

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION

UNITED STATES OF AMERICA)	DOCKET NO. 1:08CR83
)	
)	
vs.)	
)	MOTION TO DISMISS
)	WITH LEAVE TO RE-FILE
JOHN PETER BRADLEY,)	
Defendant.)	
_____)	

NOW COMES the United States of America, by and through Gretchen C. F. Shappert, United States Attorney for the Western District of North Carolina, and moves this Court pursuant to F.R.Cr.P. 48(a) to dismiss the above-captioned Bill of Indictment with leave to re-file at a later date. In support of this Motion, the United States offers the following:

1. The Defendant was indicted by a sitting Grand Jury on August 5, 2008, in a single-count Bill of Indictment alleging that he possessed a firearm after having been convicted of a misdemeanor crime of domestic violence, a violation of Title 18,

United States Code, Section 922(g)(9).

2. The prior conviction alleged in the Bill of Indictment was for assault on a female, said conviction having been entered on or about March 29, 2007 in a North Carolina court. The victim of that misdemeanor offense was the Defendant's wife.
3. A "misdemeanor crime of domestic violence" includes a misdemeanor offense that "has, as an element, the use or attempted use of physical force, . . . committed by a current or former spouse. . . of the victim. . . ." 18 U.S.C. § 921(a)(33)(A).
4. In interpreting this definition, the Fourth Circuit Court of Appeals held in *United States v. Hayes*, 482 F.3d 749 (4th Cir. 2007), "that a predicate offense must, in order to qualify as [a misdemeanor crime of domestic violence], have *as an element* a domestic relationship" (emphasis added). The North Carolina crime of assault on a female does not contain as an element a requirement that there be a domestic relationship, although that fact is present in the underlying case.
5. There is a split in the Circuits on this issue, with the Fourth

Circuit standing as the lone minority.¹ The United States Supreme Court granted a *writ of certiorari* on March 28, 2008. *United States v. Hayes*, 128 S.Ct. 1702 (Mar. 28, 2008). However, unless and until the Supreme Court rules otherwise, *Hayes* is the binding precedent of this Circuit. As such, the underlying assault of a female conviction currently is not a qualifying misdemeanor crime of domestic violence.

6. Should the Supreme Court reverse the Fourth Circuit in *Hayes*, the United States intends to re-file the current charge. Otherwise, the assault on a female conviction cannot support the current § 922(g)(9) violation.
7. The undersigned prosecutor has spoken to counsel for the Defendant, James Mills, concerning this Motion, who indicated that he did not object.

¹ See *United States v. Heckenliable*, 446 F.3d 1048, 1049 (10th Cir. 2006); *United States v. Belless*, 338 F.3d 1063, 1067 (9th Cir. 2003); *White v. Dep't of Justice*, 328 F.3d 1361, 1367 (Fed. Cir. 2003); *United States v. Shelton*, 325 F.3d 553, 562 (5th Cir. 2003); *United States v. Barnes*, 295 F.3d 1354, 1365-66 (D.C. Cir. 2002); *United States v. Chavez*, 204 F.3d 1305, 1313-14 (11th Cir. 2000); *United States v. Meade*, 175 F.3d 215, 219 (1st Cir. 1999); *United States v. Smith*, 171 F.3d 617, 620 (8th Cir. 1999).

WHEREFORE the United States respectfully requests that the above-captioned Bill of Indictment be dismissed with leave to re-file.

RESPECTFULLY SUBMITTED, this the 5th day of September, 2008.

GRETCHEN C. F. SHAPPERT
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/s Don Gast

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CERTIFICATE OF SERVICE

The foregoing document was filed electronically via ECF and was served on counsel for the Defendant via ECF. The email address for defense counsel is listed in ECF as follows:

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This the 5th day of September, 2008.

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