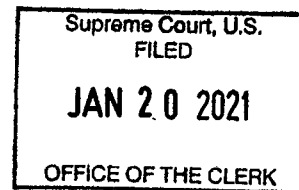


20-6963

IN THE SUPREME COURT OF THE UNITED STATES



F. Allan Midyett, Petitioner

v.

Robert Wilkie, Secretary,
Department of Veterans Affairs, Respondent

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

PETITION FOR WRIT OF CERTIORARI

Petitioner
F. Allan Midyett, pro se
511 S.W. 3rd Avenue, #223
Rochester, MN 55902
623-466-4667

QUESTION PRESENTED

The question in this case is whether the Secretary of the Department of Veterans Affairs can refuse to comply with provisions of 25 U.S.C. Ch. 36 to take adverse acts causing harm to an adult American Indian employee, who is a member of a federally recognized Indian tribe, and/or former employee of the Department of Veterans Affairs (DVA).

CORPORATE DISCLOSURE STATEMENT

Petitioner F. Allan Midyett is an individual and thus does not issue stock and does not have a parent corporation or any publicly held company that owns 10% or more stock in him as an individual.

See Fed. R. App. P. 26.1(a)

PARTIES TO THE PROCEEDING

Petitioner is F. Allan Midyett, M.D.

Respondent is Robert Wilkie, Secretary, Department of Veterans Affairs

LIST OF ALL COURTS

The United States Court of Appeals for the Eighth Circuit,
Case No. 20-1032, F. Allan Midyett, M.D. v. Robert Wilkie,
Secretary, Department of Veterans Affairs, Appeal

The United States District Court for the Western District of Arkansas
Fayetteville, Division

Equal Employment Opportunity Commission

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Petitioner, pro se, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case pursuant to 28 U.S.C. 1254.

OPINIONS BELOW

The opinion of the court of appeals is unpublished.

JURISDICTION

The judgment of the Court of Appeals was entered on August 20, 2020. Petition for re-hearing en banc was denied on October 13, 2020. Petition for stay was denied on October 20, 2020. The covid-19 extensions for a writ of certiorari are extended to and including January 28, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

STATUTORY PROVISIONS INVOLVED

25 U.S.C. Ch. 36: Indian Employment, Training, and Related Services.

STATEMENT

The question in this case is whether the Secretary of the Department of Veterans Affairs can refuse to comply with provisions of 25 U.S.C. Ch. 36 to take adverse acts causing harm to an adult American Indian employee, who is a member of a federally recognized Indian tribe, and/or former employee of the Department of Veterans Affairs (DVA).

Petitioner is an adult Cherokee American Indian, who is a member of the Cherokee Nation, who was an employee of DVA at relevant times herein. Petitioner is an Indian as defined in 25 U.S.C. Ch. 36. There is no document in evidence in this

matter DVA, a federal agency as defined in 25 USC Ch. 36, does not have a program as set out in 25 USC Ch. 36. Pertinent provisions of §3404, contained therein, provide:

(iii) creating or enhancing employment opportunities; (v) assisting Indian . . . adults to succeed in the workforce; (vi) encouraging self-sufficiency; (viii) facilitating the creation of job opportunities; (ix) economic development; (x) any services related to the activities described in clauses (i) through (x).

Defendant has produced no document of compliance with this statute in evidence in this matter in regard to Petitioner. 25 U.S.C. §479 sets out notice by publication in the Federal Register annually of the list of all Indian tribes eligible “for the special programs and services provided by the United States to Indians because of their status as Indians”. This put all parties including the Courts on notice.

While there are prior orders of the district court clearly stating Petitioner is a Cherokee American Indian, there is no prior court order applying or denying any provision of 25 U.S.C. Ch. 36 to Petitioner by Defendant. The Court of Appeals did not apply nor deny any provision of 25 USC Ch. 36 to Petitioner by Defendant.

The District Court order on Petitioner’s Motion 60(b), Doc. 20¹ in Case No. 5:19-cv-05152, states only: “Order denying Motion to Set Aside Order” and nothing more. Doc. 21,² Case No. 5:19-cv-05152 filed December 30, 2019. There is no explanation. The Appellate Court did not follow its standard set out in *Reid ex rel. M.A.R. v. BCBSM, Inc.*, 787 F.3d 892 (8th Cir. 2015), where the Court held “reviewing ruling on Rule 60(b) motion for abuse of discretion. . . Here, the district court . . .

¹Appendix L

²Appendix D

provided no explanation for doing so. . .we remand the case to the district court.” The Appellate Court chose to treat Petitioner differently from its holding in the *Reid* case where it remanded that case.

REASONS FOR GRANTING THE PETITION

This Court’s review is warranted so that the legislative intent of 25 U.S.C. Ch. 36 will not be undermined. Congress clearly expressed its legislative intent in 25 U.S.C Ch. 36, §3401 et seq: “all Federal programs that emphasize the value of work” then set out the provisions in §3404 shown above. This case demonstrates the harm caused when the legislative intent is not followed. This is demonstrated in ¶16, Doc. 20: Petitioner has been irrevocably harmed as demonstrated by the holding in *Walker v. Mem’l Health Sys. of E. Tex.*, 231 F.Supp.3d 210 (E.D. Tex., 2017) that an adverse report to the NPDB causes irreparable harm to the physician and his ability to maintain employment. [Petitioner] has been without employment. Defendant has produced no document in evidence in this matter to show compliance with the provisions of 25 U.S.C. Ch. 36 in regard to Petitioner by taking adverse acts in violation of this statute causing him harm by reporting him to the National Practitioner Data Bank (NPDB), refusing him a trial de novo on his Title VII claim in federal court as provided in Section 717(c) of Title VII of the Civil Rights Act of 1964, as set out in *Chandler v. Roudebush*, 425 U.S. 840, 96 S.Ct. 1949, 48 L.Ed.2d 416 (1976). This creates a split among the circuits that follow *Chandler* among which are at least the 4th circuit, the 6th Circuit, the 9th circuit, the 10th Circuit, and the D.C. Circuit.

This case is worthy of further review because virtually every circuit that has considered a Motion 60(b) has ruled the same thing: remand. These circuits are the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 9th, 11th, and D.C. circuits. The 8th Circuit in this matter did not remand in regard to American Indian Petitioner. This creates a split among the circuits. I am proceeding pro se. I filed a petition to proceed in forma pauperis which was granted by the District Court in Case No. 5:14-cv-05016. (§4, Doc. 20 reference to case) My request to the Court to appoint an attorney to represent me was refused. In that case, in my Original Complaint, I set out the ADA, my request for reasonable accommodation for hearing impairment, hypertension, and that my wife is being treated for ovarian cancer. My wife who is an attorney tried to assist me for as long as she could. See *SAI v. Transp. Sec. Admin.*, 315 F.Supp.3d 218 (D. D.C. 2018) regarding pro se litigants. I refer to myself herein as Petitioner for legal purposes.

The Order denying the Motion 60(b) states only: “Order denying Motion to Set Aside Order” and nothing more. There is no explanation. Denial of Petitioner’s Motion 60(b) is denial of its entire contents containing a plethora of issues that could not be “mechanically” ruled upon as that term has been used by other Circuit Courts. As set out above, rehearing was denied. Petitioner set out in his Motion 60(b) significant issues and facts including the EEO Decision in §3, Doc. 20; in §4, Doc. 20, the denial of the opportunity to present his case. This raises the EEO Decision for review based on denial of the Motion 60(b). Denial of a trial de novo on a Title VII claim in federal court violates Section 717(c) of Title VII as set out in *Chandler* above. This demonstrates denial of provisions of 25 USC §3404 set out above in regard to

Petitioner to cause harm to Petitioner as set out in ¶16, Doc. 20 above. This demonstrates violation of due process of law in regard to Petitioner, a person protected under 25 U.S.C. §3404.

I. THE COURT OF APPEALS' DECISION WARRANTS REVIEW BY THIS COURT

A. The Court of Appeals' decision squarely conflicts with decisions by the 4th circuit, the 6th Circuit, the 9th circuit, the 10th Circuit, and the D.C. Circuit.

Petitioner was denied a trial de novo on his Title VII claim in federal court in violation of *Chandler v Roudebush* creating a split among the circuits.

1. Petitioner's Motion 60(b) specifically references EEOC Decision presenting Question of Considerable Importance Regarding Split Among the Circuits regarding Chandler v. Roudebush

¶3, Doc. 20, makes reference to EEOC Decision. Petitioner initiated EEO counseling on December 20, 2011. On March 21, 2012 he filed EEO complaint setting out discrimination and harassment. This demonstrates Defendant's denial of provisions of 25 USC §3404 in regard to Petitioner. Petitioner is Cherokee, American Indian. Defendant has produced no document in evidence in this matter: (1) Petitioner was not an employee on March 21, 2012; (2) Petitioner has been allowed any trial de novo in federal court on his Title VII claims. *Chandler* sets out a "trial de novo", not a "review of the administrative record". Because Petitioner did not receive a trial de novo as set out in *Chandler*, this creates a split among the circuits that follow *Chandler v. Roudebush* among which are at least the 4th circuit, the 6th Circuit, the 9th circuit, the 10th Circuit, and the D.C. Circuit. Certiorari is warranted to correct this

error and to enforce the meaning of the statute as set forth in *Chandler* in regard to Petitioner, an adult American Indian.

II. THE COURT OF APPEALS HAS HELD ABUSE OF DISCRETION TO PROVIDE NO EXPLANATION FOR DENYING MOTION 60(b)

A. The Court of Appeals' decision squarely conflicts with decisions by 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 9th, 11th, and D.C. circuits - all remanding Motions 60(b)

The District Court order from which Petitioner appeals states only: "Order denying Motion to Set Aside Order" and nothing more. There is no explanation. The Appellate Court did not remand.

This case is worthy of further review because virtually every circuit that has considered a Motion 60(b) has ruled the same thing: remand. These circuits are the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 9th, 11th, and D.C. circuits. The 8th Circuit in this matter did not remand in regard to American Indian Petitioner. This creates a split among the circuits.

The Appellate Court did not follow the standard in *Reid ex rel. M.A.R. v. BCBSM, Inc.*, 787 F.3d 892 (8th Cir. 2015) where it found no explanation was ground to remand but chose to treat Petitioner differently.

The 1st Circuit in the case of *Bouret-Echevarría v. Caribbean Aviation Maint. Corp.*, 784 F.3d 37 (1st Cir. 2015) sets out a cogent discussion. "We review the denial of a Rule 60(b) motion for abuse of discretion. See *Ahmed v. Rosenblatt*, 118 F.3d 886, 891 (1st Cir.1997). "Abuse occurs when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper

factors are assessed, but the court makes a serious mistake in weighing them.” *Indep. Oil & Chem. Workers of Quincy, Inc. v. Procter & Gamble Mfg. Co.*, 864 F.2d 927, 929 (1st Cir.1988). . . In the first instance, an inquiring court should assume the truth of fact-specific statements contained in a Rule 60(b)(6) motion.”

Petitioner’s Motion 60(b)(6) contained such “fact-specific statements” setting out sworn statements.

¶21, Doc. 20: Petitioner is ABR CAQ³ neuroradiologist, published author of two internationally published medical textbooks, previously testified as medical expert; ¶22: testimony on Petitioner’s qualifications as only one who could read MRI; ¶23: white radiologist disparate treatment testimony; Chief of Radiology testimony of hearsay upon hearsay and lack of understanding of RVU values; ¶26: W.D. Ark. criminal charges filed against Defendant’s employee Levy; ¶27: DVA employee testimony Levy was told not to provide PSB evidence to Petitioner

In the *Bouret* factors, Petitioner satisfies the requirements in his Doc. 20. Timing, Exceptional Circumstances of due process violation, meritorious claim or defense. The *Bouret* Court held:

“These fact-specific portions of Bouret–Echevarria's motion could not be dismissed. . . They had a probative weight that the district court ignored.” *Id.* at 47.

That Court held the district court abused its discretion, vacated the district court’s Order and remanded for hearing in conformity with the provisions of the Appellate opinion.

In this matter, the Court of Appeals refused to remand and did not find abuse of discretion in regard to Petitioner.

³American Board of Radiology Certificate of Added Qualifications in Neuroradiology

B. Title 25 - 25 U.S.C. Ch. 36: Indian Employment, Training And Related Services

Defendant has refused compliance in regard to Petitioner with any part of 25 U.S.C. Ch. 36: Indian Employment, Training and Related Services which includes § 3404 setting out employment protections for American Indians and provides both the Attorney General and Secretary of Veterans Affairs shall coordinate federally funded employment and related services programs. Defendant has produced no document in evidence in this matter that would exclude Defendant from 25 U.S.C. Ch. 36.

Defendant has produced no document in evidence in this matter to demonstrate:

- (1) Defendant does not have a program as set out in 25 U.S.C. Ch. 36.
- (2) Petitioner is not an adult American Indian who qualifies for the protections set out in 25 U.S.C. Ch. 36.
- (3)Defendant applied the provisions of 25 U.S.C. Ch. 36 to Petitioner.
- (4) Defendant had any other employee at VHSO who was a member of a federally recognized Indian tribe - the definition of "Indian" in 25 U.S.C. Ch. 36.

Doc. 20, p. 1 states Petitioner is an American Indian. ¶3, Doc. 20, Petitioner is Cherokee. ¶27, Doc. 20, Petitioner is the only employee in this matter who is a member of a federally recognized American Indian tribe. See 25 U.S.C. §479. ¶32, Doc. 20:

"The Secretary shall publish in the Federal Register a list of all Indian tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

"(b) Frequency of publication

The list shall be published within 60 days of November 2, 1994, and annually on or before every January 30 thereafter.”

In the Federal Register, Vol. 85, No. 20, p. 5463 is listed Cherokee Nation. Because of the requirement for publication in the Federal Register of the “list of all Indian tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians” “annually on or before every January 30”, this put all parties, including the Courts on notice. Because 25 U.S.C. Ch. 36 is federal law entitled “Indian Employment, Training and Related Services” that put all parties including the Courts on notice it is one of the “special programs and services provided by the United States to Indians because of their status as Indians”. These are “official publications” as referred to in F.R.C.P. 44(a)(1)(A).

¶49, Doc. 20: “[Petitioner] was the only Cherokee American Indian in the Department of Radiology at VHSO. Perforce, any and all selection rates regarding [Petitioner] Cherokee American Indian Dr. Midyett fall well within this “rule of thumb for courts” in race discrimination.”

¶47, Doc. 20, citing *Ricci v. DeStefano*, 557 U.S. 557, 129 S.Ct. 2658, 174 L.Ed.2d 490 (2009) sets out the impact of four fifths or 80% rule -

“A selection rate for any race, sex, or ethnic group which is less than four fifths ($4/5$) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact”

¶47 sets out 29 CFR §1607.9 that sets out no assumption of validity of selection activities. ¶49 demonstrates Petitioner was a federal employee and as the only Cherokee American Indian falling well within this “rule of thumb for courts” in race

discrimination. ¶47, Doc. 20, Chief of Staff John Henley states the radiologist at a PSB should be able to see the documentation. ¶50, Doc. 20, set out above regarding white employee Hamric . ¶9, Doc. 20, Petitioner sets out there is no document in evidence in this matter to show Levy, PSB Chair, produced any evidence to [Petitioner]. This shows the evidence of adverse impact under the 80% rule in regard to Petitioner.

Because Defendant has refused to comply with provisions of 25 U.S.C. §3404 in regard to Petitioner, he is now and has been unemployed. Defendant has produced no document in this matter to show legitimate reasons why Defendant has refused compliance with this statutory law in regard to Petitioner. Petitioner believes Defendant's persistent violation of pertinent provisions of 25 U.S.C. §3404 in regard to Petitioner demonstrates "any other reason that justifies relief" as set out in F.R.C.P. 60(b)(6). Petitioner's Motion 60(b) included F.R.C.P. 60(b)(6). See Doc. 20.

C. Defendant refused 28 U.S.C. 535(b) compliance requirements regarding Levy now charged in W.D. Ark. with criminal charges

Doc. 20, p. 1 sets out criminal charges against Defendant's employee, Robert Levy. ¶19, Doc. 20, Petitioner sets out he hand delivered his written opposition in his EEO claim to Defendant's facility director Mark Enderle on December 20, 2011 containing disclosed Agency (DVA) medical errors which Enderle described as reading like a pathology textbook. Although Defendant's employee Robert Levy is now charged with criminal conduct involved with his medical employment with [Defendant], Defendant has not complied with 28 U.S.C. 535(b) by disclosing Agency (DVA) wrongdoing in this matter causing adverse acts causing harm to Petitioner, who is a

former federal employee.

¶27, Doc 20: This “is demonstrated by the sworn testimony of [Defendant’s] employee Jerry Duncan where he testifies to advising Levy to withhold evidence from [Petitioner]. In the 07/14/2015 EEO Tr. P. 403 [Defendant’s] employee Jerry Duncan testified Robert Levy was given advice not to respond to [Petitioner’s] request for PSB evidence alleged against him despite the fact that the request was made pursuant to provisions of VHA Handbook 1100.19. This handbook says it “must be followed”. [emphasis added] This predates any criminal charges against Robert Levy. This shows [Defendant’s] personnel knew at that time Levy was a problem. They had [Petitioner’s] written opposition dated December 20, 2011 that “these misses read like a pathology textbook”.

At the request of Defendant the U.S. Attorney for W.D. Ark. chose to represent a presumed criminal defendant, Robert Levy, in a civil matter in 2014 against Petitioner protected by federal statutory employment protections as set out in 25 U.S.C. §3404 in that civil matter involving the presumed criminal defendant.

Petitioner sets out Case No. 5:14-CV-05016 in ¶4 of his Motion 60(b). Petitioner’s Original Complaint in 2014 is file-marked 1-14-2014 in the W.D. Ark.. Defendant has produced no document in evidence in this matter setting out how the W.D. of Ark. U. S. Attorney in his representation of Robert Levy in 2014 would not be a conflict of 28 C.F.R. §50.15(a) as discussed in *Lindsey, In re.*:

“Indeed, before an attorney in the Justice Department can step into the shoes of private counsel to represent a federal employee sued in his or her individual capacity, the Attorney General must determine whether the representation

would be in the interest of the United States. See 28 C.F.R. § 50.15(a).” Id. at 1273.

Petitioner’s Motion 60(b), p. 1, put the Court on notice of criminal charges against Defendant’s employee Dr. Levy, a federal employee, involved in this matter and put both Defendant and the Court on notice of 28 U.S.C. 535(b) compliance requirements in regard to federal employees and federal lawyers involved in this matter as set out in *Lindsey, In re*, 158 F.3d 1263 (D.C. Cir. 1998) providing an in-depth discussion of federal employee’s responsibilities under 28 U.S.C. §535(b) Defendant has produced no document in evidence in this matter to show compliance with 28 U.S.C. §535(b) requirements disclosing Agency (DVA) wrongdoing in this matter. Petitioner believed he could rely on legitimate enforcement of federal statutes. This demonstrates Defendant’s violation of 25 U.S.C. §3404 as set out above in regard to Petitioner.

- 1. Defendant’s employee Robert Levy now charged in the W.D. Ark. by the U.S. Attorney with two counts of having made false statements in violation of 18 U.S.C. 1001(a)(2), with two counts of having made false statements in connection with health care services in violation of 18 U.S.C. 1035(a)(2), and charged with three counts of involuntary manslaughter**

Doc. 20, p. 1 sets out criminal charges against Defendant’s employee, Robert Levy. ¶19, Doc. 20, Petitioner sets out he hand delivered his written opposition in his EEO claim to Defendant’s facility director Mark Enderle on December 20, 2011 containing disclosed Agency (DVA) medical errors which Enderle described as reading like a pathology textbook. Although Defendant’s employee Robert Levy is now charged with criminal conduct involved with his medical employment with Defendant, Defendant has not complied with 28 U.S.C. 535(b) by disclosing Agency (DVA)

wrongdoing in this matter causing adverse acts causing harm to Petitioner, who is a former federal employee.

2. ***In re Lindsey*: “at the very least “[section] 535(b) evinces a strong congressional policy that executive branch employees must report information “relating to violations of Title 18, the federal criminal code”**

“[G]overnment attorneys stand in a far different position from members of the private bar. Their duty is not to defend clients against criminal charges and it is not to protect wrongdoers from public exposure. . . Each part of the government has the obligation of carrying out, in the public interest, its assigned responsibility in a manner consistent with the Constitution, and the applicable laws and regulations . . .Indeed, before an attorney in the Justice Department can step into the shoes of private counsel to represent a federal employee sued in his or her individual capacity, the Attorney General must determine whether the representation would be in the interest of the United States. See 28 C.F.R. § 50.15(a)...[i]f there is wrongdoing in government, it must be exposed.... [The government lawyer's] duty to the people, the law, and his own conscience requires disclosure...."to allow any part of the federal government to use its in-house attorneys as a shield against the production of information relevant to a federal criminal investigation would represent a gross misuse of public assets." *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 921 (8th Cir.), cert. denied, --- U.S. ----, 117 S.Ct. 2482, 138 L.Ed.2d 991 (1997). . . [a]ny information ... received in a department or agency of the executive branch of the Government relating to violations of title 18 involving Government officers and employees shall be expeditiously reported to the Attorney General. . . at the very least "[section] 535(b) evinces a strong congressional policy that executive branch employees must report information" relating to violations of Title 18, the federal criminal code . . . As the House Committee Report accompanying section 535 explains, "[t]he purpose" of the provision is to "require the reporting by the departments and agencies of the executive branch to the Attorney General of information coming to their attention concerning any alleged irregularities on the part of officers and employees of the Government." *Lindsey, In re*, 158 F.3d 1263 (D.C. Cir. 1998)

There is no requirement for Petitioner to have made any motion to enforce 28 U.S.C. 535(b). Petitioner made the report of Agency (DVA) medical errors to Defendant's facility director Mark Enderle in December, 2011 who described the

Agency (DVA) medical errors Petitioner reported to him as “reading like a pathology textbook”. The onus is on the federal facility director, Mark Enderle, and the federal lawyers to comply with this statute. Defendant has produced no document in evidence in this matter to show that in any case involving Petitioner this statute was complied with in regard to Petitioner. Petitioner believed he could rely on legitimate enforcement of federal statutes. There is no disputing Defendant’s employee Robert Levy has been indicted by the same U. S. District Attorney for the W.D. Ark. who chose to defend Levy in a civil matter against Petitioner, a former federal employee, who is a person Title 25 is enacted to protect. This representation at the request of Defendant demonstrates Defendant’s violation of 25 U.S.C. §3404 as set out above in regard to Petitioner.

Petitioner sets out Case No. 5:14-CV-05016 in ¶4 of his Motion 60(b). Petitioner’s Original Complaint in 2014 is file-marked 1-14-2014 in the W.D. Ark.. Defendant has produced no document in evidence in this matter setting out how the U. S. Attorney for the W.D. Ark. in his representation of Robert Levy in 2014 would not be a conflict of 28 C.F.R. §50.15(a) as discussed in *Lindsey, In re.* above.

The inference is the civil division of the U.S. Attorney was defending in 2014 in a civil matter the same person [Levy] who was most likely being investigated for criminal conduct while at the same time refusing to give equal consideration to federal laws the Attorney General was charged to coordinate for the benefit of Petitioner, a former federal employee, in the same civil case.

Because Petitioner’s Original Complaint in the W.D. Ark. Case No. 5:14-CV-

0516 is file-marked 1-14-2014, the relevant question is: do any of the Levy charges involve the year 2014? This would be during the time period of the 2014 Levy civil case with Petitioner, a former federal employee. The inference is yes, they do. Would this create a conflict under 28 CFR 50.15(a)? The inference is yes it would create a conflict. The next relevant questions are: how many of those criminal charges against Levy involve the year 2014? And how serious are those criminal charges? Is one of these criminal charges manslaughter? The inference is yes, these criminal charges against Levy involve the time period 2014 when the U.S. Attorney for the W.D. Ark. chose to defend Defendant's employee Levy in a civil matter against an adult American Indian who has federal statutory employment protections under Title 25 of whom Petitioner, a former federal employee who is a person Title 25 is enacted to protect, is one. This is a conflict under 28 CFR 50.15(a). This creates the presumption of the violation of 28 U.S.C. § 535(b) by Defendant's refusing to disclose the answers to these relevant questions. Defendant's employee Kent Smith was "Of Counsel" in Case No. 5:14-CV-05016.

- (a) Defendant's employee attorney Kent Smith participated in 2014 Levy civil case with no document in evidence showing 28 U.S.C. §535(b) compliance in regard to Petitioner demonstrating §3404 violation**

Defendant's employee Kent Smith, an attorney, is listed as "Of Counsel" in Case No. 5:14-cv-05016 but there is no document in evidence in this matter to show compliance with 28 U.S.C. §535(b) in regard to Petitioner in that case demonstrating violation of §3404 as set out above. Defendant has produced no document in evidence

in this matter to show when Defendant's employee Robert Levy may have initially had investigations begun against him. ¶19, Doc. 20, Petitioner sets out that he hand delivered his written opposition in his EEO claim to Defendant's facility director Mark Enderle on December 20, 2011 setting out disclosed Agency (DVA) medical errors which Enderle described as reading like a pathology textbook; the inference is the investigation began against Defendant's employee Levy at that time. Defendant has produced no document in evidence in this matter to show the criminal investigation into Defendant's employee Robert Levy did not include 2011. Defendant has produced no document in evidence in this matter to show Defendant's compliance with 28 U.S.C. § 535(b) as set out in *Lindsey, In re* in regard to Petitioner, whose employment is protected by provisions of Title 25. Defendant has produced no document in evidence in this matter to show how far back the investigation into Defendant's employee Robert Levy actually went, i.e., to what year did the investigation reach back. It may well be Petitioner's disclosures were the trigger for this investigation that resulted in criminal charges against Levy.

¶48, Doc. 20 sets out Defendant's personnel stated [Petitioner] is the only radiologist denied the evidence at any and all Professional Standards Board hearings. Perhaps the reason for this is because in the mere handful of cases before the PSB Defendant's employee Robert Levy chaired regarding Petitioner, there were cases involving Robert Levy as a participating pathologist. That may be one of the reasons Robert Levy chose to violate provisions of 42 U.S.C. §11112 by refusing to provide a record of the proceeding in regard to Petitioner. Defendant has produced no document

in evidence in this matter to contradict this.

¶27, Doc 20: This is the correlation in the circumstances between the fraudulent statements attributed to [Defendant's employee] Levy regarding [Petitioner]. [Petitioner] is a witness having material facts to those circumstances. This is demonstrated by the sworn testimony of [Defendant's] employee Jerry Duncan where he testifies to advising Levy to withhold evidence from [Petitioner]. In the 07/14/2015 EEO Tr. P. 403 [Defendant's] employee Jerry Duncan testified Robert Levy was given advice not to respond to [Petitioner's] request for PSB evidence alleged against him despite the fact that the request was made pursuant to provisions of VHA Handbook 1100.19. This handbook says it "must be followed". [emphasis added] This predates any criminal charges against Robert Levy. This shows [Defendant's] personnel knew at that time Levy was a problem. They had [Petitioner's] written opposition dated December 20, 2011 that "these misses read like a pathology textbook".

This demonstrates the violation of 28 U.S.C. § 535(b) as set out in *Lindsey, In re* in regard to Petitioner protected by provisions of Title 25. This raises the presumption Defendant's employee Robert Levy was under investigation at that time. Criminal defendants are usually told not to provide incriminating evidence, commonly known as "Miranda warnings". The PSB pursuant to provisions of 42 U.S.C. §11112 should have a record of the proceedings. Defendant's employee Levy chose to violate this statutory provision to avoid this record. This provides the presumption the criminal investigation of Defendant's employee Levy began with Petitioner's disclosures to Defendant's facility director Mark Enderle in 2011. The PSB Levy

chaired in regard to Petitioner was in February 2012. See ¶47, Doc. 20. Defendant has produced no document in evidence in this matter to show otherwise. Defendant has produced no document in evidence in this matter to show compliance with 28 U.S.C. § 535(b) as set out in *Lindsey, In re*. This enabled presumed criminal defendant Levy, his employee, to continue in his course of action. Defendant has produced no document in evidence in this matter to show how Levy complied with 25 USC §3404 as set out above in regard to Petitioner at this PSB Defendant's employee Levy chaired. This demonstrates acts that have caused irreparable harm to Petitioner as set out in ¶16, Doc. 20, above.

Defendant has produced no document in evidence in this matter to show there were no criminal charges against his employee Robert Levy, that Levy committed no criminal act in the relevant time period, especially the year 2014. This demonstrates Defendant's violation of 25 U.S.C. §3404 as set out above in regard to Petitioner. This demonstrates evidence of "other misconduct that prevented movant from fully and fairly presenting his case" as set out in Appellate Court Order.

3. No Gutierrez Court adjudication and Order of scope of employment regarding Defendant's employee Robert Levy in 2014 civil case

In ¶4 of Petitioner's Motion 60(b) is set out Case No. 5:14-CV-05016 wherein Petitioner specifically pled he was denied the opportunity to present his case, denied the right to confront and cross-examine any witness. This prevented [Petitioner] from having a fair and impartial hearing and fairly and fully presenting his case. This tainted all other matters after it.

This calls attention to Bouret factor (2). There is no Attorney General certification in Case No. 5:14-CV-05016 that Defendant's employee Robert Levy was acting in the scope of employment. In Case No. 5:14-cv-0516-TLB, [Petitioner] sets out several claims that "sound in tort" as well as the supporting statutory violation. Petitioner cited federal statutes. Petitioner also attached exhibits pursuant to F.R.C.P. 10, among which was one that he has an Indian preference for employment. This put [Defendant] and the Court on notice of Title 25 regarding [Petitioner]; no other minority has such statutory "employment preference". Under "Relief Requested" Petitioner requests damages for loss of income, particularly including health insurance benefits, pain, physical distress, such other relief, injunctive relief, equitable relief, among other things. In that case Defendant's employee Kent Smith is listed as "Of Counsel".

28 CFR 50.15 provides for representation of a federal employee

"(hereby defined to include present and former Federal officials and employees)"
"when the actions for which representation is requested reasonably appear to have been performed within the scope of the employee's employment"

"Representation is not available to a federal employee whenever:

"(1) The conduct with regard to which the employee desires representation does not reasonably appear to have been performed within the scope of his employment with the federal government;

"(ii) That the Department of Justice will not assert any legal position or defense on behalf of any employee sued in his individual capacity which is deemed not to be in the interest of the United States."

There is no Attorney General certification of employment for Defendant's employee Robert Levy in Case No. 5:14-cv-0516-TLB.

"If the local U.S. Attorney, to whom the Attorney General has delegated responsibility, refuses certification, the employee can make a federal case of the matter by alleging a wrongful failure to certify. See § 2679(d)(3). The federal employee's claim is one the U.S. Attorney has no incentive to oppose . . . the U.S. Attorney will feel a strong tug to certify, even when the merits are cloudy. . . . the Act specifically allows employees whose certification requests have been denied by the Attorney General, to contest the denial in court. § 2679(d)(3) . . . the United States will be substituted as the party defendant. § 2679(d)(2). . . . the scope-of-employment judgment determinative of substitution can and properly should be checked by the court, i.e., the Attorney General's scarcely disinterested certification on that matter is by statute made the first, but not the final word. . . . In adjudicating the scope-of-federal-employment question "at the very outset," the court inevitably will confront facts relevant to the alleged misconduct The local U.S. Attorney, whose conflict of interest is apparent, would be authorized to make final and binding decisions insulating both the United States and federal employees like Lamagno from liability while depriving plaintiffs of potentially meritorious tort claims." See *Gutierrez de Martinez v. Lamagno*, 115 S.Ct. 2227, 515 U.S. 417, 132 L.Ed.2d 375 (1995)

The 5th Circuit held the *Gutierrez* decision is in:

"accord with traditional understandings and basic principles: that executive determinations generally are subject to judicial review and that mechanical judgments are not the kind federal courts are set up to render". *Garcia v. United States*, 62 F.3d 126, (5th Cir. 1995)

The court in Case No. 5:14-cv-05016 did not adjudicate and Order that Levy was acting in the scope of his office or employment and substitute the United States. There was no order for joinder of the United States by the Court under Fed. R. Civ. Pro. 19(a)(1) indicating the Court did not believe it could not "accord complete relief among existing parties" or where a party's absence may impair its ability to protect its interests or subject it to multiple claims. The parties were [Petitioner] and Defendant's employee Levy. The United States was never made a party. Because there was no appeal of this Case No. 5:14-cv-0516-TLB , Petitioner believed he could rely on the Court to enforce that there was no Order that Levy was acting in the scope of his

employment as set out in *Gutierrez*.

The Attorney General did not certify Levy was acting in the scope of his office or employment. Petitioner did not raise this issue. If Defendant's employee Levy had raised the issue pursuant to 28 U.S.C. 2679 (d)(3) and the Court found in Levy's favor, then the United States would have been substituted as defendant. See *Gutierrez*. There was no adjudication and Order Levy was acting in the scope of his employment. There was no Order for joinder of the United States by the Court. The parties were [Petitioner] and Defendant's employee Levy. Since there is no Attorney General certification that Levy was acting in the scope of his employment and no Court adjudication and Order that Levy was acting in the scope of his employment, this raises the presumption that Levy was not acting within the scope of his employment. This raises the issue that if Levy was not acting within the scope of his employment, under what authority did the U. S. Attorney represent Defendant's employee Levy against Petitioner, a former federal employee, protected in his employment claims in this matter by 25 U.S.C. Ch. 36 who is a person this federal statute is enacted to protect. The United States was not a party to the case. 28 U.S.C. 2679(d)(3) could have provided authority for the Asst. U. S. Atty. to represent Defendant's employee Levy, but Defendant's employee Levy did not raise the issue with the Court.

Petitioner can not waive the authority for the U. S. Attorney to act in representation of Defendant's employee Robert Levy. This goes to statutory standing as set out in statutes and federal regulations with which the U.S. Attorney is obligated to comply. Unlike private attorneys who may choose representation, the U.S. Attorney

must comply with certain federal requirements in regard to representation of clients. The U.S. Attorney failed to do this in regard to Defendant's employee Robert Levy in Case No. 5:14-cv-05016. This adverse act caused Petitioner irrevocable harm. See ¶16, Doc. 20. This demonstrates Defendant's violation of 25 U.S.C. §3404 as set out above in regard to Petitioner. This demonstrates evidence of "other misconduct that prevented movant from fully and fairly presenting his case" as set out in Appellate Court Order.

28 C.F.R. 50.15 provides: "Department of Justice will not assert any legal position or defense on behalf of any employee sued in his individual capacity which is deemed not to be in the interest of the United States". This is not a "new theory". A pertinent provision of 25 U.S.C. §3404 sets out the Attorney General and the Secretary of Veterans Affairs, shall coordinate federally funded employment and related services programs. Black's Law Dictionary defines "coordinate" as "Of the same order, rank, degree, or authority". This demonstrates the deviation from this standard to exercise free rein in disregard of this federal law to leave Petitioner, a person whom this federal law is enacted to protect, unprotected from this uncontrolled, arbitrary exercise of unauthorized power against Petitioner.

4. No prior case with finding and Order regarding evidence presented to show "actually litigated"

In ¶4, Doc. 20, Petitioner set out "he was denied the opportunity to present his case". There is no finding and Order in any prior case involving Petitioner regarding Defendant's employees nor the United States regarding evidence presented showing

any issue was “actually litigated”. See Restatement of Judgments (Second) Section 27. There is no preclusive effect of any prior case involving Petitioner. Defendant has always been on notice of this. This demonstrates Defendant’s violation of 25 U.S.C. §3404 as set out above in regard to Petitioner, an adult American Indian. This demonstrates evidence of “other misconduct that prevented movant from fully and fairly presenting his case” as set out in Appellate Court Order.

5. There is no res judicata because Defendant requested representation of Levy in violation of 28 C.F.R. 50.15

Defendant in this matter has consistently refused to admit there is no res judicata because Defendant requested representation of his employee Levy in violation of provisions of 28 C.F.R. 50.15 regarding conflicts between present and former federal employees and representation not in the interest of the United States. Petitioner, a former federal employee, was protected in his employment by federal statute, 25 U.S.C. Ch. 36. Defendant’s employee Levy was a presumed criminal defendant. All as set out above.

6. *Yankton* elements are not met

In *Yankton Sioux Tribe v. U.S. Dept. of Hhs*, 533 F.3d 634, 2008 WL 2628931 (8th Cir. 2008) the Court sets out at 639:

“To establish that a claim is barred by res judicata a party must show: “(1) the first suit resulted in a final judgment on the merits; (2) the first suit was based on proper jurisdiction; (3) both suits involve the same parties (or those in privity with them); and (4) both suits are based upon the same claims or causes of action.” *Costner v. URS Consultants, Inc.*, 153 F.3d 667, 673 (8th Cir.1998).”

As set out above, there is no finding and Order in any prior case involving

Petitioner regarding any of Defendant's employees nor the United States regarding evidence presented showing any issue was "actually litigated". See Restatement of Judgments (Second) Section 27. There is no preclusive effect of any prior case involving Petitioner. Because there is no prior case with any preclusive effect, *Yankton* elements (1) and (2) are not met.

According to the Restatement (Third) of Agency, a principal is subject to vicarious liability in two instances: (1) when the agent commits a tort within the scope of employment; or (2) acts with apparent authority or purports to act on behalf of the principal. § 7.03(2)(a)(b). Levy's attorney provided the exception to this provision. There was no *Gutierrez* Order of scope of employment in the 2014 Levy case. The *Yankton* elements are not met. There is no res judicata.

D. Defendant provides no explanation why his employee Robert Levy chose to violate judicially set and/or legislatively set limits for his own purposes

Defendant provides no explanation why his employee Robert Levy as PSB chair violated pertinent provisions of 42 U.S.C. §11112, i.e., Levy refused Petitioner the right to confront and cross-examine any witness at the PSB he chaired in regard to Petitioner. Defendant provides no explanation why Levy as PSB Chair violated provisions of federal law 5 U.S.C §7114 governing [Petitioner's] favorable January 20, 2012 Step 2 Grievance Resolution in regard to American Indian Petitioner. This federal law makes this Grievance Resolution final as to Defendant before the PSB. Defendant provides no explanation how this complies with 5 C.F.R. 2635.101(13): "Employees shall adhere to all laws and regulations that provide equal opportunity for

all Americans regardless of race, color, religion, sex, national origin, age, or handicap.” See ¶¶ 4, 5, 6 of Doc 20. Defendant provides no explanation how this complies with 25 USC §3404 as set out above in regard to adult American Indian Petitioner.

¶16 of Doc. 20 sets out the irrevocable harm caused to Petitioner by the adverse report to the NPDB and his ability to maintain employment citing *Walker v. Mem'l Health Sys. of E. Tex.*, 231 F.Supp.3d 210 (E.D. Tex., 2017).

¶15, Doc 20: There is no evidence in this matter that [Petitioner] has been allowed to confront and cross-examine any witness, has been provided the right to introduce evidence in his behalf.

1. *Branch v. Hempstead* case law on procedural and substantive due process requirements for a physician

¶14, Doc. 20, sets out the Honorable Franklin Waters in *Branch v. Hempstead County Memorial Hosp.*, 539 F.Supp. 908 (W.D. Ark., 1982) held:

“The law is well settled that a physician on the staff of a public hospital may not be dismissed or his privileges reduced without compliance with certain procedural and substantive due process requirements. . . These include, at least (1) adequate notice, *Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975); (2) adequate opportunity for a hearing, *Armstrong v. Manzo*, 380 U.S. 545, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965); (3) the right to introduce evidence, *Baltimore & Ohio Railroad Co. v. United States*, 298 U.S. 349, 56 S.Ct. 797, 80 L.Ed. 1209 (1936); and (4) the right to confront and cross-examine witnesses, *Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974).”

2. Defendant's employee Levy's violation of judicial limits set by case law

Branch sets out the case law of *Baltimore & Ohio* providing the right to introduce evidence and *Wolff* providing the right to confront and cross-examine

witnesses. Levy chose to put himself above these case laws. This demonstrates Levy exceeding the judicial limits as set out in the *Branch* case setting out U.S. Supreme Court case law by substituting his own judgment which deviated from any standards either necessary or reasonable thereby exercising free rein unfettered by the restraints of judicial authority transforming Levy's acts into an impermissible delegation of executive power leaving Petitioner unprotected from this uncontrolled, arbitrary power in the hands of this administrative official of the executive branch, i.e., Defendant. Because Defendant has taken no corrective action, this effectively demonstrates Defendant's endorsement of this substitution of judgment over judicial limits to make the important policy choices that belong to the judiciary through case law.

3. 42 U.S.C. §11112 - the statutory limits Levy violated

¶21, Doc 20: Defendant's employee Robert Levy signed a materially false, fictitious, or fraudulent statement or representation in regard to Petitioner when Levy executed the board action report alleging unsatisfactory in all areas made in contradiction of known documentation demonstrating the exact opposite in violation of provisions of 42 U.S.C. §11112, the law requiring a reasonable effort to obtain the facts of the matter. 42 U.S.C. §11112 provides, among other things, the physician must be given a list of the witnesses and has the right to call, examine, and cross-examine witnesses. Defendant has produced no document in evidence in this matter to show (1) Levy provided any list of witnesses to Petitioner; (2) Levy allowed Petitioner to confront and cross-examine any witness at the PSB he chaired in

violation of provisions of 42 U.S.C. §11112; (3) there is a record of this PSB the failure of which is a violation of provisions of 42 U.S.C. §11112; (4) no record of the PSB Levy chaired against Petitioner has been provided to him at any time. This shows violation of provisions of 42 U.S.C. §11112 which provides for such a record. Petitioner has repeatedly requested a record of the proceedings.

4. 5 U.S.C. §7114 - the statutory limit Levy violated

¶21, Doc 20: Defendant's employee Robert Levy signed a materially false, fictitious, or fraudulent statement or representation in regard to Petitioner when Levy executed the board action report alleging unsatisfactory in all areas made in contradiction of known documentation demonstrating the exact opposite in violation of 5 U.S.C. §7114 (c)(3), the law enforcing the Step 2 Grievance Resolution executed by Defendant's employee Witztum stating Petitioner has an overall Satisfactory proficiency effective before the PSB. This law makes the Step 2 Resolution final as to Defendant before the PSB. Defendant has provided no document in evidence in this matter to demonstrate why this is not an unfair labor practice in regard to Petitioner as set out in 5 U.S.C. §7116 by Levy's refusal to honor Petitioner's favorable proficiency final as to Defendant by law as set out above. Defendant has provided no document in evidence in this matter to demonstrate Petitioner was provided this Step 2 Grievance Resolution as set out in 5 U.S.C. §§ 7101, 7116, 7118 by Defendant.

This demonstrates Defendant's employee Robert Levy exceeding the legislative limits set by provisions of 42 U.S.C. §11112 and of provisions of 5 U.S.C. §7114 by substituting his own judgment which deviated from any standards either necessary

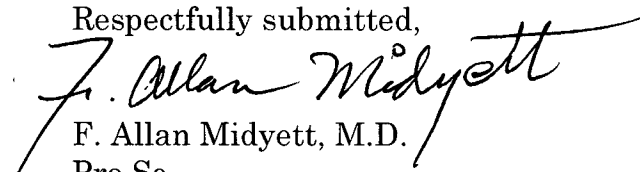
or reasonable thereby exercising free rein unfettered by the restraints of legislative authority transforming Levy's acts into an impermissible delegation of executive power leaving Petitioner unprotected from this uncontrolled, arbitrary power in the hands of this administrative official of the executive branch, i.e., Defendant. Because Defendant has taken no corrective action, this effectively demonstrates Defendant's endorsement of this substitution of judgment over the statutory provisions to make the important policy choices that belong to Congress.

This demonstrates Defendant's violation of 25 U.S.C. §3404 as set out above in regard to Petitioner. This demonstrates evidence of "other misconduct that prevented movant from fully and fairly presenting his case" as set out in Appellate Court Order.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,


F. Allan Midyett, M.D.
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Rochester, MN 55902
623-466-4667

DECLARATION OF COMPLIANCE WITH RULE 33.2

1. This Petition for Writ complies with the type-volume limitation of Rule 33.2 because it does not exceed 40 pages, and it also complies with this Rule because the Writ contains 8,158 words, excluding the parts of the Writ exempted by the Rule.

2. This Petition for Writ complies with the type face requirements of Rule 33 and

the type style requirements of Rule 33 because this Petition for Writ has been prepared in proportionally spaced typeface using Wordperfect X9 using Century Schoolbook 12.

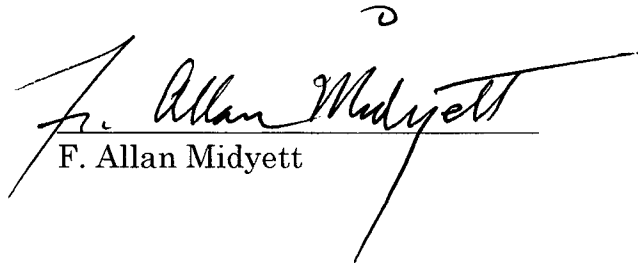
3. The Petition for Writ has been scanned for viruses and it is virus free.

CERTIFICATE OF SERVICE

I, F. Allan Midyett, hereby declare pursuant to 28 U.S.C. §1746 on penalty of perjury that I have served upon the following by Federal Express a true and correct copy of the above and foregoing on this 20th day of January, 2021:

Robert Wilkie
Secretary of Veterans Affairs
Office of the Secretary,
Department of Veterans Affairs (VA)
810 Vermont Avenue, NW, Room 1000
Washington, DC 20005

Solicitor General of the United States
Room 5616
Department of Justice
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F. Allan Midyett