No. 20-627

IN THE SUPREME COURT OF THE UNITED STATES

ERNEST HEMSCHOT III,
Petitioner Pro Se

v.

THE FLORIDA DEPARTMENT OF AGRICULTURE
AND CONSUMER SERVICES, DIVISION OF LICENSING,
Respondent

On Petition for a Writ of Certiorari to the Florida Court of Appeal for the Fifth District

PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTORY STATEMENT

Petitioner applied to the Department for a concealed carry permit (of a firearm) under Florida law. Department denied the permit because Petitioner had been committed to a mental health facility in New Jersey twenty years ago. Petitioner argued that a New Jersey Expungement Order obtained by him nullified the record of commitment and therefore no reason existed to deny the permit. Petitioner argued that the Full Faith and Credit Clause of the United States Constitution required the State of Florida to honor the New Jersey Expungement Order. The Florida Court of Appeals for the Fifth District disagreed and entered a 'PCA' decision, or a per curiam affirmance of the lower tribunal without a written opinion. PCA decisions are final and cannot be appealed to the Florida Supreme Court. Petitioner filed an omnibus motion for rehearing/clarification/written opinion and a separate petition for rehearing *en banc*. All were denied on July 22 and July 24, 2020, respectively. This Petition for Certiorari now follows.

I. QUESTION PRESENTED FOR REVIEW

Did the Florida Court of Appeal commit reversible error and abuse its discretion in declining to recognize and apply Petitioner's New Jersey Expungement Order to its denial of a Florida Firearms Concealed Carry Permit, as required by the Full Faith and Credit Clause of the United States Constitution?

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Section 3. Supreme court.—

"(a) ORGANIZATION.—The supreme court shall consist of seven justices. Of the seven justices, each appellate district shall have at least one justice elected or appointed from the district to the supreme court who is a resident of the district at the time of the original appointment or election. Five justices shall constitute a quorum. The concurrence of four justices shall be necessary to a decision. When recusals for cause would prohibit the court from convening because of the requirements of this section, judges assigned to temporary duty may be substituted for justices.

(b) JURISDICTION.—The supreme court:

(1) Shall hear appeals from final judgments of trial courts imposing the death penalty and from decisions of district courts of appeal declaring invalid a state statute or a provision of the state constitution.

(2) When provided by general law, shall hear appeals from final judgments entered in proceedings for the validation of bonds or certificates of indebtedness and shall review action of statewide agencies relating to rates or service of utilities providing electric, gas, or telephone service.

(3) May review any decision of a district court of appeal that expressly declares valid a state statute, or that expressly construes a provision of the state or federal constitution, or that expressly affects a class of constitutional or state officers, or that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law."

III. Petition for Writ of Certiorari

Petitioner Ernest Hemschot III applied for and was denied a Concealed Firearms Carry Permit by the Department. The Florida Court of Appeal for the Fifth District affirmed in a proceeding known colloquially as a "PCA" or per curiam affirmed decision without a written opinion. There is no appeal to the Florida Supreme Court permitted from a PCA decision as per the Florida Constitution, Article V, §3(b)3, and therefore Petitioner respectfully petitions this honorable Court for a writ of certiorari to the Florida Court of Appeals for the Fifth District to review its final decision in the case.

IV. Opinions Below

The PCA decision of the Florida Court of Appeal is reproduced in full in Petitioner's Appendix at Page 1. It is explicitly not final. The decision of the Florida Department of Consumer Affairs is reproduced at Petitioner's Appendix at Page 19.

V. Jurisdiction

The decision of the Florida Court of Appeal became final and not appealable on July 24, 2020 by virtue of the denial of Petitioner's petition for rehearing *en banc*. Petitioner respectfully invokes this Court's jurisdiction under 28 U.S.C. §1257, having timely filed this petition for a writ of certiorari within ninety days of the denial. See Appendix at Pages 2 and 3.

VI. Statement of the Case

A. Facts

Petitioner experienced two mental health commitments in the State of New Jersey, one in 1996 and one in 2000. A collateral effect of the commitments was that Petitioner was prohibited from owning and bearing firearms, a cherished Second Amendment right. Seeking to remove that disability, Petitioner applied to the New Jersey Superior Court for an Order expunging the commitment records, which is the procedure under New Jersey law that removes the disability. If no record exists of the commitment, there is no longer a disability. The New Jersey court issued an Expungement Order on January 14th, 2010; see Appendix at Page 27.

Petitioner subsequently retired and moved to the State of Florida. On November 9, 2018, Petitioner applied for a concealed weapon carry permit in Florida. On November 13, 2018, he received a notice from the Department of Agriculture and Consumer Services, Division of Licensing (herein "the Department") that the application had been denied. The notice did not provide any specific explanation as to the

reason for the denial nor did it include any documentation for the denial; see Appendix at Page 23.

On November 19, 2018, Petitioner filed two timely separate appeals, one with the Department and one with the Florida Department of Law Enforcement (herein "FDLE"). On January 4, 2019, the Department dismissed the appeal to it without prejudice with Leave to Amend.

On January 15, 2019, a timely Amended Petition was filed with the Department. On January 31, 2019, FDLE denied the appeal to it. On February 11, 2019, the Department provided notification that an informal hearing was scheduled for May 14, 2019 in Jacksonville; see Appendix at page 26. Petitioner had requested a formal hearing before an Administrative law judge; see Appendix at Page 25.

No representative appeared on behalf of the Department at the informal hearing and thus, Petitioner could not ask any questions of any representative as to the basis for the denial of the permit. Furthermore, Petitioner was never given copies of the Department's case file. Petitioner testified at the informal hearing on May 14, 2019; see Transcript, Appendix at Page 5. At that hearing, Petitioner introduced and discussed the importance of the New Jersey Expungement Order and the applicability of the Full Faith and Credit Clause. On May 20, 2019, the Department issued a Final Order denying the appeal without addressing the Full Faith and Credit argument at all; see Appendix at Page 19.

Petitioner filed a timely appeal with the Florida Court of Appeal for the Fifth District. That court affirmed the decision of the Department without explanation in a non-appealable PCA decision; see Appendix at Page 1. The court never addressed the applicability of the Full Faith and Credit Clause to the New Jersey Expungement Order. Petitioner filed an omnibus motion for rehearing/written opinion/clarification pursuant to Florida Court Rules. In addition, he petitioned for review *en banc*. All were denied and the court issued a Mandate on August 17, 2020; see Appendix at Page 4. This Petition for a Writ of Certiorari now follows.

B. Applicability of the Full Faith and Credit Clause

By way of background, in January of 2008 Congress enacted the NICS Improvement Amendments Act of 2008 (herein NIAA), Pub. L. 110-180, 121 Stat. 2559 (2008), which the federal government adopted in response to the Virginia Tech tragedy in April of 2007. The purpose of the Act was to encourage states to supply mental health records to the federal government in accordance with the Brady Handgun Violence Prevention Act of 1993, Pub. L. 103–159, 107 Stat. 1536 (1993).

One of the goals of the NIAA was to expand the national database of persons who had been committed for mental health treatment and to enhance the effective-

ness of federal law barring the purchase of firearms by such persons. However, the NIAA contained explicit provisions protecting the due process rights of these individuals by providing them a mechanism to obtain relief from the disabilities associated with a commitment, such as limitations on their ability to purchase or possess firearms.

It was never the intent of federal law to permanently bar persons who have received treatment for mental illness from owning firearms. The NIAA encouraged states to adopt laws that afforded relief from the disability by conditioning federal grants to states to upgrade their systems on the passage of such disability relief laws. 121 Stat. at 2568.

Under the NIAA, a qualifying state law is one that offers relief from the firearms disability to persons who have been committed to a mental institution and are disqualified pursuant to 18 U.S.C. 922(g)(4). See 121 Stat. 2569-70. Under a qualifying program, relief is mandated if the applicant meets a two-pronged standard of "lack of dangerousness" and the relief is "not contrary to the public interest":

> "[A] state court, board, commission, or other lawful authority shall grant the relief, pursuant to State law and in accordance with the principles of due process, if the circumstances regarding the disabilities referred to in paragraph (1), and the person's record and reputation, are such that the person will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest."

121 Stat. at 2570 (emphasis added). The qualifying program must also permit de novo judicial review if the initial decision is by a non-judicial entity. 121 Stat. §105(a)(3) at 2570.

The NIAA provides that if relief is granted pursuant to a qualifying law, "the adjudication or commitment . . . is deemed not to have occurred for purposes of 18 U.S.C. 922(d)(4). It is that provision which prohibits the sale of firearms to a person adjudicated as a mental defective or who has been committed to a mental institution, and 18 U.S.C. 922(g)(4) which prohibits the purchase, transportation or possession of firearms by such persons." See 121 Stat. 2570 (emphasis added)[1].

The New Jersey qualifying program which provides relief from legal disabilities is an Expungement of the commitment records if the petitioner satisfies the statutory criteria, found at N.J.S.A. 30:4-80.8 through 80.11. At the informal hearing,

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[1] For a concise summary of the NIAA and the conditions for relief see https://www.bjs.gov/content/pub/pdf/niaasrpc.pdf, sourced on August 28, 2020, and for a summary of the related federal firearms laws, see https://www.atf.gov/file/58791/download, sourced on August 28, 2020.

Petitioner submitted a copy of the Expungement Order issued by the New Jersey court pursuant those provisions. Notably, that law states:

> "If the court finds that the petitioner will not likely act in a manner dangerous to the public safety and finds that the grant of relief is not contrary to the public interest, **the court shall grant such relief** for which the petitioner has applied and, an order directing the clerk of the court to expunge such commitment from the records of the court." Id. (Emphasis added)

Once an expungement is granted, "the commitment shall be deemed not to have occurred and the petitioner may answer accordingly any question relating to its occurrence." N.J.S.A. 30:4-80.11.

Black's Law Dictionary, Fifth Edition, a venerable legal resource, defines the word "expunge" as:

> "Expunge: To destroy; blot out; obliterate; erase; efface designedly; strike out wholly. The act of physically destroying information-including criminal records -in files, computers, or other depositories."

New Jersey's Expungement Law is now in accord with the Federal guidelines as a 'Qualifying Relief from Disabilities' Program[2].

Petitioner availed himself of New Jersey's relief from disabilities law and successfully obtained an Expungement Order; Appendix . That Order was given to the hearing officer at the hearing before the Department on May 14, 2019. However, the hearing officer failed to consider the legal effect of the Expungement Order under the relevant section 790.06 (2)(j) Florida Statutes (2018), which plainly states:

> **790.06 License to carry concealed weapon or firearm.**
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> .....
>
> (2) The Department of Agriculture and Consumer Services shall issue a license if the applicant:
>
> .....
>
> (j) Has not been committed to a mental institution under chapter 394, or similar laws of any other state. An applicant who has been granted relief from firearms disabilities pursuant to 790.065 (2)(a)4 d **or pursuant to the**

[2] See the Assembly Statement to the new expungement bill, No. 4301, which specifically notes that the new expungement law was in direct response to the NIAA and the concerns of the U.S. Attorney-General, https://www.njleg.state.nj.us/2008/Bills/A4500/4301_S1.PDF, sourced on August 29, 2020.

law of the state in which the commitment occurred is deemed not to have been committed in a mental institution under this paragraph. (Emphasis added).

The Florida statute is a strikingly clear expression of legislative intent to allow persons formerly committed to a mental institution to regain their firearm rights upon a showing that the circumstances surrounding their commitment no longer apply, and that they are no longer dangerous to themselves or others. It was Florida's response to the NIAA.[3] The ban on possessing firearms was never intended to be a lifetime ban. People can and do recover from mental illness.

Research does not reveal any other Florida cases directly on point; the present case appears to be a case of first impression. Most cases deal with felons regaining their rights after conviction. By analogy, however, the case of Schlenther v. Department of State, Division of Licensing, 743 *So.2d* 536 (Fla. 2d DCA 1998) offers some guidance.

In 1969, Schlenther committed a felony in Connecticut where he resided at the time. Upon conviction his civil rights were suspended. Those civil rights were restored by a court order on January 24, 1973. Later that year he moved to Florida. In 1996 he applied for a concealed weapon permit which was granted in 1997. That permit was later administratively revoked because he had not sought restoration of his civil rights in the State of Florida.

The Second District Court of Appeal held that Florida must give full Faith and Credit to the Connecticut Order restoring his civil rights. That court stated:

> "He [Schlenther] did not arrive here [in Florida] under a disability. To the contrary, he arrived as any other citizen, with full rights of citizenship. Appellant must not now be required, twenty-five years later, to ask this State to restore his civil rights. They were never lost here.
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> ...
>
> Once another state restores the civil rights of one of its citizens whose rights had been lost because of a conviction in that state, they are restored, and the State of Florida has no authority to suspend or restore them at that point. The matter is simply at an end.
>
> **We conclude that the restoration of appellant's civil rights in Connecticut is entitled to full faith and credit in this State** and that the appellee erred in revoking appellant's concealed weapons permit. We reverse." Id. at 537 (emphasis added).

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[3]See https://www.fdle.state.fl.us/OGC/Summaries/2010/2010-Legislative-Summary.aspx (page 12), sourced on September 3, 2020.

The impact of the Full Faith and Credit Clause in the United States Constitution was settled over a century ago by the United States Supreme Court in Fauntleroy v. Lum, 210 *U.S.* 230 (1908). Fauntleroy holds that the Full Faith and Credit Clause required Mississippi to enforce a valid Missouri judgment although the judgment was for a gambling obligation on futures contracts, which was specifically prohibited by the laws of Mississippi. The Florida Fifth District Court of Appeals has specifically noted that the law "has not changed since that decision." See, M&R Invs. Co. v. Hacker, 511 *So. 2d* 1099 (Fla. 5th DCA 1987)(enforcement of a Nevada judgment for a gambling debt, which is not permitted in Florida).

The Florida Supreme Court has observed that principles of comity and full faith and credit apply even if the reviewing court disagrees on the merits with the sister state. In Ledoux-Nottingham v. Downs, 210 So. 3d 1217, 1223 (Fla. 2017), a grandparent visitation case from Colorado, the Florida Supreme Court cited with approval a 2016 decision of the United States Supreme Court, wherein that Court stated:

> "With respect to judgments, "the full faith and credit obligation is exacting." Baker v. General Motors Corp., 522 U.S. 222, 233 (1998). "A final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land." Ibid. A State may not disregard the judgment of a sister State because it disagrees with the reasoning underlying the judgment or deems it to be wrong on the merits. On the contrary, "the full faith and credit clause of the Constitution precludes any inquiry into the merits of the cause of action, the logic or consistency of the decision, or the validity of the legal principles on which the judgment is based." Milliken v. Meyer, 311 U.S. 457 (1940)." V.L. v. E.L., ___ U.S. ___, 136 S.Ct. 1017,1020 (2016).

Accord, Dept. of Children & Families v. J.H.K., 834 So. 2d 298 (Fla. 5th DCA 2002)(termination of parental rights in New Mexico); Kemp & Assocs. v. Chisholm, 162 So. 3d 172 (Fla. 5th DCA 2015) (recognition of Texas adoption judgment for purposes of inheritance in Florida); Dept. of Children & Families v. V.V., 822 So. 2d 555 (Fla. 5th DCA 2002)(termination of parental rights in Mississippi); Maine v. Hanson, 36 So. 3d 879 (Fla. 5th DCA 2010)(effect of foreign judgment which had been docketed in Florida).

Based on this line of cases, it is indisputable that the State of Florida must give full faith and credit to the Expungement Order from New Jersey. Failure to do so by the Department is a gross abuse of discretion and reversible error. Petitioner has already done everything in New Jersey that he is required to do; his commitment was expunged in accordance with federal guidelines. Petitioner should not now be required years later to avail himself of Florida's relief from disabilities statute under FS 790.065 (2)(a)4d, which only applies to residents who were committed in the State of Florida. Because his commitments were in New Jersey, the New Jersey

Expungement Order is dispositive and final. Failure to recognize such leaves Petitioner without a remedy and permanently deprived of his Second Amendment rights.

The irony here is that Petitioner could lawfully possess firearms in New Jersey after the Expungement Order was issued, but now cannot do so in Florida under the Department's mistaken interpretation of Florida law. The result is also a clear violation of the Florida Constitution and the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution in that Florida is discriminating against Petitioner because of the legally expunged mental health records.

VII. REASONS FOR GRANTING THE WRIT

Although the United States Supreme Court generally only considers matters of great public importance, the present case should be taken up. Petitioner has been consistently denied his rights by the State of Florida, which has now taken action that has violated his Second Amendment rights permanently. There is no further appeal in the State of Florida because of the unique application of per curiam affirmed (PCA) decisions. One can only conclude that the Florida court denied relief without even considering the impact of the Full Faith and Credit Clause and the Expungement Order on the applicable law. The opinion of the Department of Agriculture is now the official position of the State of Florida in this matter. That opinion is inherently flawed for not even addressing the Full Faith and Credit Clause, and therefore the holding of the Court of Appeals must fall. The United States Supreme Court is now the court of last resort which can correct this gross abuse of discretion.

Although this case may not be a matter of great public importance, it is for Petitioner. Without this honorable Court's intervention, he has no other remedy to correct this manifest injustice. Petitioner and persons like him deserve a full and fair hearing on the merits which has been consistently denied in Florida. Recovered mentally ill citizens deserve a second chance, and Petitioner has followed all applicable law to get that chance. Please grant this petition.

VIII. CONCLUSION AND PRAYER FOR RELIEF

Appellee's failure to give Full Faith and Credit to the Expungement Order from New Jersey was reversible error, and the Court should reverse and remand the matter back to the Department of Agriculture and Consumer Services with specific instructions to issue the concealed carry permit if all other statutory criteria are met. Failing that, the Court should reverse and remand the matter back to the Department for a formal hearing before a real judge instead of a supervisor as Petitioner originally requested.

DATED this 8th day of October, 2020.

Respectfully submitted,

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