CASE # 02-1412

IN THE

Supreme Court of the United States

DONALD M. BIRD *Petitioner*

V.

GRAY DAVIS
GOVERNOR OF CALIFORNIA
BILL LOCKYER *Respondents*
ATTORNEY GENERAL OF CALIFORNIA

On Petition For Writ Of Certiorari
To The Ninth Circuit Court of Appeals
San Francisco, California

PETITION FOR REHEARING

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PETITION FOR REHEARING

Petitioner Donald M. Bird (1) vacating his denial of the petition for Writ of Certiorari, entered on May 5, 2003 and (2) granting the petition, as compelling grounds for this motion.

The Petitioner finds the Court's denial of his Writ of Certiorari unacceptable. Given that this court rarely rethinks its position and grants a rehearing the Petitioner will endeavor to beat the odds, and state in his Petition exactly what he feels this Court needs to hear.

Being Pro Se, offers the Petitioner the latitude to state that which officers of the Court would dare not consider. The Petitioner, after examining his Writ of Certiorari again, asks the question of the Court. Did the Petitioner mention the word "God" too many times? After all it is he and not this Court which endows us with our unalienable rights, and it is he that will eventually judge us all for our deeds here on earth. As it stands now the Petitioner will never know what prompted the Court's pusillanimous decision in choosing to ignore this case that involves the usurpation of a fundamental right guaranteed by the very document which created the Court in the first place.

The fact is that this court could have returned this case to the Lower Court, and I do mean lower court, and given those Justices the opportunity to re-examine their "decision". This act of judicial responsibility would have been a far more tolerable outcome for the Petitioner to accept. However with the reputation of the 9th Circuit Court this Petitioner would have hopefully expected our highest court to make a decision. Returning this case to this maverick court would have only prolonged the agony. The Petitioner is adamant to this courts failure to take advantage and spank these "socialists" in the 9th Circuit. This case, in spite of the seeming ambivalence of this Court, is extremely important to the sovereignty of every citizen of our country. It makes one wonder if the members of this Court have a conscience. The Petitioner finds great solace in the assumption he has "given pause" to the Justices of this Court. The Writ of

Mandamus tells you what you must do to fulfill your constitutional duties, and you folks lacked the temerity to comply. Lack of temerity is not name calling, but instead is an apt description of the Court's inaction in this matter concerning the fundamental tenants of this Court's duties. The Court that represents the Judicial leadership of the United States is a sham when it fails to respond by fulfilling its obligation to the Sovereign Citizens of our beloved country. This case is for every citizen that believes in our Constitution and the Bill of Rights. This Court is obligated to treat every Sovereign Citizen with respect. This Petitioner, and all of his fellow Patriots, however insignificant in the eyes of the highest Court, have been cheated. Shame on you all. It is not too late to amend your position on this Writ of Certiorari. If this country is truly the land of the ***free….***Prove it and make history. Give all of us a definitive clear decision on the Individual Right to Keep and Bear Arms. The Petitioner makes no apology for the abrasiveness of the scolding given to the Court. This Court deserves a harsh reminder that its members are duty bound to Protect and Preserve our Constitution. If you folks are so enamored by the perquisites of your positions that your fear to stand up to those who would steal our freedoms out weighs what you know to be wrong, then this country is doomed.

Ad officium justiciariorum spectat unicuique coram eis placitanti justitiam exhibere. It is the duty of justices to administer justice to everyone pleading before them.

Judici satis poena est quod Deum habet ultorem. It is punishment enough for a judge that he has God to take vengeance upon him.

Error qui non resistitur approbatur. An error that is not resisted is approved.

WRIT OF PETITION FOR MANDAMUS

The above petitioner, Donald M. Bird moves the Honorable Magistrate Gregory G. Hollows of the United States District Court of the Eastern District of California for a rule on the respondents Gray Davis (Governor of California) and Bill Lockyer (Attorney General of California). The petitioner requests the court to show cause why a mandamus should not be issued commanding the respondents to recant with a public statement and a statement for the record of this court the following: Statements and remarks made in the answer to the complaint filed against the respondents June 5, 2001. The petitioner shows cause why this court should issue the mandamus. The petitioner declares as a sovereign citizen of the United States of America and a citizen of the State of California, the statements in the respondents response to the petitioner are false and fail to agree to the wording and meaning of the United States Constitution and the Bill of Rights, and in particular the Second Amendment. The petitioner reminds the respondents that they recite an oath when they become an elected public official. The respondents appear to the petitioner to have ignored the oath of office. This request for a Writ of Mandamus is expressly for one reason and one reason only. The petitioner demands the respondents obey the oath and acknowledge the fact and exact true wording of the Second Amendment. It is recognized by the petitioner that the Writ of Mandamus is the ultimate motion a grieved citizen retains to pray for relief. It may be arguable in the prior complaint filed against the respondents, that this petitioner could not show damages of his civil rights. The petitioner maintains that any citizen that usurps, or causes any of the rights of any citizen to be infringed does indeed violate the citizen's constitutional rights. The petitioner acknowledges that this mandamus will not lie to control the respondents Gray Davis or Bill Lockyer in the discharge of their ordinary official duties nor to compel the respondents to perform any act over which

they have the right to exercise their judgment or discretion. The petitioner also acknowledges that the respondents cannot be compelled, by Writ of Mandamus to perform a mere ministerial act devolved on them by the laws of the State. However the petitioner takes the unchallengeable position that the respondents must and should be ordered to support, defend and adhere to the United States Constitution as it is written, and interpret *not this said* document whenever it is convenient politically or for personal recognition.

Although the state cannot be sued (which in the opinion recent court cases can be successfully argued) there is nothing in the nature of the Governor (Gray Davis) and the Attorney General (Bill Lockyer), which prevents a suit against the person engaged in discharge of his duties. This is fully sustained by the analogy of the doctrine of the Supreme Court of the United States in the case of Marbury vs. Madison.

The better doctrine seems to be, that the Governor is not an exception to the general rule that all public officers may, by mandamus, be compelled to perform an act clearly defined and enjoined by the law, and which is merely ministerial in its nature, and neither involves any discretion, nor leaves any alternative, perform either its legal or constitutional duties. This argument is founded on theory rather than reality. That each of these coordinate departments has duties to perform, in which it is not subject to the controlling, or direction authority of either of the others, must be conceded. But this independence arises not from the grade of the officer performing the duties, but the nature of the authority exercised. Under our system of government, no officer is placed above the restraining authority of the law, which is truly said to be universal in its behests, all paying it homage; the least as feeling its care, and the greatest as not exempt from its power. And it is only where the law has authorized

it, that the restraining power of one of these coordinate departments can be brought to operate as a check upon one of the others. The judicial power cannot interpose and direct in regard to the performance of an official act which rests in the discretion of any officer, whether executive, legislative or judicial.

(Pacific Railroad v. Governor, 23 *Miss,. 353; Colten v. Ellis, 7 Jones' Law [N.C], 545; Chamberlain v. Sibley, 4 Min., 309; 7 O.S.R., 372.)*

In the case of *The State of Ohio, ex rel. Lewis Whiteman et al. v Salmon P. Chase, Governor, 5 O.S. Rep.,* 529, the question, "Whether the Governor can be controlled in his official action by the authority a Writ of Mandamus from the Supreme Court," was presented and discussed for determination.

BARTLEY, C.J., in delivering the opinion of the court, said: "Can the chief executive officer of the State be directed or controlled in his official action by proceedings in Mandamus? It is claimed on the part of the defense, that, in as much as the government is, by the Constitution, divided into the three separate and coordinate departments; the legislative, the executive, and the judicial: and inasmuch as each department has the right to judge of the Constitution and laws for itself, and each officer is responsible for an abuse or usurpation, in the mode pointed out in the Constitution, it necessarily follows, that each department must be supreme within the scope of its powers, and neither subject to the control of the other, for the manner in which it performs, or its failure to perform either its legal or constitutional duties. This argument is founded on theory rather than reality. That each of these coordinate departments has duties to perform, in which it is not subject to the controlling, or direction authority of either of the

others, must be conceded. But this undependence arises not from the grade of the officer performing the duties, but the nature of the authority exercised. Under our system of government, no officer is placed above the restraining authority of the law, which is truly said to be universal in its behests, all paying it homage; the least as feeling its care, and the greatest as not exempt from its power. And it is only where the law has authorized it, that the restraining power of one of these coordinate departments can be brought to operate as a check upon one of the others. The judicial power cannot interpose and direct in regard to the performance of an official act which rests in the discretion of any officer, whether executive, legislative or judicial."

In *Marbury v. Madison, 1 Cranch Rep., 170*, Chief Justice MARSHALL said: "It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing a mandamus is to be determined." The Constitutional provision declaring that "the supreme executive power of this State shall be vested in the Governor", clothes the Governor with important political powers, in the execution of which he uses his own judgment or discretion and in regard to which his determinations are conclusive. But there is nothing in the nature of the chief executive office of this State, which prevents the performance of some duties merely ministerial being enjoined on the Governor. While the authority of the Governor is supreme in the exercise of his political and executive functions which depend on the exercise of his own judgment or discretion, the authority of the judiciary of the State is supreme in the determination of all legal questions involved in any matter judicially brought before it.

The petitioner (as well as the court should) support the view of the law of Mandamus. It expressly states the Writ shall be grantable where a citizen has a legal right to insist that a

certain act shall be done, the performance of which is, by law made the duty of a public officer.

As it was a remedy introduced to prevent disorder from a failure of justice, in pursuance of the principles of the common law, it ought now to be used upon all occasions where the law has established no specific remedy, and where in justice and in good government there ought to be one. If there be a right and no other specific remedy, this writ should not be denied by our courts. It may be stated as a general principle that this writ is only granted for public persons, and to compel the performance of public duties. (3 *Stephens' Nisi Prius,* 2291.) It can be resorted to only in those cases where the matter in dispute, in theory, concerns the public, and in which the public has an interest. The degree of its importance to the public, is not, however, scrupulously weighed. (1 *Swift's Digest, 564.)* A mandamus gives no right, not even a right of possession, but simply puts a man in a position which will enable him to assert his right, which in some cases he could not do without it.

In order to lay the foundation for issuing a Writ of Mandamus, there must have been a refusal to do that which it is the object of the mandamus to enforce, either in direct terms, or by circumstances distinctly showing an intention in the party not to do the act required. *(3 Stephens' Nisi Prius*, 2292. *Redfield on Railways, 441. Note5.)*

And although the power to issue a mandamus is not in America regarded as a prerogative power yet the writ so far partakes of the nature of a prerogative writ, that the court has the power to issue or withhold it, according to its discretion. And if issued, it would manifestly be attended with hardship and difficulties, the court may, and even should refuse it. *(Ex-parte Fleming, 4 Hill* 581.)

established no specific remedy, this writ should not be denied. *(The Proprietors of St. Luke's Church c. Slack, 7 Cushing's Rep.,* 226.)

However, therefore, the respondents in the exercise of the Supreme Executive Power of the State may, from the inherent nature of the authority in regard to many of the respondents duties, they have a discretion which places them beyond the control of the judicial power, yet in regard to a mere ministerial duty enjoined on them by statute, which might have been devolved on another officer of the state (as of State Senator or Congressman or Assemblyman) and affecting any specific Private Right they maybe made amendable to the compulsory process of this court of Mandamus.

The petitioner supports the position that the Constitution is the Supreme Law of the United States of America and no court is entitled to support any person, public or private, to abridge this cornerstone of our Republic. If the respondents, Gray Davis and Bill Lockyer, act in a ministerial capacity and they violate any Constitutional Right, they are not exempt from the power of the Writ of Mandamus. Cite case Low vs. Town Georgia 360, People vs. Bissel 19 til 229.

The petitioner states that to simply define and declare what are the Rights of the Citizen is not the only object of Civil Government; and it meets only a part of the wants and needs of a citizenry.

An equally important branch of the civil and criminal juris prudence of a civilized nation is the remedy provided by law for those who have been deprived of their rights. That remedy which comes nearest to restoring to the party that of which has been deprived approaches nearest to a perfect remedy.

In this Petition of Mandamus, the petitioner only seeks acknowledgment of his Second Amendment Rights to keep and Bear Arms as a Private Citizen!

The petitioner has filed with Writ of Mandamus the supporting documentation that gives reason to argue the petitioner would not or could not obtain any relief from this court or any court to obtain the simple admittance from the Respondents.

It is specifically requested from this court to order the respondents to comply with this Petition.

The Petitioner implores the justices to review the definition of “sedition” Blacks Law -7th Edition page 1361.

“THE COURTS ARE SOWING SEEDS”.

The U.S. Supreme Court has stated that "No state legislator or executive or judicial officer can war against Constitution without violating his undertaking to support it." Cooper v. Aaron, 358 U.S. 1,78 S. Ct. 1401 (1958).

Any judge who does not comply with his oath to the Constitution and engages in acts in violation of the Supreme Law of the Land. The judge is engaged in acts of treason. Having taken at least two, if not three, oaths of office to support the Constitution of the United States. Any judge who has acted in violation of the Constitution is engaged in an act or acts of treason.

The U.S. Supreme Court, in Scheurer v.

> Rhodes, 416 U.S. 232, 94 S.Ct. 1683, 1687 (1974) stated that "when a state officer acts under a state law in a manner volatile of the Federal Constitution, he "comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States."
>
> If a judge does not fully comply with the Constitution, then his orders are void, In re Sawyer, 124 U.S. 200 (1888), he/she is without jurisdiction, and he/she has engaged in an act or acts of treason.

The 14th Amendment to the Constitution plainly and in unduplicitous words makes it irrevocably clear that the right to keep arid bear arms is an individual right. 42U.S.C. paragraph 1983, accredits **"to anyone protection for redress, if he is deprived of any rights, privileges…to which he is entitled under the Constitution of the United States."** Negroes had their guns confiscated and successfully sought their remedy under the 14th Amendment. It is difficult to see how remedies could be granted, if no individual right to keep and bear arms existed.

The *Bill of Rights* was drafted for the entire nation. California's "Act of Admission to the Union" provided for this state to enter the Union *"on an equal footing with the original States in all respects whatever"*. By this provision the *Bill of Rights* including the right to arms, became confirmed and applied to all California citizens. The *Bill of Rights* is not repealable.

The California Constitution obligates the legislature to adhere to the principles of *liberty* in Article I Sections 1,2,4, and *7*. Liberty is important because it is more than just a right! Liberty is a condition, a state of being, under which sacred endowments are secured, and by which one may exercise his rights and abilities "free from restraints". Liberty is a condition free from infringement and coercion, unhampered *by* adverse laws written by government officials.

If the condition to exercise a right in a manner "free from restraints" is taken away, *it is liberty that is lost, but not the right itself.* Rights that are endowed to

man by the Creator will always exist. These sacred endowments can never be taken away by our fellow man; however, the use -or- exercise of these endowments can only be prevented or denied by a corrupt government. No government can *take away* these endowed rights per se!

The right to arms is dependent upon *the existence of liberty* in order for it to be exercised. No person can ever *lose* his essential rights, because they are un-alienable, *but one can lose, or be denied, liberty.* Liberty is the undergirding energy force that makes possible the actualization of a right.

The *Bill of Rights* has an exclusive and unique power for which there is no equal! The *Bill of Rights* is a palladium which provides inviolability for sacred rights and is still higher law than the first seven articles in the Constitution. The first seven articles were written by the hand of man, but the *Bill of Rights* contains the endowments from the Creator. It is unrepealable! No man can nullify the laws of God! Its sphere of authority is supreme in guarding the rights of the law-abiding people. It is the *American Magna Carta!* No public official can lawfully override, set aside or repeal any of its provisions. The first Ten Amendments (Articles) in the *Bill of Rights* can NOT be superseded by a law in any form, including executive orders, executive agreements, treaties, state or federal pre-emption, etc.

Our sovereignty, our independence, our right to be self-governing, our liberty, our freedom and our right to the pursuit of happiness under a republican form of government are all guarded by the existence of the *Second Amendment* in the *Bill of Rights.*

Additionally, all of the other nine amendments in the *Bill of Rights,* for their existence, depend upon the existence of the *Second Amendment.* The right is necessarily and apparently absolute! To detrude the *Second Amendment* by use of state pre-emption, is unforgivable!

The Fifth Circuit Court of Appeals U.S. vs. Timothy Emerson - Case No. 99/99-10331—April 5,2002- Page 36 of Appendix. See VII of Conclusion, third paragraph. PLEASE READ IT! "We agree with the district court that the Second Amendment protects the right of individuals to privately keep and bear their own firearms that are suitable as individual, personal weapons and are not of the general kind or type excluded by *Miller,* regardless of whether the particular individual is then actually a member of a militia."

The Revolutionary War was not fought for "rights". The founding fathers knew that our rights were inherent. What they fought for was "independence and liberty". Denial of the exercise of our rights is a denial of liberty.

THE ULTIMATE AUTHORITY
ADMENDMENT II

A well-regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.

CONCLUSION

For the reasons set forth above, as well as those presented in the petition for certiorari and supplemental petition, petitioner prays *that* this Court grant rehearing of the order of denial, vacate that order, grant the petition and review the decision and order below.

This Appellant is asking this Court to reason with logic and common sense. No precedents should be their guide. It is time to recognize they all swear to the identical oath to the one and only Constitution. The Appellant implores and pleads this Supreme Court to put aside pride, ego and political views. The Appellant respectfully requests this Court to accept the Appellant's unorthodox presentation of the Writ of Certiorari. The Appellant offers no excuse or apology for the written arguments/statements as presented. Many others have entered this Court with great hope and expectations. This Appellant feels no different and prays all nine Justices vote to support their oath and will finally accept the true meaning of The Second Amendment.

With Revered Respect,

Donald M. Bird
Appellant. Pro Se
May 23, 2003

CERTIFICATE OF COUNSEL

I certify pursuant to Supreme Court Rule 44.2 that this petition for rehearing is restricted to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented, and that it is presented in good faith and not for delay.

Donald M. Bird
Counsel for Petitioner