No. 21-6843

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

In re Kevin Brewer Petitioner

ON PETITION FOR A WRIT OF MANDAMUS
TO THE EIGHTH CIRCUIT COURT OF APPEALS AND
AS INDIVIDUAL JUDGES

Kevin Brewer
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ISSUE PRESENTED

The entire panel of active judges in 8th Circuit Court Of Appeals have evaded, refused and failed to address the merits of a constitutional claim within a petition for certificate of innocence, brought forth under the Due Process Clause of the Fourteenth Amendment and the notice and knowledge, including knowledge of any duration period it requires, as set out by the Supreme Court in Lambert v. California, 355 U.S. 225 (1957).

The aforementioned issue determines the final and only question in this case to be presented on certiorari, and that question is whether the petitioner is liable for constituting any offense, in which the scienter requirements of the Due Process Clause of the Fourteenth Amendment has not been met, which determines whether petitioner has met the requirements of a certificate of innocence.

List of Parties

Petitioner,

Kevin Brewer

Respondents,

Hon. Lavenski R. Smith Chief Judge, Hon. James B. Loken, Hon. Steven M. Colloton, Hon. Raymond W. Gruender, Hon. Duane Benton, Hon. Bobby E. Shepherd, Hon. Jane Kelly, Hon. Ralph R. Erickson, Hon. L. Steven Grasz, Hon. David R. Stras, Hon. Jonathan A. Kobes

Related Cases

Brewer v. Ark. Sex Offender Assessment Comm., 2013 Ark. App. 475 (Ark. Ct. App. 2013) Opinion entered September 11, 2013

In matter of Kevin Brewer Ark. Code Ann. 12-12-919 Application Case no. CV-2013-043 Case id 10CV-13-43 Clark County Arkansas, Order entered December 30, 2013

Kevin Brewer v. Clark County Circuit Clerk case id CV-13-282 Arkansas Supreme Court, Order entered April 18, 2013

Kevin Brewer v. United States, No. 21-1872, U. S. Court of Appeals for the Federal Circuit. Order entered August 16, 2021

Kevin Brewer v. United States, No. 20-1209, U. S. Court of Federal Claims. Memorandum Opinion and Order entered February 19, 2021

State Of Hawaii v. Kevin Brewer case no. 94-0049 (Hawaii) Judgement entered September 9, 1994

United States v. Kevin Brewer, No. 6:09-cr-60007, U. S. District Court for the Western District of Arkansas. Order entered August 25, 2009.

United States v. Kevin Brewer, No. 09-3898, U. S. Court of Appeals for the Eighth Circuit. Judgment entered December 20, 2010

United States v. Kevin Brewer, No. 6:10-cv-06003, U. S. District Court for the Western District of Arkansas. Order entered May 20, 2010

United States v. Kevin Brewer, No. 13-1261, U. S. Court of Appeals for the Eighth Circuit. Judgment entered September 10, 2014

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No.

IN THE SUPREME COURT OF THE UNITED STATES

In re Kevin Brewer Petitioner

ON PETITION FOR A WRIT OF MANDAMUS

Petitioner respectfully prays that a writ of mandamus issue to 8th Circuit Court Of Appeals and as individual judges

OPINIONS BELOW

Opinion in Brewer v. Ark. Sex Offender Assessment Comm. is published at 2013 Ark. App. 475 (Ark. Ct. App. 2013). Appx.J

Opinion in United States v. Kevin Brewer, No. 21-1286 (8th Cir. 2021). is unpublished Appx.A

Opinion in United States v. Brewer is published at 766 F.3d 884 (8th Cir. 2014) Appx.L

Opinion in United States v. Brewer is published 628 F.3d 975 (8th Cir. 2010). Appx.R

Memorandum Opinion and Order in Kevin Brewer v. United States, No. 20-1209, U. S. Court of Federal Claims is unpublished. Appx.F

JURISDICTION

The 8th Circuit Court Of Appeals issued opinion and judgement July 13, 2021 and denied petition for rehearing and rehearing en banc on August 13, 2021 Appx.D. This Court has jurisdiction under 28 U.S. Code § 1651 Writs

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Federal Statutes and Provisions Involved

28 U.S.C. 1495 - Damages for unjust conviction and imprisonment; claim against United States. The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim for damages by any person unjustly convicted of an offense against the United States and imprisoned.

28 U.S.C. 1651 – Writs (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law. (b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction

34 USC 20913 (d)INITIAL REGISTRATION OF SEX OFFENDERS UNABLE TO COMPLY WITH SUBSECTION (B) The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b)

34 USC 20919: Duty to notify sex offenders of registration requirements and to register (a)In generalAn appropriate official shall, shortly before release of the sex offender from custody, or, if the sex offender is not in custody, immediately after the sentencing of the sex offender, for the offense giving rise to the duty to register—

(1) inform the sex offender of the duties of a sex offender under this subchapter and explain those duties;

(2) require the sex offender to read and sign a form stating that the duty to register has been explained and that the sex offender understands the registration requirement; and

(3) ensure that the sex offender is registered.

(b)Notification of sex offenders who cannot comply with subsection (a) The Attorney General shall prescribe rules for the notification of sex offenders who cannot be registered in accordance with subsection (a).

28 U.S. Code § 2403 - Intervention by United States or a State; constitutional question (b) In any action, suit, or proceeding in a court of the United States to which a State or any

agency, officer, or employee thereof is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The State shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

28 U.S. Code § 2513 - Unjust conviction and imprisonment (a)Any person suing under section 1495 of this title must allege and prove that:

(1) His conviction has been reversed or set aside on the ground that he is not guilty of the offense of which he was convicted, or on new trial or rehearing he was found not guilty of such offense, as appears from the record or certificate of the court setting aside or reversing such conviction, or that he has been pardoned upon the stated ground of innocence and unjust conviction and

(2) He did not commit any of the acts charged or his acts, deeds, or omissions in connection with such charge constituted no offense against the United States, or any State, Territory or the District of Columbia, and he did not by misconduct or neglect cause or bring about his own prosecution.

(b) Proof of the requisite facts shall be by a certificate of the court or pardon wherein such facts are alleged to appear, and other evidence thereof shall not be received.

© No pardon or certified copy of a pardon shall be considered by the United States Court of Federal Claims unless it contains recitals that the pardon was granted after applicant had

exhausted all recourse to the courts and that the time for any court to exercise its jurisdiction had expired.

(d) The Court may permit the plaintiff to prosecute such action in forma pauperis.

(e) The amount of damages awarded shall not exceed $100,000 for each 12-month period of incarceration for any plaintiff who was unjustly sentenced to death and $50,000 for each 12-month period of incarceration for any other plaintiff.

Supreme Court Rule 10. Considerations Governing Review on Writ of Certiorari. Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court. A

petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

SORNA Guidelines XII. DURATION OF REGISTRATION. Section 115(a) of SORNA specifies the minimum required duration of sex offender registration. It generally requires that sex offenders keep the registration current for 15 years in case of a tier I sex offender, for 25 years in case of a tier II sex offender, and for the life of the sex offender in case of a tier III sex offender.

SORNA Proposed Rule 85 FR 49332 Section 72.3 and Section 72.8 See Appx.SS

State Statutes and Provisions Involved

Ark. Code Ann. 12-12-906. (2) (A) Duty to register or verify registration generally - Review of requirements with offenders. (2) (A) A sex offender who moves to or returns to this state from another jurisdiction and who would be required to register as a sex offender in the jurisdiction in which he or she was adjudicated guilty or delinquent of a sex offense shall register with the local law enforcement agency having jurisdiction within seven (7) calendar days after the sex offender moves to a municipality or county of this state. (as was before amendment) (also see Appx.NN

Ark. Code Ann. § 12-12-906 (D)(C) (c) (1) (A) (i) (vi) When registering a sex offender as provided in subsection (a) of this section, the sentencing court, the Department of Correction, the Department of Community Correction, the Arkansas State Hospital, the Department of Human Services, or the local law enforcement agency having jurisdiction shall: (i) Inform the sex offender of the duty to submit to assessment and to register and obtain the information required for registration as described in § 12-12-908; (vi) Require the sex offender to complete the entire registration process, including, but not limited to,

requiring the sex offender to read and sign a form stating that the duty of the sex offender to register under this subchapter has been explained.

H.R.S. 846E-4 (1) (6) Duties upon discharge, parole, or release of covered offender. (1) Explain to the covered offender the duty to register and the consequences of failing to register under this chapter; (6) Require the covered offender to sign a statement indicating that the duty to register has been explained to the covered offender

H.R.S § 846E –10 Termination of registration requirements. (a) Tier 3 offenses. A covered offender whose covered offense is any of the following offenses shall register for life and, except as provided in subsection (e), may not petition the court, in a civil proceeding, for termination of registration requirements: see amendments exhibits Appx.Y

Statement Of Case

On September 9, 1994, while stationed in Hawaii and serving in the United States Marines, see AppxJJ (military discharge). following a jury trial, Brewer was convicted in Hawaii state court of several sexual offenses stemming from an alleged sexual assault of a woman his hotel room. Following his conviction, Brewer was sentenced to eight years imprisonment, but execution of his sentence was stayed pending appeal. (judgement) AppxII. Following a successful appeal, Brewer pled guilty in April 1997 to reduced charges of five counts of Sexual Abuse in the Second Degree and two counts of Sexual Abuse in the Third Degree. On September 3, 1997, Brewer was sentenced to five years of probation and one year of jail on each count, with the sentences on each count running concurrently. Appx.EE exhibits (plea agreement).

In 2006, Congress enacted SORNA, requiring those convicted of sex offenses to "provide state governments with (and to update) information, such as names and current addresses, for inclusion on state and federal sex offender registries." See Reynolds v. United States, 565 U.S. 432, 434 (2012). SORNA's registration requirements did not apply those convicted of sex offenses before its enactment. Rather, SORNA provided the Attorney General with rule-making authority to determine registration requirements for pre-SORNA offenders. 42 U.S.C. § 16913(d); see *Brewer, 766 F.3d at 886* (discussing same). Specifically, in February 2007, the Attorney General promulgated an Interim Rule making SORNA registration requirements applicable to individuals convicted of pre-SORNA sex offenses. Based upon the Attorney General's Interim rule, Mr. Brewer was required to register under SORNA, but failed to do so. See *Brewer, 766 F.3d at 886* (discussing same). In 2009, while living in Arkansas, Mr. Brewer was arrested and pled guilty in the United States District Court for the Western District of Arkansas, and sentenced to 18 imprisonment and 15 years of supervised release, for failing to register under SORNA due to his 1997 sex offense conviction. see Appx.MM (conditional plea) In 2014, the United States Court of Appeals for the Eighth Circuit overturned Mr. Brewer's 2009 district court conviction, holding that the Attorney General's Interim Rule violated the Administrative Procedure Act, 5 U.S.C. § 553. See *Brewer, 766 F.3d at 892.* On September 16, 2020, Mr. Brewer filed a petition for certificate of innocence and motion to amend with the district court, pursuant to 28 U.S.C. 2513. see Appx.Y (petition). On January 26, 2021, the district court denied Mr. Brewer's petition for a certificate of innocence. Appx.B (order). On July 13, 2021, the Eighth Circuit affirmed the decision of the district court to deny Mr. Brewer's petition for certificate of innocence. Appx.A (opinion). On July 23, 2021 Brewer filed a petition for rehearing and rehearing en banc. Appx.V (petition). On August 13, 2021 the petition for rehearing and rehearing en banc was denied. see Appx.D

While pursuing his case before the district court, on September 14, 2020, Mr. Brewer filed a complaint in the Court of Federal Claims, alleging wrongful conviction and imprisonment, and seeking money damages, pursuant to 28 U.S.C. § 1495, § 2513. see Appx.Z (complaint). On January 4, 2021 Brewer in his reply to response filed a motion to stay proceedings pending the final outcome on the certificate of innocence. On February 19, 2021 the Court of Federal Claims issued a memorandum and order denying relief under 28 U.S.C. § 1495 and § 2513 also denying the motion for a stay. see Appx.F (opinion order) On April 12, 2021 the Brewer filed a Notice of Appeal in the Court of Federal Claims appealing memorandum and order denying the motion to stay proceedings, Brewer v. United States No. 20-1209 (Fed. Cl. 2021). On May 21, 2021 Brewer filed a motion for a stay or extension of time in the US Court of Appeals for the Federal Circuit. On June 21, 2021 the US Court of Appeals for the Federal Circuit denied the motion and deemed it the better course for Mr. Brewer to raise any argument concerning the ruling of the Court of Federal Claims or to alternatively request a stay in the merits brief. Appx.E (order) On August 25, 2021 Brewer filed a motion to extend time to file brief until after he files this petition in the Supreme Court. On August 26, 2021 the clerk issued an order granting the extension of time. see Appx.G (order) This petition of Writ to the Supreme Court now follows.

REASONS FOR GRANTING WRIT

Mandamus

This petition for writ for mandamus is brought forth under 28 U.S. Code § 1651. 28 U. S. C. § 2403(b) may apply in future proceedings if certiorari is granted.

The 8th Circuit Court Of Appeals evaded, failed and refused to address with no discussion, the question and issue of a claim of a constitutional right clearly brought before them on appeal and petition for rehearing and rehearing en banc. The entire panel of active judges in the 8th Circuit Court Of Appeals have refused, failed and evaded their ministerial duty to perform and act as judges. Therefore, an order is necessary to compel the appropriate judges in 8th Circuit Court Of Appeals to act and perform their duty. Without an order from this court to compel the 8th Circuit Court Of Appeals to address this issue before a petition for certiorari is decided, the petitioner will suffer unconstitutional irreparable prejudice, harm and deprivation of rights, seeking further review on a petition for certiorari. This puts Brewer in an unlawful predicament, in which the issue and question in his due process notice claim, in his petition for certificate of innocence, was never addressed with in any discussion with an explanation and reasoning in any opinion on the merits he put forth, and he does not have any further right to have the issue addressed. see Rule 10. Considerations Governing Review on Writ of Certiorari "Review on a writ of certiorari is not a matter of right," The chances of getting a certiorari granted are very slim and almost hopeless, according to research, and there are better odds getting admitted into Harvard, than getting a certiorari granted. see Appx.HH (Supreme Court Press). If a mandamus or certiorari is not granted it will cause unconstitutional irreparable prejudice, harm and deprivation of rights owed to Brewer.

This is also the third writ of mandamus Brewer has had to file in relation to this case, to get the court and judge to act and adequately perform their duty. See (mandamus petitions) Appx.H, I, LL, KK. The district court judge who has continually resided over this case, ordered the court clerk not to file Brewer's pleadings without his approval. see Appx.N (order). The court clerk for Clark County in the State of Arkansas also refused to file

pleadings in a related case. See Appx.I (order). The attorney who represented Brewer on appeal in United States v. Brewer 766 F.3d 884 (8th Cir. 2014), unknowingly to Brewer, requested court not to file his pro se motion to expand the certificate of appealability, in which he also raised the question and issue that is before this court in this writ. Tragically, the Federal Defender, Angela L. Pitts passed away, but did still manage in some way to preserve this issue for the Supreme Court, see Appx.M, AA, (letter and order).

By not granting a mandamus or certiorari, the Supreme Court will have denied the petitioner any right owed to have his constitutional right within his claim for relief addressed on its merits by any court. If no action is carried out by this court, the 8th Circuit Court Of Appeals will have set the precedent as to how a constitutional claim can be completely evaded and not addressed in any discussion within an opinion, and s*wept under the rug of their jurisdiction.* It's the duty of any judge to address with an opinion the merits of a claim before them, even if their conclusion is erroneous, and if they do not do so, they are failing to perform their duty and act as judges. see Virginia v. Rives, 100 U.S. 313, 323-324, (1879) in regards to mandamus "Its use has been very much extended in modern times, and now it may be said to be an established remedy to oblige inferior courts and magistrates to do that justice which they are in duty, and by virtue of their office, bound to do.

The 8th Circuit Court Of Appeals should have addressed this question and issue in their first instance of review and or furthermore remanded the case back to the district court to address the issue and question where the very first instance this issue and question should have been addressed. This Supreme Court has set precedent that judges must address the merits of a issue in the first instance. see Jody Lombardo, et al. V. City of St. Louis, Missouri, et al. 594 U.S (2021) *"We instead grant the petition for certiorari, vacate the*

judgment of the Eighth Circuit, and remand the case to give the court the opportunity to employ an inquiry that clearly attends to the facts and circumstances in answering those questions in the first instance." Even though the district court should have been the first to address this question and issue, it was still before and within the 8th Circuit Court Of Appeal's authority and jurisdiction to review and address this question and issue. Through the appeal, petition for rehearing and rehearing en banc, this question and issue was before the entire 8th Circuit Court Court Of Appeals panel, which gave the entire 8th Circuit Court Of Appeals opportunity to address this question and issue. The issue was not even addressed with a dissent. The applicability of *Lambert v. California* to Brewer is not addressed in report and recommendation, order or opinion of a court. see Appx.A, B, C, D. The merits of Brewer's due process notice claim has also been evaded in the past history in this case. see Appx.L, N, O, P, Q, R, S, T. Therefore, the entire 8th Circuit Court Of Appeals evaded, failed and refused to discuss and address the question and issue of a claim of a constitutional right that was clearly before them to adjudicate. At this point in proceedings Brewer has no other form of adequate relief to get his issue adequately addressed other than to petition for a writ of mandamus. Brewer has no right to a certiorari, but does have the right owed to have the merits he put forth in his constitutional claim addressed. The reasons Brewer has brought forth, fall under the reasons that necessitate a mandamus and only this court can remedy and resolve the question and issues. Mandamus is appropriate where petitioner "*lack adequate alternative means to obtain the relief they seek*", Mallard v. U.S. Dist. Court for S. Dist. of Iowa, 490 U.S. 296, 309, (1989).

RESPONSE

Under Rule 20 3(b) the active judges in 8th Circuit Court Of Appeals, as respondents, must respond to this petition or if they do not wish to respond advise the Clerk and all other parties by letter (in this case each other). The 8th Circuit Court Of Appeal's response as the respondents to this writ, should also be taken into account on review of this writ by this court, before it makes a decision, as to whether and how they choose to address this issue and question remanded upon them under the present circumstance, for their reconsideration.

CERTIORARI CONSIDERATIONS

Exceptional Circumstances

1.This case involves the conflicting compliance and application of the Fourteenth Amendment in five distinct jurisdictions. The jurisdictions of the states of Arkansas, Hawaii, the jurisdiction of the 8th Circuit Court Of Appeals, the jurisdiction of the U S Court of Federal Claims and finally the jurisdiction and authority of the US Supreme Court. The U S Court of Federal Claims has ruled it has no jurisdiction over the certificate of innocence, but does have jurisdiction over monetary damages. This case is also currently pending on appeal in United States Court of Appeals for the Federal Circuit. See Appx.E, F, (opinion and order).

2. The outcome of this case and the precedent it sets, effects everyone required to register for any offence, and effected by the U S Supreme Court precedent ruling in Lambert v. California, 355 U.S. 225 (1957), especially in the 8th Circuit Court Of Appeal's jurisdiction.

3. Certificate of innocence within itself is an exceptional circumstance within its requirements, which involves two distinct jurisdictions, the jurisdiction the offense allegedly occurred and jurisdiction of U S Court of federal Claims. see 28 U.S.C. § 1495 and 28 U.S.C.§ 2513 Damages for unjust conviction and imprisonment; claim against United States and Unjust conviction and imprisonment

4. The issue and question *now* before the court has never been addressed by the lower courts even though it has been clearly put before them. The 8th Circuit Court of Appeals has never even addressed or discussed the applicability of *Lambert v. California*, the main authority ruling brought forth in Brewer's claim for relief within his petition for certificate of innocence. But, it did affirm the district judge's order adopting the report and recommendation that knowledge of registration requirements, is not required under Arkansas State law. The report and recommendation stated that only the state must show the person has been convicted of a qualifying sex offense and that he failed to register, which can only be construed, as that the requirement of due process and notice is not required under Arkansas State law and the Due Process Clause of the Fourteenth Amendment. see report and recommendation Appx.C. and opinion Appx.A. The Arkansas Supreme Court and Court Of Appeals have concluded and set that precedent in *their* jurisdiction.

5. Pursuant Rule 10. Considerations Governing Review on Writ of Certiorari (if) (a) a United States court of appeals has entered a decision in conflict with the decision of another

United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far *departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;* (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, *or has decided an important federal question in a way that conflicts with relevant decisions of this Court.*

As stated in Lambert v. California, 355 U.S. 225 (1957). *"Engrained in our concept of due process is the requirement of notice. Notice is sometimes essential so that the citizen has the chance to defend charges. Notice is required before property interests are disturbed, before assessments are made, before penalties are assessed."* The 6th Circuit Court Of Appeals also concluded "*As the founders rightly perceived, as dangerous as it may be not to punish someone, it is far more dangerous to permit the government under guise of civil regulation to punish people without prior notice.*" Does 1-5 v. Snyder, 834 F. 3d 696 (6th Cir. 2016)

6. Whether the states Arkansas and Hawaii are now exempt from complying to *Lambert v. California* and the requirements of the Fourteenth Amendment, is an *important question of federal law*, and by the entire 8th Circuit Court Of Appeals not disturbing and affirming the district court's order adopting the report and recommendation, that the State of Arkansas is exempt, *conflicts with relevant decisions of this Court. s*ee report and recommendation Appx.C. The 8th Circuit also *sanctioned such a departure by a lower court,* and can be considered to have departed *from the accepted and usual course of judicial proceedings of addressing the merits of question of law before them to adjudicate,* when

they evaded and departed from even addressing the merits of the question and issue of the applicability of a Supreme Court decision (*Lambert v. California)* and the Due Process Clause of the Fourteenth Amendment. see (petition for rehearing and rehearing enbanc) Appx.V. This borders on abuse of discretion. See Adkins v. State, 371 Ark. 159, (Ark. 2007) *"it is clear that failure to register as a sex offender is a strict liability offense; because the State proved that appellant was required to register but failed to do so, and because it was not required to prove that he failed to do so with any particular culpable mental state"* "*(holding that there is no mens rea component in a failure-to-register-as-a-sex-offender context). Because it is a strict-liability offense, a person who fails to act in accordance with the statutory requirements completes the offense". (knowledge* is a component of mens rea) Brown v. State, No. CACR11-892, (Ark. Ct. App. 2012) *"The burden of knowing the mandatory nature of the registration scheme is on the sex offender; the registration requirements are mandatory, and failure to comply with those duties is a strict-liability offense."* These conclusions of the Arkansas Supreme Court and Court of Appeals, even though they have provisions under state law which state otherwise and provides for a process of due process notice and acknowledgement of requirements, can be only be construed as those provisions are irrelevant, unnecessary and not required to be followed under the Due Process Clause of the Fourteenth Amendment. See Ark. Code Ann. § 12-12-906 (D)(C) (c) (1) (A) (i) (vi). These decisions conflict with the Supreme Court ruling in *Lambert v. California* in regards to Fourteenth Amendment and its scienter requirements. See Virginia v. Rives, 100 U.S. 313 (1880)" *The prohibitions of the Fourteenth Amendment have exclusive reference to State action. It is the State which is prohibited from denying to any person within its jurisdiction the equal protection of the laws, and, consequently, the statutes founded upon the Amendment,"*

Certificate of innocence

This present issue and question within this writ arise from Brewer seeking monetary damages for wrongful conviction and imprisonment pursuant to 28 U.S.C. § 1495 and 28 U.S.C.§ 2513 in the United States Court Of Federal Claims, which requires that Brewer acquire a certificate of innocence. It was this court's decision in Reynolds v. United States, 565 U.S. 432 (2012) that led to his vacated conviction, release from prison and petition for certificate of innocence.

The underlying claim in this case, is based on the required certificate of innocence. This question and issue was first brought before the district court and Brewer's first appeal in the 8th Circuit Court Of Appeals, but it was about the obligation and duty to register and foreclosed because of a guilty plea. see opinion and plea Appx.R, MM. *Now*, the question and issue is in regards to the present underlying certificate of innocence, is about the Due Process Clause of the Fourteenth Amendment, and the applicability of Lambert v. California, 355 U.S. 225 (1957). Brewer's claim of innocence is based on the fact that he claims he did not have sufficient knowledge or received the notice and due process required under Due Process Clause of the Fourteenth Amendment which requires notice and knowledge, including knowledge of any duration period. see Appx.U, V, W, X, Y, Z, BB, CC, DD, EE, FF. The 8th Circuit Court Of Appeals concluded that Brewer's actions constituted an offense against state law, therefore is not entitled to a certificate of innocence, but failed to disclose or address what *specific state law registration requirement* that Brewer did allegedly violate and constituted the offense. See Appx.A (opinion)

Brewer in his claim for relief stated he cannot be liable of constituting an offense because he never had sufficient notice and knowledge of the duration period and amended law

requirements in effect at the time of the act in question was considered to have constituted an offense. see Appx.U, V, W, X, Y, Z, BB, CC, DD, EE, FF..

The state of Hawaii the jurisdiction of conviction and the state of Arkansas, the jurisdiction the offense of failure to register allegedly occurred, both have provisions in their state laws for notice and acknowledgment of their sex offender registration requirements. see Ark. Code Ann. § 12-12-906 (D)(C) (c) (1) (A) (i) (vi) and H. R. S. 846E-4 (1) (6)

The 8th Circuit did not discuss, address or state which *specific state law registration requirement* Brewer violated that constituted an offense. The only applicable requirement under his circumstances could have been, Ark. Code Ann. 12-12-906. (2) (A) (before or after amended), (see Appx.NN) which details a time period in which he was required to register after moving or returning to that state. Only by the acknowledgment forms can it be determined what requirements Brewer was notified of to show his knowledge, which are in exhibits in, see Appx.X, Y, DD, EE, FF, which also includes the amended requirements he was not notified of or acknowledged (amended acknowledgment forms are the ones unsigned).

Brewer would like to clarify that in one of his pleadings he did state that he thought he was required to register, but that was in regards to when he was on parole and ordered to do so by his parole officer, not after he had completed his community supervision. Under the Arkansas State law which Brewer was required to register, there has been several cases of ambiguity. The question of who is required to register, when no longer on community supervision and adjudicated guilty before the effective date, has been before the federal district court and Arkansas Supreme Court and Court of Appeals several times. See Edmond v. Winters, 226 F. Supp. 3d 914, (E.D. Ark.2016), U.S. v. Brewer, 628 F.3d 975

(8th Cir. 2010) Hammock v. State, CACR08-1045, (Ark. Ct. App. 2009), Williams v. State, 91 S.W.3d 68 (Ark. 2002), Kellar v. Fayetteville Police Dept., 339 Ark. 274, 5 S.W.3d 402, 404 (1999), also see district court order Appx.S and opinion Appx.R.

What distinguishes Brewer circumstances from those cases is the fact he was never firstly initially registered and notified of his requirements and duration period or registered in his jurisdiction of conviction, he had not been required to register in over 2 years because he was living in South Africa, in which time upon his return, the registration laws had been amended, in which he had no knowledge of. According to Arkansas State law provisions, the local law enforcement agency having jurisdiction was supposed to determine what requirement he was in violation of and or inform him of any requirements. see Ark. Code Ann. § 12-12-906 (D)(C) (c) (1) (A) (i) (vi) " also see in exhibits, Training Protocol and incident report Appx.DD.

The Attorney General, in its new Proposed Regulations Articulating the Registration Requirements for Sex Offenders under the Sex Offender Registration and Notification Act, has added guidelines for liability of registration requirements. see SORNA Proposed Rule 85 FR 49332, Sections 72.3 and 72.8. Appx.SS.

Registration and Termination in Jurisdiction of Conviction

Brewer was never initially registered and notified of requirements in accordance to federal or state law provisions in jurisdiction of conviction, nor received *notice of duration period of registration in any jurisdiction.*

He never was informed or had any acknowledgement that he could have petitioned the State court in Hawaii for termination of registration after being required to register for 5 years. Because of lack of due process notice of his requirements in jurisdiction of conviction, Brewer lost his opportunity to petition for termination of his registration requirements 20 years ago. The duration period of registration that was attached to his sentence, has been amended and extended while he was already serving a duration period of registration, several times, from 5 years to 15 years to 25 years to 40 years to life. See HI Rev Stat H.R.S § 846E –10 Termination of registration requirements. also see termination exhibits in Appx.Y. Brewer's duration period of registration and opportunity to petition the court for termination, under the Federal Sex Offender Registration and Notification Act has also been extended from 5 years to life. See Sorna Guidelines XII. DURATION OF REGISTRATION. Section 115(a) of SORNA specifies the minimum required duration of sex offender registration. It generally requires that sex offenders keep the registration current for 15 years in case of a tier I sex offender, for 25 years in case of a tier II sex offender, and for the life of the sex offender in case of a tier III sex offender. Brewer would be classified under the amended laws as tier III. In Commonwealth v. Muniz, 164 A.3d 1189 (Pa. 2017), the Pennsylvania Supreme Court held (1) SORNA's registration provisions constituted punishment notwithstanding the General Assembly's identification of the provisions as nonpunitive; (2) retroactive application of SORNA's registration provisions violated the federal ex post facto clause; and (3) retroactive application of SORNA's registration provisions also violated the ex post facto clause of the Pennsylvania Constitution. The 6th Circuit Court Of Appeals also concluded certain retroactive applications of requirements are unconstitutional. see Does 1-5 v. Snyder, 834 F. 3d 696 (6th Cir. 2016) *"We conclude that Michigan's SORA imposes punishment. And while many (certainly not all) sex offenses involve abominable, almost unspeakable, conduct that deserves severe legal penalties,*

punishment may never be retroactively imposed or increased. Indeed, the fact that sex offenders are so widely feared and disdained by the general public implicates the core counter-majoritarian principle embodied in the Ex Post Facto clause. As the founders rightly perceived, as dangerous as it may be not to punish someone, it is far more dangerous to permit the government under guise of civil regulation to punish people without prior notice. Such lawmaking has "been, in all ages, [a] favorite and most formidable instrument[ ] of tyranny." The Federalist No. 84, supra at 444 (Alexander Hamilton). It is, as Justice Chase argued, incompatible with both the words of the Constitution and the underlying first principles of "our free republican governments." Calder, 3 U.S. at 388–89; accord The Federalist No. 44, supra at 232 (James Madison) ("[E]x post facto laws ... are contrary to the first principles of the social compact, and to every principle of sound legislation."). The retroactive application of SORA's 2006 and 2011 amendments to Plaintiffs is unconstitutional, and it must therefore cease." These ex post facto violations have occurred under the premise of this court's ruling in Smith v. Doe 538 U.S. 84 (2003) in which this court concluded, that retroactive application of a sex offender registration laws was not a ex post facto violation under the circumstances and background of that particular case. see Appx.GG (Sex Offender Registration and Notification In the United States Current Case Law and Issues).

United States Court Of Federal Claims and United States Court of Appeals for the Federal Circuit

This case is also still pending in United States Court of Appeals for the Federal Circuit. In the most recent proceedings in the United States Court of Appeals for the Federal Circuit, it denied Brewer's motion to stay proceedings pending a final ruling by this court in

relation to the complaint, seeking money damages for wrongful conviction and imprisonment pursuant to 28 U.S.C. § 1495 and 28 U.S.C. § 2513. The court deemed it better to raise it as an issue on appeal. see Appx.E (order). The question as to whether the United States Court Of Federal Claims and the United States Court of Appeals for the Federal Circuit can stay proceedings in their jurisdiction pending the outcome of the proceedings in another jurisdiction, is before the United States Court of Appeals for the Federal Circuit on appeal, but they have yet to make a final decision in their jurisdiction because its still in merit briefing proceedings. The outcome of this writ now effects the outcome of the appeal in the United States Court of Appeals for the Federal Circuit.

The certificate of innocence in this case is still not final until this court makes a final ruling on this writ. Even though Brewer prematurely raised the issue of the denial of certificate of innocence as unconstitutional in U. S. Court of Federal Claims, it cannot be formally raised and addressed until there is a final ruling on the certificate of innocence by this court. see Appx.F (memorandum opinion)

This court may have the opportunity to settle the question pending on appeal in the United States Court of Appeals for the Federal Circuit, if Brewer files for a stay in this court.

NON DELEGATION DOCTRINE

Brewer concedes that non delegation doctrine is not the issue in this writ, but is preserving this issue and establishing record under a premature Amicus Curiae for other possible future Supreme Court reviews, as this case arises from the similar circumstances as in the case of Gundy v. United States 139 S. Ct. 2116 (2019) in which this court recently

decided. Brewer also raised the issue of non delegation in his past pleadings, see (opinion) Appx.L, and is a pre-Act offender as *Gundy* and effected by that decision.

It can be said with high probability that sex offender laws have been amended more than any law in the history of the United States and still comes before the Supreme Court on many occasions to resolve its issues. The question as to whether the retroactive application of sex offender laws in present is an ex post facto violation, has evolved. Many states and the 6th Circuit Cout Of Appeals have concluded ex post facto violations after implementation of new amended state and federal registration laws. See Appx.GG. (Sex Offender Registration Issues). Many issues and problems have arisen in amending registration laws. The amended laws have become more onerous than were in this court's previous ruling in Smith v. Doe 538 U.S. 84 (2003) in which this court concluded, that retroactive application of a sex offender registration laws was not a ex post facto violation. But due to all the amendments (social media, residency, relationship, employment, church restrictions) (travel has not been completely restricted, but has been regulated),see Appx.OO, PP, (travel permits and acknowledgement form), since this court first ruled in *Doe.*

This court must now reexamine, as stated in *Smith v. Doe,* if *now* as to*" whether the statutory scheme is so punitive either in purpose or effect as to negate the State's intention to deem it civil. E. g., ibid. Because the Court ordinarily defers to the legislature's stated intent, ibid., only the clearest proof will suffice to override that intent and transform what has been denominated a civil remedy into a criminal penalty.",* and if its determined punitive, how long shall this punishment continue. Sex offender registration is a requirement of the punitive punishment of a criminal sentence, and in many cases, its requirements have become more onerous. See Appx.OO, PP, RR., Exhibits Appx.UU

This issue of the constitutionality of the non delegation of authority appears to be an important issue before this court, because every other court (including eleven Courts of Appeals) rejected to consider the issue. Yet, this court nonetheless granted certiorari in *Gundy* and JUSTICE KAVANAUGH in Paul v. United States 589 U. S. _ (2019) made a dissent in regards to reviewing this issue again even further. This court's willingness to still pursue this issue pertaining to the constitutionality of the application of the non delegation doctrine after being rejected by every other court, is a good example of this court performing their duty and responsibility as a branch of the U.S. Government, just as the legislative and executive branches. Non delegation is a very important issue before this court as it also effects Congress and the Supreme Court as the judicial branch of the U.S. Government. As set out in Marbury v. Madison, 5 U.S. 1 Cranch 137 137 (1803) the U.S. Supreme Court asserted its power to review acts of Congress and invalidate those that conflict with the Constitution. *Marbury v. Madison* greatly enhanced the Supreme Court's power by ultimately establishing the court's power to declare acts of Congress unconstitutional. Just as important, it emphasized that the Constitution is the supreme law of the land and that the Supreme Court is the arbiter and final authority of the Constitution. As a result of this court ruling, the Supreme Court became an equal partner in the government.

Brewer agrees that the actual delegation of authority to Attorney General does not violate non delegation, but the manner, act and performance of the duty to "specify the applicability" of SORNA's registration requirements and "to prescribe rules for registration." do violate the non delegation doctrine. The *results of the applicability and prescribed rules* are unconstitutional within that authority. Whatever rules the Attorney General promulgates still must conform to the U.S. Constitution. The applicability,

guidelines and rules that the Attorney General has prescribed, has now come into question if they violate the ex post facto clause of the U.S. Constitution and State Constitutions, even though delegated the authority by Congress to do so. The application and rules for pre-Act offenders still has not been resolved in over a decade, and has become more difficult, as more courts conclude the retroactive applications have become constitutional ex post facto violations. see Appx.GG. The reason delegation of authority to Attorney General is being questioned is because Congress gave vast authority to the Chief Prosecutor in the U.S. to prosecute under its own created rules of law (even though limited in scope), and the blame for the issues and problems that have arisen in implementing SORNA on pre-Act offenders, reflects back upon Congress for giving the Attorney General that vast authority, which has resulted in courts ruling violations of the U.S Constitution and State Constitutions. Congress is ultimately responsible for issues and problems that have arisen in implementing SORNA on pre-Act offenders, by delegating authority and passing the problems in implementation on to the Attorney General. The application of SORNA to pre-Act offenders within itself, violates the ex post facto clause of the constitution, *if* the retroactive application has created more onerous conditions on pre-Act offenders, see Weaver v. Graham, 450 U.S. 24 (1981) "F*or a criminal or penal law to be ex post facto, it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it. Lindsey v. Washington, 301 U. S. 397, 301 U. S. 401; Calder v. Bull, 3 Dall. 386, 3 U. S. 390. It need not impair a "vested right." Even if a statute merely alters penal provisions accorded by the grace of the legislature, it violates the Ex Post Facto Clause if it is both retrospective and more onerous than the law in effect on the date of the offense" see* also Appx.OO, RR. (reregistration) It should be determined in sentencing the duration period, eligibility for termination and future conditions of registration attached to the sentence.

The question needs to be addressed as to how many new registration requirements can be amended and added upon pre-Act offenders who have completed their sentence and those already serving a duration period of registration before it is considered punishment more onerous and akin to parole and probation. This court has ruled that there is a limit on amended registration requirements and conditions, see Packingham v. North Carolina, 582 U.S. (2017) " Held: *The North Carolina statute impermissibly restricts lawful speech in violation of the First Amendment."*

Sex offender registration has become akin to extended community supervision, parole and probation, (sentences of punishment) and can be in many instances more onerous. See Appx.OO, QQ, RR, and Exhibits Appx.UU (pertaining to registration). The fees offenders are required to pay for registration are also akin to probation and parole fees. See Appx.OO (Alabama Acknowledgement form 31, 32) and its substantial SORNA implementation. By duration periods of registration with fees attached to a sentence, being increased, its akin to serving parole and probation and its duration being extended, without violating any parole and probation conditions and being placed back on parole and probation after it being served. see Appx.QQ, RR. There are also conditions placed upon travel of offenders. An offender must travel within a certain period of time and provide information and must attain a travel permit or be liable for prosecution. see Appx.PP (travel permits).

The Attorney General till date has steadily, only temporarily provided bandages for the persistent issues and problems that have arisen in implementing SORNA on pre-Act offenders and is steadily amending the guidelines. see SORNA Proposed Rule 85 FR 49332. Appx.SS. Majority of States still have not substantially implemented SORNA see Appx.TT (SORNA implementation) and the Attorney General is yet, in 15 years, prescribe definitive rules to pre-Act offenders under 34 USC 20913 *(d) Initial registration of sex offenders*

unable to comply with subsection (b) The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b). States are also having issues implementing SORNA under their State Constitutions. see Appx GG (SORNA issues). The questions raised in *Gundy* even though this court did not address all of them, are a good example of the results of the applicability and prescribed rules by the Attorney General. The Attorney General till date still has not promulgated a federal SORNA acknowledgement form notifying pre-Act offenders of the retroactive requirements placed upon them, or designated a definitive appropriated official to do so under 34 USC 20919: Duty to notify sex offenders of registration requirements and to register, in regards to pre-Act offenders, yet, it has steadily prosecuted offenders in the loopholes of the laws they promulgated as in *Gundy*. What differentiates the challenges to the non delegation doctrine issue as discussed in *Gundy* from past challenges to the non delegation doctrine, is the kind of authority delegated and to whom it was delegated (Chief Prosecutor), and its results.

The very reason this writ is even before this court is in relation to the underlying certificate of innocence, and within it, the Attorney General violated the law, by violating and not complying with the notice and comment requirements of APA substantive rule-making, within its delegated authority from Congress. see United States v. Brewer 766 F.3d 884 (8th Cir. 2014). The Attorney General has violated the law without any repercussions. The Attorney General as the Chief Prosecutor in the U.S. has abused its delegated authority and prosecuted many people illegally. As in the cases of Reynolds v. United States, 565 U.S. 432 (2012) and petitioner in this case United States v. Brewer 766

F.3d 884 (8th Cir. 2014), everyone who was prosecuted before the interim rule became valid, were prosecuted illegally. Within its authority it created criminal liability upon all pre-Act offenders, and started prosecuting them before the rule it published even became valid. This is a perfect example of what JUSTICE GORSUCH stated "is delegation running riot." " in his dissent in *Gundy.* The rules that the Attorney General has designed to prosecute, are more of a prosecutorial tracking tool instead of preventing sex offenders from reoffending. Steadily putting unnecessary conditions on offenders that have not reoffended is detrimental to rehabilitation, but does provide the Attorney General with a job.

In *Gundy*, JUSTICE ALITO stated he is willing to review this issue again, if the court will change its approach of thinking under these new circumstances of challenges to the constitutionality of the non delegation doctrine. In Paul v. United States 589 U. S. ___ (2019), JUSTICE KAVANAUGH who did not participate in *Gundy* also stated he was willing to review this question. *"Like Justice Rehnquist's opinion 40 years ago, JUSTICE GORSUCH's thoughtful Gundy opinion raised important points that may warrant further consideration in future cases."* Sadly, JUSTICE GINSBURG passed away. JUSTICE THOMAS, JUSTICE GORSUCH, CHIEF JUSTICE ROBERTS dissented in *Gundy.* It is very much possible the questions about the authority delegated to the Attorney General will be before the Supreme Court again. JUSTICE KAVANAUGH stating he is willing to review the issue, can be viewed as, he did not agree with the opinion in *Gundy.* There is now also the newest JUSTICE BARRETT who did not participate and replaced JUSTICE GINSBURG. Under the present makeup of JUSTICES, with JUSTICE THOMAS, JUSTICE GORSUCH, CHIEF JUSTICE ROBERTS, JUSTICE KAVANAUGH, already expressing their view, JUSTICE ALITO now has the majority he stated to change the approach of review, regardless of the view of JUSTICE BARRETT who has not participated

in this question and issue yet. It is very likely a constitutional violation will be found within the authority delegated to the Attorney General by Congress, dependent on how this question and issue is raised in the future. The future of the non delegation doctrine now relies on a new approach and view on the constitutionality of the "intelligible principle" directed to a prosecutor by Congress, in which the duration period of registration was extended and Pre-Act offenders who have already completed their sentence and duration period of registration are required to *re*register. See App.RR, TT. (reregistration and SORNA substantial implementation).

CONCLUSION

The question and issue *now* is not a question of if the 8th Circuit Court Of Appeal's conclusion on this issue and question of the requirement of due process notice is erroneous. If the issue and question had been addressed with a discussion and explanation, the petitioner would have no grounds and reason for mandamus or have any right to certiorari, even if the 8th Circuit Court of Appeal's had came to erroneous fact finding and conclusions of law. But, the complete failure to even discuss and address the issue and act and perform their duty as judges, brings upon the necessity of a writ for mandamus and or certiorari. Brewer's claim for relief involving his constitutional right under the Due Process Clause of the Fourteenth Amendment and the notice and knowledge, including knowledge of any duration period it requires, has not been addressed or discussed in *any opinion or order*, yet Brewer has repeatedly and consistently brought this issue and question before the court in his past pleadings. see Appx.U, V, W, X, Y, Z, BB, CC, DD, EE, FF.

This court has the authority to treat this writ of mandamus as a writ of certiorari. see In Re United States, 583 U. S. (2017). This issue and question can be remedied through a certiorari. If certiorari is granted the Supreme Court can remand the issue of a

constitutional right under the Due Process Clause of the Fourteenth Amendment and the notice and knowledge, including knowledge of any duration period it requires under the Due Process Clause of the Fourteenth Amendment, back to the 8th Circuit to be addressed in the first instance. But Brewer, however, argues that under the circumstances and background of this case, the Supreme Court can make a final ruling on the underlying certificate of innocence and foreclose any further litigation on the issue and question through certiorari, without having to grant mandamus relief or remand the question and issue back to the 8th Circuit, because the record and facts in this case are clear, simple and sufficient enough to do so, in regards to if the Brewer had sufficient notice and had the knowledge required by the Due Process Clause of the Fourteenth Amendment, in order to be liable for a conduct that would constitute an offense and violation of law. The ultimate question in this case dealing with the underlying petition for certificate of innocence, is if Brewer's conduct constituted a violation of state law, if he did not receive the sufficient due process notice required by the Due Process Clause of the Fourteenth Amendment.

All acknowledgement forms Brewer acknowledged and the amended acknowledgement forms which include requirements that Brewer was not aware of at time the alleged offence, are on record and within this petition. see exhibits in Appx.X, Y, DD, EE, FF, which also includes the amended requirements he was not notified of or acknowledged (amended acknowledgment forms are the forms unsigned).

If this court grants Brewer his requested relief of certificate of innocence, it will only effect those who do not receive the due process notice required under the Due Process Clause of the Fourteenth Amendment. By not granting a mandamus or certiorari, the Supreme Court will have denied the petitioner any right owed to have his constitutional right within his claim for relief addressed by any judge or court. Brewer as a U. S. Marine veteran and U. S.

citizen, is owed the right to have the merits of his claim for relief and issue adequately addressed even upon erroneous conclusions of law and fact finding, which has yet to be done at this stage by any judge in which these pleadings were before them. see past pleadings Appx.U, V, W, X, Y, Z, BB, CC, DD, EE, FF. This petition for a writ should be granted.

Respectfully Submitted,

Kevin Brewer Pro Se /s/ Kevin Brewer

November 10, 2021