 4473 largely redundant for state purposes. The SP-65 does not, however, ask if one has been indicted, but only asks if one has been convicted of a felony.

willfully and intentionally making a false statement on a firearm consent form, when he answered that he was not under an indictment for a felony, when the Commonwealth's evidence proved only that Smith was indicted for a felony two days before Smith completed the form, when there was absolutely no evidence that Smith was officially or even informally advised of the indictment, and when the evidence proved that Smith was never advised when his charge would even be presented to the grand jury to seek an indictment."

STANDARDS OF REVIEW

Sections I and III of this brief raise questions of law and statutory interpretation, which are reviewed *de novo*. *See* Conkling v. Commonwealth, 45 Va. App 518, 520-21 (Va. Ct. App. 2005). Section II deals with the sufficiency of the evidence, and is reviewed "in the 'light most favorable' to the Commonwealth," drawing "all fair inferences" therefrom. App. 67.

ARGUMENT

I. Both the Commonwealth and the Court of Appeals Have Relied on *Federal* Case Law to Interpret a *State* Statute, Overlooking the Fact That the Statutes Use Materially Different Language.

A. United States v. Hester Does Not Apply.

The Commonwealth argues that Smith acted with a "'deliberate avoidance of learning the truth'" and thus "willfully and intentionally" made a false statement on the Form 4473.[3] The Commonwealth relies on a Fourth Circuit case, U.S. v. Hester,[4] as authority for its theory of the case.[5] Hester was also cited by the Court of Appeals below in its panel opinion as nonbinding but "highly persuasive" authority.[6]

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[3] Commonwealth Reply Brief below, p. 16 (hereinafter "Govt. Reply").

[4] 880 F.2d 799 (4th Cir. 1989).

[5] Factually, this case is a far cry from Hester. First, Hester's indictment was handed down over six months before he attempted to purchase his firearm, whereas Smith's indictment was two days old. 880 F.2d 799, 800. Second, Hester appeared in court at least three times after his indictment was handed down, making it seem unlikely that he did not know he had been indicted. *Id.* Here, Smith obviously had not appeared in court during the two day window between the indictment and the attempted firearm purchase.

[6] Smith v. Commonwealth, 56 Va. App. 166, 173 (Ct. App. Va., April 27, 2010).

Both the panel and *en banc* court opined that the federal crime (18 U.S.C. § 922(a)(6)) and the state crime (Virginia Code § 18.2-308.2:2) are "**parallel**" (emphasis added).[7] Both the Commonwealth and the Court of Appeals have overlooked one critical piece of information. In Hester, the Fourth Circuit was interpreting the federal statute, which makes it a crime to "**knowingly**" make a false statement, while the Virginia Code section at issue makes it a crime to "**willfully and intentionally**" make a false statement.[8] Only the *en banc* concurring opinion recognized this difference, "disagree[ing] with the maority's conclusion that the [state] crime ... 'paralell[s] the federal crime...."[9]

The Virginia Code's requirement of "willfully and intentionally" establishes a higher scienter requirement than does the federal code's "knowingly" requirement, making Hester readily distinguishable.

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[7] 56 Va. App. at 173; Smith v. Commonwealth, 57 Va. App. 319, 325 (Va. App., November 23, 2010).

[8] 880 F. 2d at 800; Virginia Code § 18.2-308.2:2.

[9] *Id.* at 326.

B. Federal Gun Statutes Use Two Distinct Intent Standards — "Knowingly" and "Wilfully."

Federal firearms laws generally are "subject to one of two intent standards — **knowingly** or **willfully**," and "analysis of each prohibited act" comes down to "which offenses are **knowing** and which are **willful**."[10]

18 U.S.C. § 924(a)(1), which lays out the penalties for violating federal firearm statutes, employs "**knowingly**" in **certain** provisions, while employing "**willfully**" in **other** provisions. Thus, as Halbrook points out, "[willfully] must mean something more than [knowingly]." Halbrook, 2:5, p. 89. Indeed it does. "**Knowing**" is intended to be a **lesser** burden for the state to prove, and thus generally is reserved for only certain crimes with an inherent moral connotation. The **greater** intent requirement, "**wilfully**," is intended to cover those offenses that are of a lesser moral content. In Bryan v. U.S.,[11] the Supreme Court explained that:

> [w]ith respect to the three categories of conduct that are made punishable by § 924 if performed

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[10] Halbrook, Stephen P., Firearms Law Deskbook, Thompson West, 2008-2009 Edition (hereinafter "Halbrook"), § 2:4, p. 88 (emphasis added). In fact, the Virginia Code section at issue goes even further, requiring that the false answer must be given "willfully **and** intentionally." Virginia Code 18.2-308.2:2 (emphasis added).

[11] 524 U.S. 184 (1998)

> '**knowingly**,' the background presumption that every citizen knows the law makes it unnecessary to adduce specific evidence to prove that 'an **evil-meaning mind**' directed the 'evil-doing hand.' **More is required**, however, with respect to the conduct ... that is only criminal when done '**willfully**.' The jury must find that the defendant acted with an evil-meaning mind, that is to say, that he acted with knowledge that his conduct was unlawful. [524 U.S. at 193 (emphasis added).]

The Fourth Circuit in Hester held that "deliberate disregard" could be used to prove "knowingly,"[12] but did not conclude, as the Court of Appeals assumed, that "deliberate disregard" could be deemed sufficient to establish "wilfully and intentionally."

Such misplaced reliance on Hester fatally infects the rest of the Court of Appeals' opinion. Thus, the Court of Appeals committed reversible error both when it assumed that the federal and state statutes are "parallel," and when it then held that the Commonwealth need only prove the lesser standard of "knowing" to convict Smith.

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[12] 880 F. 2d at 801.

II. The Evidence Was Insufficient to Establish A Violation of Virginia Code § 18.2-308.2:2.

A. Smith Did Not Act With A "Deliberate Avoidance of Learning the Truth."

At the time he attempted to purchase a firearm, Smith was aware he had been arrested and charged with a felony, and that a court date would likely be set soon.[13] He was aware that he faced a maximum penalty of imprisonment for over one year.[14] Smith may even have been aware that the charge had been "certified to the Grand Jury."[15] The Commonwealth sums up its case by stating that Smith "claimed he was not under indictment [when] he knew he was 'in trouble' for a felony charge that was then pending in the Circuit Court."[16]

But all this establishes is that Smith knew a Grand Jury would be looking at his case. Smith was a layman, never before in trouble with the law.[17] He was never told that the result of a Grand Jury would or even

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[13] App. 37, 61.

[14] App. 40.

[15] App. 61.

[16] Govt. Reply, p. 18.

[17] App. 31.

could be an indictment. To assume otherwise would require Smith to have a lawyer's knowledge of the criminal justice system. It would require him to know what a Grand Jury is, that Grand Juries hand down indictments, and that he could expect to be indicted since his case had been "certified."

In fact, not only would Smith be required to know what "indictment" meant, but he would be required to know what "certified" and "Grand Jury" mean — words that do not appear in either the state statute or on the Form 4473.

Smith testified that he had absolutely no idea of the existence of his indictment,[18] and the Commonwealth offered no evidence to the contrary. There was no evidence that, in a period of only two days, Smith had been contacted either by his lawyer or by the court, or had visited the court to find out his case status. Due to the two-day span between the indictment and the attempted firearm purchase, the **only reasonable inference** to draw is that Smith's indictment was completely unknown to him.

Yet the trial court determined that "the evidence shows that [Smith] **knew what was going on**."[19] The court did not articulate exactly "what"

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[18] App. 38.

[19] App. 49 (emphasis added).

Smith knew was "going on."[20] However, regardless of what the "what" was, it was apparently close enough for the court to find Smith guilty of acting "willfully and intentionally." The Commonwealth, more than happy to fill in the blanks for the trial court, argues this was a finding of willfulness, asserting in its brief that "[t]he evidence demonstrated that Smith knew he was under indictment."[21]

On appeal, the Commonwealth argued that a rational fact finder could have found that Smith had acted willfully and intentionally.[22] It argued that Smith's intent was "fairly deducible from the evidence."[23] But there was no such evidence.

In its April 27 panel opinion, the Court asserted that Smith "**affirmatively** asserted something to be true while all along *knowing* he did not know it to be true. This was, at its core, an intentional deceit."[24] To the

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[20] Even if, as the Commonwealth points out, Smith knew he was "in trouble," that does not mean Smith knew he had been indicted, or even was put on notice to expect an indictment.

[21] Govt. Reply, p. 14.

[22] Govt Reply, p. 9.

[23] *Id.*

[24] 56 Va. App. at 175 (emphasis added, italics original)

contrary, Smith made no affirmative declaration, but only a **negative** one. Smith merely denied that he was under indictment without actually knowing for certain that his denial was accurate. This is hardly "intentional," much less "willful," as required by the plain language of the statute.[25]

B. The Court Below Unfairly Inferred That Smith's Decision to Buy a Firearm Was in Deliberate Disregard of the Felony Charge Against Him.

Both opinions of the Court of Appeals reference a November 7, 2007 handwritten note from Smith's counsel saying "[p]lease give me a call to discuss the case."[26] From this handwritten note alone, the court of appeals inferred:

> Smith did not call his counsel as instructed. **Instead**, on November 15, he walked into a pawnshop and attempted to buy a 40-caliber handgun. [App. 68, 78 (emphasis added).]

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[25] Significantly, this portion of the Court's April 27 opinion does not appear in the November 23 opinion. Nevertheless the April opinion's error remains uncorrected. Seizing on the warning appearing on the Form 4473 "that making any false ... statement is a crime punishable as a felony," the Court asserted: "[d]espite that warning, Smith **affirmatively** declared he was *not* 'under indictment' while all along *knowing* he had no idea what the word 'indictment' meant." 57 Va. App. at 326 (emphasis added, italics original). The Court of Appeals makes it sound as if Smith went out of his way to "affirmatively" mislead. Rather, he was simply responding to a question.

[26] App. 62.

First, the letter did not specify any date on which a reply was expected. Given the fact that the letter concerned a trial date set for January 11, 2008 — two months in the future — there would have been no reason for Smith to have answered the note within a week of the receipt.

Additionally, there is no justification whatsoever for the Court of Appeals to have inferred that there was a causal connection between the request to call counsel, and Smith's effort to purchase a firearm. Yet, by its use of the word, “instead,” the Court of Appeals stated that Smith's trip to the pawnshop was taken as a direct substitute for, or alternative to, responding to counsel's request. That inference is unfair and unsupported, attributing to Smith a deliberate attempt to circumvent the law as if he knew that he had better purchase a firearm as soon as possible before the January 11, 2008 trial date.

C. The Court of Appeals Has Articulated a Rule That Will Condemn Defendants for No Reason But A Deficient Legal Vocabulary.

The rule articulated by the Court of Appeals was not carefully constructed, and it has the potential to sweep much too broadly. Under the rule, even if Smith had never been arrested for marijuana possession, he would still be guilty, for no reason but that he did not know the meaning of

the word "indictment" — a fact that Judge Bumgardner points out in his panel dissent.[27] The Court of Appeals held that "[i]f Smith did not know what an indictment was, he should not have *affirmatively* represented on the ATF Form that he was not under indictment."[28]

The Court of Appeals stated that Smith "wilfully and intentionally" made a false statement because he "[did] not know whether [his answer] was true or false."[29] The Court went on to **articulate a rule** that

> "a firearm buyer makes a false statement ... when he admits he does not know what the word 'indictment' means, yet he nonetheless affirmatively declares ... he is not under indictment when, in fact, he is."[30]

This rule would not only include cases like Smith's, where the Defendant had at least some knowledge that he was "in trouble" with the law, but also those where other Defendants had no notice whatsoever.

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[27] 56 Va. App. at 177. At trial, Smith testified that, at the time he filled out the Form 4473, he "had no idea what the word 'indictment' meant." App. 38. The Court of Appeals noted that the "prosecutor focused on this point." 57 Va. App. at 323. The Court of Appeals did so as well.

[28] 56 Va. App. at 172 (italics original).

[29] *Id.*

[30] 56 Va. App. at 175.

This is demonstrated by the following hypothetical: John Doe goes into a gun store to purchase a handgun, and is handed a Form 4473. He has never been arrested for any crime. Doe has no idea what "indictment" means, but since he has never been in trouble with the law, he infers that he is not under indictment. However, unbeknownst to Doe, he is (rightly or wrongly) the subject of a covert police investigation. As a result of that investigation, a Grand Jury secretly has handed down an indictment a few hours before Doe went to purchase his firearm. The indictment is sealed under Virginia Code § 19.2-192.1, so as not to alert other subjects under investigation.

Doe meets all of the parts of the Court of Appeals' rule: Doe (i) answered that he was not under indictment,(ii) Doe did not know what "indictment" meant and (iii) Doe actually was under indictment. Thus, though Doe clearly has acted neither "willfully" nor "intentionally," he would be guilty of a making a false statement, and subject to up to ten years imprisonment.[31]

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[31] Such a result would be profoundly unfair, and contrary to law. No person who answers that he is not under indictment can know his answer as to be "the truth" in a metaphysical sense. Rather, a person is not required to "know" definitively that he is not under indictment; he can only answer to his knowledge. That is what Smith did. He believed that he

Dissenting from the panel opinion, Judge Bumgardner rightfully observed that the question posed by the Form 4473 required an answer of Smith's "precise legal status."[32] As Judge Bumgardner pointed out, it does not require "[a]n understanding of the indictment process," and "does not relate to one's comprehension of the question but to one's consciousness of the existence of the status."[33]

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was not under indictment at the time he attempted to purchase the firearm. The rule announced by the Court of Appeals effectively would establish strict liability for answers given on the Form 4473, which would essentially edit the words "wilfully and intentionally" out of Virginia Code § 18.2-308.2:2.

[32] App. 75.

[33] *Id.* The federal disqualification for which the question is posed requires a person to be "under indictment." Not arrested. Not charged. Not even having appeared in court on a felony charge. But "under indictment." To go beyond the words of the statute would be to convict Smith for not "knowing" that he had been placed on indictment status two days before.

III. Virginia Code § 18.2-308.2:2 Makes it a Felony to Give a False Answer on Any Form "Required By Federal Law," but Form 4473 Is Neither "Required" Nor Even Authorized By Federal Law.

Virginia Code §18.2-308.2:2(K), under which Smith was convicted, states that "[a]ny person willfully and intentionally making a materially false statement on the consent form required in subsection B or C or on such firearm transaction records **as may be required by federal law**, shall be guilty of a Class 5 felony" (emphasis added). Thus, if the Form 4473 is not "required" by federal law, the Virginia Code does not criminalize the giving of false statements on the Form 4473.

A. The Form 4473 Draws Authority From a Statute that Expired in 1998.

All firearms purchasers in the United States who buy guns through Federal Firearms Licensees are first given a Form 4473 to complete. The questions asked on the Form 4473 are drawn from 18 U.S.C. § 922(s), which was enacted as part of the Brady Handgun Violence Prevention Act ("Brady Act").[34] The Brady Act also instructed the Federal Bureau of Investigation ("FBI") to create a National Instant Criminal Background

[34] Pub.L. 103-159, 107 Stat. 1536.

Check System ("NICS") to run background checks on prospective gun purchasers.

Since the NICS system had not yet been created, § 922(s) provided that, for **only five years** after enactment while the NICS system was developed, all firearms dealers were required to obtain certain information — an exhaustive list provided in § 922(s)(3) — from **handgun** purchasers only. That information would be given to the chief law enforcement officer in the jurisdiction for verification.[35] The Brady Act was enacted on November 30, 1993, and **§ 922(s) expired** on November 30, 1998, the same day the FBI launched the NICS system.[36]

The ATF has greatly exceeded the scope of its authority by continuing to use Form 4473 after the sunset of § 922(s), which elapsed more than a decade ago.[37] Since Congress enacted a specific sunset provision in § 922(s), Congress clearly intended that gun buyers would not still be asked the § 922(s)(3) questions after 1998.

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[35] This provision was struck down by Printz v. U.S., 521 U.S. 898 (1997).

[36] http://www.fbi.gov/about-us/cjis/nics

[37] First, Form 4473 asks questions not included in § 922(s)(3)'s exhaustive list. Second, Form 4473 has been applied to the sale of **all** firearms, while § 922(s) applies to handguns only.

Rather, after § 922(s)'s expiration, § 922(t) was to take over once "the national criminal background check system is established." Section 922(t) contains no requirement that a buyer provide the information required by § 922(s). Rather, the buyer **must only prove his identity**, allowing the dealer to contact the FBI to run the background check rather than seeking purchasers' responses to the questions contained in the expired § 922(s)(3).[38]

Additionally, the Code of Federal Regulations does not authorize ATF to mandate completion of the Form 4473. 28 C.F.R. § 25.7 provides for obtaining only a person's name, sex, race, date of birth and state of residence, but it does not include such questions as whether one is under indictment.[39]

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[38] 18 U.S.C. § 922(t)(1)(C).

[39] The indictment question, as posed to Smith on the Form 4473, uses language that does not appear in federal law. Even **assuming** that the Form 4473 were **legal** under federal law, and further **assuming** that it were **required** by federal law, Question 11(b) still does not comport with the federal statute it is supposed to mirror.

Question 11(b), as posed to Smith, asked "Are you **under indictment or information** in any court for a felony, or any other crime, for which the judge could imprison you for more than one year?" (emphasis added). This question has its roots in 18 U.S.C. § 922(n), which states that "[i]t shall be unlawful for any person who is **under indictment** for a crime punishable by imprisonment for a term exceeding one year to ...

B. Form 4473's Only Continuing Purpose is to Serve as a Trap for the Unwary.

With the establishment of the NICS system, § 922(s) was made both irrelevant and inoperative. There is now no need to ask a gun buyer if, for example, he has been convicted of a felony, because his answer to that question is not relied on. The required background check will determine whether the prospective purchaser is qualified to buy a firearm.

The panel opinion exalts the Form 4473 warning to buyers that "[t]he information you provide will be used to determine whether you are prohibited under law from receiving a firearm."[40] This simply is not the case. Regardless of what the Form 4473 claims, the NICS check clearly does not rely on the buyer's answers. Otherwise, Smith would have walked out of the pawnshop with a handgun on November 15, 2007.

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receive any firearm..." (emphasis added). The federal statute asks about "**indictments**." Yet ATF's Form 4473 goes further, asking about "**informations**."

By broadening Question 11(b) to include language that does not even appear in federal law, the Form 4473 cannot possibly be "required" by federal law.

[40] 56 Va. App. at 169.

Based on what the NICS system is designed to do, there is no legitimate reason to require gun buyers to answer the same questions that the background check is designed to answer independently.

If the purpose of the law is to make sure that ineligible people do not have access to firearms, the NICS system fulfills that purpose. However, if the idea is simply to give prosecutors more felony charges to bring against Americans, the Form 4473 accomplishes that quite well.

ATF cannot require use of a form without statutory or regulatory authority. Yet ATF continues to use Form 4473 as a trap for the unwary.

CONCLUSION

For the reasons stated, this Court should reverse Appellant's conviction below, holding, as a matter of law, that Appellant did not "wilfully and intentionally" make a materially false statement. This Court should remand the case to the trial court with instructions to dismiss the charges against him.

Respectfully submitted,

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May 24, 2011

CERTICATE OF COMPLIANCE

IT IS HEREBY CERTIFIED, this 24th day of May, 2011, that, with respect to the length, preparation, delivery and method of transmission of the foregoing Brief Amicus Curiae of Gun Owners of America, Inc. and Gun Owners Foundation in Support of Appellant, there has been compliance with Rule 5:26(b) and Rule 5:26(d), Rules of the Supreme Court of Virginia.

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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that, on this 24th day of May, 2011, fifteen (15) copies of this Brief Amicus Curiae of Gun Owners of America, Inc. and Gun Owners Foundation in Support of Appellant were transmitted for filing by overnight delivery (FedEx) to the Clerk of the Supreme Court of Virginia, that an electronic copy of said Brief was delivered by electronic mail to scvbriefs@courts.state.va.us and to counsel at the e-mail addresses set forth below, and that three (3) copies of said Brief were served by depositing hard copies thereof in the United States Mail, First-Class, postage prepaid, addressed to the following:

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