

20-7748
No. _____

ORIGINAL

Supreme Court, U.S.
FILED

JAN 21 2021

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

CAVIN BURNS FRANCIS MCKEN — PETITIONER
(Your Name)

vs.

STATE OF FLORIDA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

The District Court of Appeal for The Second District of Florida
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

CAVIN BURNS FRANCIS MCKEN
(Your Name)

Desoto Correctional Institution Annex
(Address)

13617 SE Hwy 70 Arcadia FL 34266
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

Whether the designation of Petitioner as a sexual offender Pursuant to Florida Statutes 3943.0435 is illegal as pertained to this Petitioner.

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☐ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☒ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the Twelfth Judicial circuit Court, in and for Sarasota County court appears at Appendix B to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☒ For cases from **state courts**:

The date on which the highest state court decided my case was Sept. 30, 2020. A copy of that decision appears at Appendix A.

☒ A timely petition for rehearing was thereafter denied on the following date: October 26, 2020, and a copy of the order denying rehearing appears at Appendix C.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Eighth Amendment to the United States Constitution

Fourteenth Amendment to the United States Constitution

Florida Statutes § 943.6435

Florida Statutes § 800.04

Florida Statutes § 775.21

Florida Rules of Criminal Procedure 3.800(a)

STATEMENT OF THE CASE

On or about March, 2017, Petitioner was arrested and charged with nineteen (19) counts of possession of obscene material photographs of sexual performance by children (10 or more images) pursuant to Florida Statutes §827.07(5).

On or about December 1, 2017, Petitioner entered into a negotiated plea agreement plead nolo contendere and was adjudicated guilty of 19 counts of possession of obscene material photographs of sexual performance by children (10 or more images) pursuant to Florida Statutes §827.07(5) and was sentenced to twenty-five (25) years of incarceration within the Florida Department of Corrections, followed by fifteen (15) years of probation. On December 1, 2017, Petitioner was designated a sexual offender pursuant to Florida Statutes §943.0435.

On December 11, 2019, Petitioner filed a motion to correct illegal sentence, pursuant to Florida Rules of Criminal Procedure 3.800(a). In the motion, Petitioner challenged the sexual offender designation as he did not have the requisite prior conviction for the designation. On December 19, 2019, the trial court denied the motion. (Appendix B).

Petitioner filed a timely notice of appeal. On September 30, 2020, the Second District Court of Appeal per curiam affirmed the appeal. (Appendix A). On October 13, 2020, Petitioner filed a timely motion for rehearing. On October 26, 2020, the Second District Court of Appeal denied rehearing. (Appendix C).

REASON FOR GRANTING THE WRIT

WHETHER THE DESIGNATION OF PETITIONER AS A SEXUAL OFFENDER PURSUANT TO FLORIDA STATUTES §943.0435 IS ILLEGAL AS PERTAINING TO THIS PETITIONER

The state in its effort to seek sexual offender designation based upon convictions on charges/offenses alone lacked the statutory requirement of previous release. Petitioner was declared a sexual offender without the state providing a history inclusive of Petitioner being "released" from a sanction, contrary to Florida statute.

According to Florida statutes §943.0435, "sexual offender" means a person who "(I) has been CONVICTED," of a qualifying offense, "AND, (II) has been RELEASED on or after October 1, 1997, from the sanction imposed for any conviction," of a list of qualifying offenses. CONVICTED and RELEASED are the key words to focus on here, because §943.0435 require a current conviction and a prior release to exist at the same time for a legal designation to be imposed.

Therefore, with no prior offenses or convictions and the scoresheet used for sentencing showing no prior crimes committed, it should be determined by this Honorable Court that the sexual offender designation is illegal and without merit based on the facts from the face of the record.

It is also clear in Sadler v. State, 112 So.3d 498, 499 (Fla. 1st DCA 2012); and Hickey v. State, 915 So.2d 663 (Fla. 2d DCA 2005), "A person convicted under Florida statute §800.04 must meet either two criteria to be designated a sexual offender; 1) First-degree felony, or attempt thereof of §800.04; 2) the offense must be any felony violation, or attempt thereof, of §800.04 AND the offender must previously have been convicted of, or plead, to a violation of

§775.21(4)(a)(i)(b)." Petitioner in this case does not satisfy either criteria. And in Schrembs v. State, (5th Judicial Circuit Court, Lake County, Florida 2015) and Dowdy v. State, (7th Judicial Circuit Court, Putnam County, Florida 2016), that this identical issue is at bar here and the First and Second District Courts of Appeals and the Fifth and Seventh Judicial Circuit Courts, all granted relief in this matter.

The Court would need to look no further than the scoresheet which was agreed to by all parties at the trial court level, if this Honorable would accept jurisdiction over this proceeding. The scoresheet shows no previous convictions of any qualifying offense in Petitioner's past. This fact alone proves it to be obvious that Petitioner has not been RELEASED on or after October 1, 1997 from a sanction imposed for a conviction on a qualifying offense. The statutory requirement of §943.0435(1)(4)(II) has not been met in this matter, thus, the imposition of the sexual offender designation is illegal.

Due to the courts of the State of Florida denying Petitioner due process and equal protection in violation of the Fourteenth Amendment, this Honorable Court should accept jurisdiction of this case to rectify this issue.

If the Court does not accept jurisdiction, the Court will be allowing the state of Florida to treat Petitioner in cruel and unusual punishment in violation of the Eighth Amendment in that Petitioner will be limited to where he can work or where he can reside or visit.

WHEREFORE, Petitioner respectfully prays that this Court would accept jurisdiction of this case and cure the constitutional violations herein

The petition for a writ of certiorari should be granted.

I hereby declare that I have read the foregoing Petition for Writ of Certiorari and the facts and matters are true and correct.

Executed this 20 day of March, 2021.

Respectfully submitted,



Gavin Burns Francis McKim DC# 540632

Desoto Correctional Institution Annex

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