

No. \_\_\_\_\_

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**IN THE SUPREME COURT OF THE UNITED STATES**

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MARK ALLEN BANES,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

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PETITION FOR WRIT OF CERTIORARI

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## **QUESTION PRESENTED FOR REVIEW**

**Whether the state of origin where a sex offender is properly registered is an improper venue for hearing a violation of the sex offender's registration when the violation was for failure to register in the destination state.**

## **IDENTIFICATION OF THE PARTIES**

The party before this Court whose judgment is sought to be reviewed is the Petitioner, MARK ALLEN BANES. The Respondent is the United States of America.

## **RELATED PROCEEDINGS**

After Mr. Banes had plead guilty in Case No. 4:20-cr-00019-001, a final judgment was entered by the Southern District of Iowa on January 8, 2021. A timely Notice of Appeal was filed and the Eighth Circuit Court of Appeals filed an unpublished opinion in Appellate No. 21-1187 on November 19, 2021 affirming the district court's judgment. A Petition for Rehearing or Rehearing En Banc was filed with the Eighth Circuit Court of Appeals but was denied on December 21, 2021 in Appellate No. 21-1188.

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**The Eighth Circuit Court of Appeals erred in affirming the district court’s decision to deny Mr. Banes’ motion to dismiss because the Southern District of Iowa was not the proper venue as the crime did not begin in Iowa, did not continue in Iowa, and it was not completed in Iowa.**

Appendix A – Court of appeals order regarding rehearing (Dec. 21, 2021)

Appendix B – Court of appeals opinion (Nov. 19, 2021)

Appendix C – District court order regarding motion to dismiss (Apr. 9, 2020)

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## **OPINIONS BELOW**

The decision of the Eighth Circuit Court of Appeals denying Mr. Banes' direct appeal is reported as *United States v. Banes*, 2021 WL 5407458 (8th Cir. November 19, 2021) and is attached in Petitioner's Appendix B. The Eighth Circuit Court of Appeals denied Mr. Banes' Petition for Rehearing or Rehearing En Banc on December 21, 2021. That order is attached in Petitioner's Appendix A.

## **BASIS FOR JURISDICTION**

A Petition for Rehearing or Rehearing En Banc was denied by the Eighth Circuit Court of Appeals on December 21, 2021. Mr. Banes seeks jurisdiction by the Supreme Court of the United States under 28 U.S.C. § 1254, having timely filed this petition for writ of certiorari within ninety days of the Eighth Circuit's denial of rehearing.

## **PROVISIONS INVOLVED**

United States Constitution, Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Title 18, United States Code, Section 2250. Pet. App. D.

Title 18, United States Code, Section 3237. Pet. App. E.

## **STATEMENT OF THE CASE**

The relevant facts of this case are largely undisputed. Mr. Banes is a sex offender, which requires him to register as such in his state of residence. On or about October 28, 2019, Mr. Banes was a registered sex offender residing in the state of Iowa. On or about October 28, 2019, Mr. Banes moved from Iowa to Oklahoma, where he resided until his arrest on November 22, 2019. Mr. Banes never registered as a sex offender in the state of Oklahoma. Subsequently, an Indictment was filed on February 20, 2020 in the Southern District of Iowa charging Mark Allen Banes with: Count I – Failure to Register as a Sex Offender, in violation of 18 U.S.C. § 2250; and Count II – Escape from Federal Custody in violation of 18 U.S.C. § 751(a).

On March 11, 2020, Mr. Banes filed a Motion to Dismiss Count I of the Indictment, arguing that venue was improper in the Southern District of Iowa because when a person required to register as a sex offender has allegedly failed to register as a sex offender in the destination state after having traveled in interstate commerce from the state of origin, venue can only be proper in the destination state because that is where the alleged crime had been committed. The district court denied this motion in an order filed on April 9, 2020. On June 22, 2020, Mr. Banes



plead guilty to Counts I and II of the Indictment. He was sentenced, and judgment filed, on January 8, 2021.

Mr. Banes appealed his sentence and the decision of the district court to deny his Motion to Dismiss. On November 19, 2021 via written opinion, Eighth Circuit Judges Shepherd, Wollman, and Kobes affirmed Mr. Banes' sentence and the decision of the district court to deny his Motion to Dismiss. Mr. Banes filed a Petition for Rehearing and Rehearing En Banc on November 30, 2021, requesting the Eighth Circuit to once again review his venue argument, but this was denied by the Eighth Circuit on December 21, 2021.

Jurisdiction of the district court was based on 18 U.S.C. § 3231, as Petitioner was charged with an offense against the laws of the United States. The jurisdiction of the Eighth Circuit Court of Appeals was based upon 28 U.S.C. § 1291, which provides for jurisdiction over a final judgment from a United States District Court.

Mr. Banes now seeks review from this Court.

### **REASONS FOR GRANTING WRIT**

**The Eighth Circuit Court of Appeals erred in affirming the district court's decision to deny Mr. Banes' motion to dismiss because the Southern District of Iowa was not the proper venue as the crime did not begin in Iowa, did not continue in Iowa, and it was not completed in Iowa.**

Venue was improper in the Southern District of Iowa because any criminal acts or omissions attributable to Mr. Banes would have taken place wholly in Oklahoma. The question of whether a § 2250(a) violation begins in the state from

which a sex offender departs when traveling in interstate commerce, which would make venue proper in that state, is important given the Constitutional implications involved. Additionally, it is important for this Court to address this issue because it was the Eighth Circuit's "first case to address venue post-*Nichols*." *United States v. Banes*, 2021 WL 5407458 at \*2 (8th Cir. 2021); *See Nichols v. United States*, 578 U.S. 104, 136 S.Ct. 1113, 194 L.Ed.2d 324 (2016). The Eighth Circuit's decision is contrary to this Court's ruling in *Nichols* and conflicts with Seventh Circuit precedent. *See United States v. Haslage*, 853 F.3d 331 (7th Cir. 2017).

The Sixth Amendment of the United States Constitution establishes the right that the accused in a criminal prosecution shall be tried "by an impartial jury of the State and district wherein the crime shall have been committed." U.S. Const. amend. VI. Mr. Banes was charged with Failure to Register under 18 U.S.C. § 2250, which provides:

(a) Whoever

(1) is required to register under the Sex Offender Registration and Notification Act;

(2)(A) is a sex offender as defined for the purposes of the Sex Offender Registration and Notification Act by reason of a conviction under Federal law (including the Uniform Code of Military Justice), the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States; or

(B) travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country; and

(3) knowingly fails to register or update a registration as required by the Sex Offender Registration and Notification Act;

shall be fined under this title or imprisoned not more than 10 years, or both.

18 U.S.C. § 2250(a).

There is no dispute that Mr. Banes failed to register as a sex offender in the state of Oklahoma, nor is it disputed that he did not update a change of residence with his registration in the state of Iowa. *Nichols* seemingly makes it clear under federal law that a sex offender registrant akin to Mr. Banes did not have to inform Iowa of such a change. *See Nichols*, 136 S.Ct. at 1118 (where this Court held a sex offender does not have to update the jurisdiction they are leaving of their new residential address). At issue here is whether Mr. Banes' offense took place, at least in part, in the Southern District of Iowa. Mr. Banes contends that it did not.

None of Mr. Banes' offense conduct took place in Iowa because the three-day period provided in § 20913 started in Oklahoma and ended in Oklahoma. *See* 34 U.S.C. § 20913. Section 20913 provides, in relevant part, that:

A sex offender shall, not later than 3 business days after each change of name, residence, employment, or student status, appear in person in at least 1 jurisdiction pursuant to subsection (a) and inform that jurisdiction of all changes in the information required for that offender in the sex offender registry.

34 U.S.C. § 20913(c). Given this language, Iowa is not a proper venue for purposes of prosecuting Mr. Banes for Failure to Register under 18 U.S.C. § 2250 because the act of failure to register was in the destination state, Oklahoma, and not Mr. Banes' state of origin, Iowa.

In affirming the district court's decision to deny Mr. Banes' Motion to Dismiss, the Eighth Circuit followed the holding of *United States v. Howell*, 552 F.3d 709 (8th Cir. 2009). Mr. Banes maintains that *Howell* does not accurately capture the issue at hand and further argues the Eighth Circuit did not fully address it on appeal.

The Eighth Circuit concluded that "because a state 'sex offender violates SORNA only when he or she moves between states,' the violation is begun in the state of origin, which is thus a proper venue under 18 U.S.C. § 3237(a)." *Banes*, 2021 WL 5407458 at \*2 (quoting *United States v. Howell*, 552 F.3d 709, 718 (8th Cir. 2009)). Section 3237 provides that "any offense against the United States begun in one district and completed in another . . . may be inquired of and prosecuted in any district in which such offense begun, continued, or completed." 18 U.S.C. § 3237(a). The Eighth Circuit held "that venue in the Southern District of Iowa was proper because Banes' violation began when he began traveling in Iowa." *Banes*, 2021 WL 5407458 at \*2. However, the Eighth Circuit's holding misinterprets § 3237(a). The Eighth Circuit held the violation began when Mr. Banes began traveling in Iowa, but all of Mr. Banes' travel in Iowa was just that, travel in Iowa. It was not interstate travel until he was not physically in the state of Iowa. Section 3237 says that one may be "prosecuted in any district in which such offense begun." 18 U.S.C. § 3237(a). Mr. Banes was not in violation of 18 U.S.C. § 2250 until he

was outside the state of Iowa for the requisite period of time and failed to register in his new location. Thus, the offense did not begin in Iowa.

Section 3237 also says that one may be “prosecuted in any district in which such offense . . . continued.” 18 U.S.C. § 3237(a). Because the offense did not begin until Mr. Banes left Iowa, the offense could not have been continued in Iowa. Additionally, at no point is it alleged Mr. Banes left Iowa and then returned. Thus, the offense was not continued in Iowa in this manner, either. Finally, § 3237(a) says that one may be “prosecuted in any district in which such offense . . . completed.” 18 U.S.C. § 3237(a). Mr. Banes was charged in the Southern District of Iowa with Failure to Register in Oklahoma. That offense was not completed until after the expiration of the three-day period set out in the registry requirements for sex offenders. *See* 34 U.S.C. § 20913(c). Because Mr. Banes failed to register in Oklahoma three days after he started residing in Oklahoma, the offense was completed in Oklahoma, and could not have been completed in Iowa. Therefore, Iowa is not a proper venue for this matter.

Mr. Banes relies on this Court’s holding in *Nichols*. In *Nichols*, the Court held that “SORNA’s plain text . . . did not require Nichols to update his registration in Kansas once he no longer resided there.” *Id.* The Court came to this conclusion because Kansas was no longer a jurisdiction “involved” under 34 U.S.C. §

20913(c)<sup>1</sup>. *Id.* at 1117. As cited above, subsection 34 U.S.C.A § 20913(c) references subsection (a). Subsection (a) provides:

A sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student.

34 U.S.C. § 20913(a). Read together, it is required that “a sex offender who changes his residence to appear, within three business days of the change, in person in at least one jurisdiction . . . where he resides, works, or studies, and to inform that jurisdiction of the address change.” *Nichols*, 136 S.Ct. at 1117.

Following *Nichols*, Mr. Banes was not required to update his registration in Iowa because he was no longer residing or working there, and he was not a student there. Because he was no longer residing in Iowa, Iowa no longer “qualifie[d] as an ‘involved’ jurisdiction under § [20913].” *Id.* at 1116. Now, Mr. Banes concedes *Nichols* does not address the same issue he brings in front of this Court. However, it is the logic used in *Nichols* that this Court should use in its decision. Mr. Banes would point this Court’s attention to *United States v. Haslage*, 853 F.3d 331 (7th Cir. 2017). Using the holding in *Nichols*, the *Haslage* court determined that where the defendants originally resided, Wisconsin, before they moved to Washington State and Minnesota, was not a proper venue under 18 U.S.C. § 2250(a) because

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<sup>1</sup> The Court in *Nichols* cites to 42 U.S.C. § 16913. However, effective September 1, 2017, 42 U.S.C. § 16913 was transferred to 34 U.S.C. § 20913.

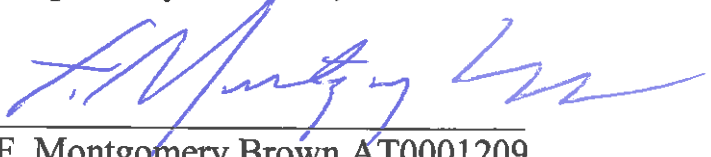
*Nichols* tells us that the place where the offense took place is the place of the new residence. *United States v. Haslage*, 853 F.3d 331, 335 (7th Cir. 2017).

Because Mr. Banes failed to register in the state of Oklahoma, his new residence, three days after he began to reside there, the offense took place in Oklahoma. The decisions in *Howell* and *United States v. Lunsford*, 725 F.3d 859 (8th Cir. 2013) are inconsistent with that in *Nichols*. This Court should resolve the Circuit interpretations, abrogate *Howell* and *Lunsford* and find the decision in *Haslage* to be the applicable federal standard for venue challenges to prosecutions under 18 U.S.C. § 2250.

### CONCLUSION

WHEREFORE, Petitioner, Mark Allen Banes, requests that this Court grant this Petition for Writ of Certiorari for the question and reasons presented.

Respectfully submitted,



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