No. 00-1428

In the Supreme Court of the United States

JOHN A. RAPANOS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's convictions under the Clean Water Act (CWA) are inconsistent with this Court's decision in *Solid Waste Agency* v. *United States Army Corps of Engineers*, 121 S. Ct. 675 (2001), which held that use of nonnavigable "isolated" intrastate waters as habitat for migratory birds is not a sufficient basis for the exercise of federal regulatory jurisdiction under the CWA.

2. Whether petitioner is entitled to reversal of his CWA convictions based on error in the jury instructions defining the term "waters of the United States," where petitioner requested an instruction substantially equivalent to the one actually given, and where the evidence showed that the wetlands filled by petitioner were adjacent to tributaries of navigable-in-fact waters.

3. Whether, and under what circumstances, Congress has constitutional authority to prohibit the filling of nonnavigable "isolated" wetlands having no hydrologic connection to navigable-in-fact waters.

4. Whether petitioner suffered a violation of the Due Process Clause based on the government's alleged failure to prove that he had actual knowledge that the areas he was filling were wetlands.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 235 F.3d 256. An earlier opinion of the court of appeals is reported at 115 F.3d 367.

JURISDICTION

The judgment of the court of appeals was entered on December 15, 2000. The petition for a writ of certiorari was filed on March 14, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted on two counts of knowingly discharging pollutants into waters of the United States without a

permit, in violation of Section 301(a) of the Federal Water Pollution Control Act Amendments of 1972 (Clean Water Act or CWA), 33 U.S.C. 1311(a). He was sentenced to three years' probation and fined $185,100. Petitioner appealed the convictions, and the government cross-appealed the sentence. The court of appeals affirmed the convictions and remanded to the district court for resentencing. Pet. App. 1a-9a.

1. Section 301(a) of the CWA, 33 U.S.C. 1311(a), prohibits the discharge of any pollutants, including dredged or fill material, into "navigable waters" except in accordance with the Act. The CWA provides that "[t]he term 'navigable waters' means the waters of the United States, including the territorial seas." 33 U.S.C. 1362(7). Discharges of dredged or fill material into "waters of the United States" may be authorized by a permit issued by the Army Corps of Engineers (Corps) pursuant to Section 404 of the CWA, 33 U.S.C. 1344, or by a state agency in States, including Michigan, that have been authorized by the United States Environmental Protection Agency (EPA) to administer the Section 404 permit program. See 33 U.S.C. 1344(g)(1); 40 C.F.R. 233.70 (1995).

At the time of petitioner's trial, the regulatory definition of the term "waters of the United States" utilized by the Corps and the EPA included seven categories of waters subject to CWA permitting jurisdiction. See 40 C.F.R. 230.3(s)(1)-(7), 232.2 (1995); 33 C.F.R. 328.3(a)(1)-(8) (1995). Those categories included waters susceptible for use in interstate or foreign commerce, including tidal waters, 40 C.F.R. 230.3(s)(1) (1995); 33 C.F.R. 328.3(a)(1) (1995); interstate waters, 40 C.F.R. 230.3(s)(2) (1995); 33 C.F.R. 328.3(a)(2) (1995); and tributaries of such waters, 40 C.F.R. 230(s)(5) (1995); 33 C.F.R. 328.3(a)(5) (1995). The regulatory definition also

extended to "[a]ll other waters * * * the use, degradation or destruction of which could affect interstate or foreign commerce." 40 C.F.R. 230.3(s)(3) (1995); 33 C.F.R. 328.3(a)(3) (1995). The regulations further provided that "[w]etlands adjacent to waters [encompassed within the regulatory definition] (other than waters that are themselves wetlands)" were defined to be "waters of the United States." 40 C.F.R. 230.3(s)(7) (1995); 33 C.F.R. 328.3(a)(7) (1995).

2. Petitioner owns a 175-acre parcel of land in Williams Township, Michigan. To make the parcel more attractive for development, petitioner cleared the heavily-wooded property of trees and shrubs, and he eradicated forested wetlands on the property by filling them with sand. Petitioner carried out those activities despite warnings from his own environmental consultants and from state regulators that the property contained wetlands and that development of the area would therefore require a permit. 115 F.3d at 368-369.

3. a. On July 27, 1994, a federal grand jury returned a second superseding indictment charging petitioner with two counts of knowingly discharging pollutants into waters of the United States, in violation of 33 U.S.C. 1311(a), and two counts of witness tampering, in violation of 18 U.S.C. 1512. Pet. App. 31a-33a. The CWA counts alleged that petitioner had deposited fill material into wetlands on his property between December 1988 and October 1991. *Id.* at 31a-32a, 33a.*

* The witness tampering counts alleged that petitioner had threatened one of his environmental consultants, Dr. Frederick Glenn Goff, for the purpose of intimidating him into keeping silent and destroying his records and reports, which had confirmed the presence of extensive wetlands on the property. Pet. App. 32a. The district court dismissed those counts at the conclusion of the government's case. Gov't C.A. Br. 4.

Petitioner's trial began on February 1, 1995. The evidence showed that until its alteration through petitioner's fill activities, the property in question contained at least 29 acres of wetlands. The evidence further demonstrated that those wetlands were hydrologically connected to a waterway known as the "Labozinski drain," which drained into Hoppler Creek, the Kawkawlin River (a navigable river), and ultimately into Saginaw Bay, a part of Lake Huron. See Gov't C.A. Br. 20; 02/01/95 Tr. 175-177.

Petitioner requested a jury instruction defining the term "waters of the United States" as follows:

> Waters such as lakes, rivers, streams (including intermittent streams), or wetlands, the use, degradation, or destruction of which could affect interstate or foreign commerce.
>
> The definition of waters of the United States also includes tributaries of the waters which I have identified, and wetlands adjacent to waters of the United States.

R. 174 (Waters of the United States). The district court instructed the jury substantially as petitioner had requested, giving the following instruction:

> The term waters of the United States includes waters such as lakes, rivers, streams, including intermittent streams or wetlands. The use degradation or destruction of, which could affect interstate or foreign commerce, including any such water from which fish or shellfish are or could be taken and sold in interstate or foreign commerce.
>
> The definition of waters of the United States also includes tributaries of the waters that I've just

identified, and wetlands adjacent to waters of the United States.

Pet. App. 38a-39a.

The jury found petitioner guilty on both of the CWA counts. The district court subsequently granted petitioner's motion for a new trial on the ground that the government had improperly cross-examined petitioner regarding his refusal to consent to warrantless searches of his property by state regulatory officials. 115 F.3d at 371. The government appealed, and the court of appeals reversed, concluding that "the prosecutor's questions and characterization did not constitute a prejudicial comment on a defendant's assertion of a constitutional privilege." *Id.* at 374; see *id.* at 372-374. On remand, the district court sentenced petitioner to three years' probation and a fine of $185,100. Pet. App. 2a.

b. Petitioner appealed his convictions. He contended, *inter alia*, that the jury instruction defining the term "waters of the United States" was erroneous under *United States* v. *Wilson*, 133 F.3d 251, 256-257 (4th Cir. 1997), because it permitted the jury to enter a guilty verdict based on a finding that degradation of the waters on petitioner's property "could affect" interstate commerce. Pet. C.A. Br. 16-18. In response, the government contended that petitioner had invited the alleged error by proposing a jury instruction substantially equivalent to the one given by the district court, and that petitioner could not satisfy the requirements of Federal Rule of Criminal Procedure 52(b) because the wetlands in question were hydrologically connected to tributaries of navigable waters that were used as habitat for spawning commercially harvested carp.

Gov't C.A. Br. 17-22. The government cross-appealed on sentencing issues. *Id.* at 41-61.

The court of appeals affirmed petitioner's convictions and remanded for resentencing. Pet. App. 1a-9a. With respect to petitioner's appeal, the court stated only that it had "reviewed each of [petitioner's] claims and f[ou]nd that the district court did not err." *Id.* at 2a. With respect to the government's cross-appeal, the court of appeals held that the district court had erred in granting two one-level downward departures and a two-level decrease for acceptance of responsibility from petitioner's sentencing range under the Sentencing Guidelines. *Id.* at 3a-9a.

ARGUMENT

1. Petitioner contends (Pet. 7-11) that his convictions should be vacated because the areas that he filled were not "waters of the United States" within the meaning of the CWA, as that term was construed in *Solid Waste Agency* v. *United States Army Corps of Engineers*, 121 S. Ct. 675 (2001). Petitioner suggests (Pet. 8) that the wetlands in question "must be classified as 'isolated wetlands' as they lacked a surface water connection to any other body of water." That claim is controverted by the record at trial and by the course of briefing in the court of appeals.

The government's expert testified at trial that the wetlands on petitioner's property drain into Hoppler Creek, which flows into the Kawkawlin River (a navigable river), which in turn flows into Saginaw Bay. 02/01/95 Tr. 175-177. In his opening brief to the court of appeals, petitioner contended that the jury instruction defining "waters of the United States" was deficient because it permitted the jury to find him guilty based on a potential rather than an actual effect on interstate

commerce resulting from degradation of the relevant waters. Pet. C.A. Br. 16-18; p. 5, *supra*. The government argued in response that petitioner had invited any error by proposing a substantially equivalent instruction, and that in any event petitioner had suffered no prejudice as a result of the instruction given by the district court. Gov't C.A. Br. 17-22. With respect to the latter point, the government explained that the wetlands on petitioner's property were ultimately connected through surface waters to Saginaw Bay. *Id.* at 19-20. The government further explained that, under the regulatory definition of "waters of the United States," the wetlands that petitioner filled were "adjacent" to tributaries of traditional navigable waters and therefore fell within the CWA's coverage under 40 C.F.R. 230.3(s)(1), (5), and (7). Gov't C.A. Br. 19-20. Under the regulations, proof of adjacency to tributaries of navigable-in-fact waters eliminated the need for any case-specific showing of either an actual *or* a potential effect on interstate commerce. *Id.* at 20. Petitioner's reply brief in the court of appeals was devoted solely to sentencing issues and did not attempt to refute the government's description of the surface-water connection between petitioner's wetlands and traditional navigable waters.

Nothing in *Solid Waste Agency* suggests that the hydrologic connection described above to traditional navigable waters is an inadequate basis for the exercise of federal regulatory jurisdiction over petitioner's wetlands pursuant to the CWA. The Court in *Solid Waste Agency* rejected the government's contention that use of nonnavigable "isolated" intrastate ponds as habitat for migratory birds was a sufficient basis for treating those ponds as "waters of the United States" within the meaning of the CWA. 121 S. Ct. at 683-684.

The Court referred, however, with apparent approval to its prior holding that "Congress' concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands 'inseparably bound up with the "waters" of the United States.'" *Id.* at 680 (quoting *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 134 (1985)). This case falls within the principle of *Riverside Bayview*, not *Solid Waste Agency*.

2. The district court instructed the jury at petitioner's trial that "[t]he term waters of the United States includes waters such as lakes, rivers, streams, * * * [t]he use degradation or destruction of[] which could affect interstate or foreign commerce." Pet. App. 38a. That instruction did not by its terms require the jury to find that petitioner's wetlands were hydrologically connected to (or could otherwise be expected to affect the quality of) navigable-in-fact waters. Thus, the instruction given by the district court might in theory have resulted in a conviction based solely on the sort of connection to commerce—*e.g.*, use of the wetlands as habitat for migratory birds—that was held in *Solid Waste Agency* to be an impermissible basis for the exercise of federal regulatory jurisdiction under the CWA.

Petitioner did not object to the pertinent instruction, however, and indeed proposed an instruction defining the term "waters of the United States" in a substantially identical manner, which effectively invited the error of which he now complains. He thus should not be entitled to raise that issue in this Court. See, *e.g.*, *City of Monterey* v. *Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 704 (1999) ("As the city itself proposed the essence of the instructions given to the jury, it cannot now contend that the instructions did not provide an

accurate statement of the law."); *United States* v. *Young*, 745 F.2d 733, 752 (2d Cir. 1984) ("not even the plain error doctrine permits reversal on the ground that the trial court granted a defendant's request to charge"; citing cases), cert. denied, 470 U.S. 1084 (1985); *United States* v. *Barrow*, 118 F.3d 482, 490-491 (6th Cir. 1997) (same); but see *United States* v. *Perez*, 116 F.3d 840, 844-846 (9th Cir. 1997) (en banc). If petitioner is not foreclosed from raising this issue by his own proposed jury instruction, he can obtain relief based on instructional error only if he can satisfy the requirements of Federal Rule of Criminal Procedure 52(b), which provides that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." In *United States* v. *Olano*, 507 U.S. 725 (1993), this Court explained that under Rule 52(b), a criminal defendant who fails to object to an alleged error at trial is entitled to relief on appeal only if he can make four distinct showings. The defendant must establish that the district court committed (1) an "error" (2) that was "plain," in the sense of "clear" or "obvious," and (3) that "affec[ted] [his] substantial rights." 507 U.S. at 732-735. Even when those showings are made, a reviewing court may exercise its discretion to reverse a conviction for plain error only (4) "if the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Id.* at 736 (internal quotation marks omitted).

Insofar as the district court's instruction defining the term "waters of the United States" would have allowed the jury to find the jurisdictional element satisfied based solely on migratory bird use, the error in the instruction is "clear" or "obvious" after this Court's decision in *Solid Waste Agency*. See *Johnson* v. *United*

States, 520 U.S. 461, 468 (1997) (holding that "where the law at the time of trial was settled and clearly contrary to the law at the time of appeal[,] it is enough that an error be 'plain' at the time of appellate consideration."). Petitioner cannot satisfy the third and fourth requirements for relief under Rule 52(b), however, because he suffered no prejudice as a result of the instructional error. As we explain above, the evidence at trial established the existence of a surface-water connection between petitioner's wetlands and navigable-in-fact waters. Indeed, the government sought to prove the potential effect on interstate commerce required by the district court's instruction by introducing evidence that petitioner's wetlands drained into tributaries of navigable waters, that the tributaries supported spawning of carp, and that carp were commercially harvested downstream. See 02/01/95 Tr. 177-188; 02/09/95 Tr. 115-130; Gov't C.A. Br. 21.

Thus, unlike in *Solid Waste Agency*, the interstate commercial nexus asserted by the government in this case was itself dependent on the existence of a surface connection to navigable-in-fact waters. Although the instruction standing alone might have permitted the jury to find petitioner guilty based on migratory bird use, the actual course of proceedings at trial eliminates any meaningful danger that such a result occurred. The defect in the district court's instructions therefore did not "affect substantial rights" or "seriously affect the fairness, integrity or public reputation of judicial proceedings." *Olano*, 507 U.S. at 734, 736.

3. Petitioner contends (Pet. 11-14) that this Court should grant certiorari to decide the question, left unresolved in *Solid Waste Agency*, whether and under what circumstances Congress may constitutionally extend federal regulatory jurisdiction to cover non-

navigable "isolated" waters lacking any hydrologic connection to traditional navigable waters. As we explain above, however, the wetlands involved in this case do not fall within that category. This Court's resolution of the constitutional issue raised by petitioner can therefore have no practical effect on the proper disposition of the instant case.

4. Petitioner contends (Pet. 14) that his convictions were obtained in violation of the Due Process Clause because the government failed to prove that petitioner "knew that the areas into which he was placing fill were wetlands." Petitioner asserts (Pet. 14) that government counsel disclaimed any attempt to prove such knowledge. The statement quoted by petitioner, however, simply reflected counsel's view that the government was not required to prove petitioner's knowledge of the downstream hydrologic connections that brought his wetlands within the regulatory definition of "waters of the United States." See 03/03/95 Tr. 10.

Petitioner does not contend that the jury was improperly instructed on the scienter element of the criminal charges. And the evidence of petitioner's knowledge of the physical characteristics of the filled area was fully sufficient to satisfy statutory and constitutional requirements. As the court of appeals noted on petitioner's prior appeal, the record showed that petitioner undertook his filling activities despite warnings from both state regulators and his own consultant that the property contained wetlands for which a permit was required. 115 F.3d at 368-369.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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