CASE NO. 21-390

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

CHRISTOPHER EVERSON-PETITIONER

VS

THERESA LANTZ,

CONNECTICUT COMMISSIONER OF CORRECTIONS, ET AL-RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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PRO SE PETITIONER

AUGUST 30, 2021

QUESTION(S) PRESENTED

The Petitioner presents two questions:

Federal Rules of Civil Procedure Rule 60 (d) (1) Provides: "(d) Other powers to grant relief, This rule does not limit a courts power to, (1) entertain an independent action to relieve a party from a judgment, order or proceeding."; and In United States v. Beggerly, 524 U.S. 38 at 46 (1998) This Court said, "if rule 60 (b) is to be interpreted as a coherent whole, be reserved, "for those cases of "injustices which" in certain instances, are deemed sufficiently gross to demand a departure' from rigid adherence to the doctrine of "res judicata."

Question one is: In what instances or circumstances, if any, is the doctrine of "Res judicata", conjoined with the "frivolous standard" of Federal Rules of Civil Procedure Rule 12 (b) (6) applicable to an Independent Action filed by a litigant pursuant to Federal Rules of Civil Procedure Rule 60 (d) (1)?

Question two is: If a litigant files an Independent Action pursuant to Federal Rules of Civil Procedure Rule 60 (d) (1), should the Independent Action be correctly filed and docketed as a new action with a new docket number or should the Independent Action be correctly filed and docketed under the prior or original action and with the prior and original docket number?

LIST OF PARTIES AND RELATED CASES

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

Christopher Everson- Petitioner

John Armstrong, former Connecticut Commissioner of Corrections –Respondent

Theresa Lantz, former Connecticut Commissioner of Corrections-Respondent

Connecticut Commissioner of Corrections, Respondent

Nelvin Levester, Respondent

Robert Carbone, Respondent

Related cases are as follows:

EVERSON V. LANTZ, Docket No. 3:04-cv-387 (RNC) Connecticut District Court, Judgment entered February 4, 2009

EVERSON V. SEMPLE, Docket No. 3:16-cv-77 (RNC) Connecticut District Court, Judgment entered September 7, 2016

EVERSON V. LANTZ, Docket No. 09-0903-cv Second Circuit Court of Appeals, Judgment entered June 9, 2009

EVERSON V. SEMPLE, Docket No 16-3381 cv Second Circuit Court of Appeals, Judgment entered on September 8, 2017

EVERSON V. COMM'R OF CORRECTIONS, Docket No. 19-882 cv Second Circuit Court of Appeals, Judgment entered August 6, 2019

EVERSON V. SEMPLE, Case No. 17-7650 cv Supreme Court of The United States, Cert denied on February 4, 2020

EVERSON V. LANTZ, COMM'R OF CORRECTIONS, Docket No. 3:04cv 387 (RNC) Connecticut District Court, Judgment denying "doc #'s 172 and 174" entered January 6, 2021

EVERSON V. LANTZ, COMM'R OF CORRECTIONS, Docket No. 21-228 cv Second Circuit Court of Appeals, judgment entered July 14, 2021

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The opinion of the Second Circuit Court of Appeals appears at Appendix A the opinion is unpublished. The opinion of the United States District Court for Connecticut Appears at Appendix B the opinion is unpublished

JURISDICTION

The Second Circuit Court of Appeals issued its opinion on April 27, 2021 and a copy of decision appears at Appendix A. Petitioners timely Motion for panel reconsideration and reconsideration *en banc* was denied on June 2, 2021 and a copy of the order denying reconsideration and reconsideration en banc appears at Appendix C. The jurisdiction of this court is properly invoked pursuant to 28 U.S.C. section 1254(1)

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

42 U.S.C. section 1983 provides:

Civil Action for Deprivation of rights: Every person who, under color of any statute, ordinance regulation, custom, or usage of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or

omission taken in such officer's judicial capacity injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Amendment 5 provides: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except In cases arising in the land or naval forces or in the militia, when in actual service in time of war or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.

Amendment 14, Section 1. provides: 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.

STATEMENT OF THE CASE

In 1984 the petitioner here began employment with the Connecticut Department of Corrections (hereinafter referred to as DOC). The appellant was a stellar employee with an outstanding work record and all good evaluations. In March of 2001 the appellant was terminated from his employment with DOC, the reason as stated by DOC for the petitioner's termination was: (disciplinary action against the petitioner for two arrest for off-duty conduct), the petitioner was arrested twice within a 60 day time period related to the same underlying circumstances, the petitioner had a dispute and argument with his girlfriend, ultimately all of the arrest charges against the appellant were dismissed in Connecticut State Court. In March 2004 the petitioner by his Attorney, filed a lawsuit Everson v. Lantz, et al., 3:04cv387 (RNC) in Connecticut District Court against DOC, under Title 42 U.S.C. section 1983 alleging his termination by DOC violated the petitioner's Constitutional Rights, and the petitioner's lawsuit cited among other things that numerous other DOC employees were arrested for comparable conduct and charged with comparable charges and were similarly situated and comparable to the petitioner inthat those individuals "the plaintiffs' named comparators" were all subject to the same workplace rules, regulations, policies and disciplinary standards and the lawsuit further alleged that those same similarly situated individuals "named comparators" had violated the same rules that DOC alleged that the petitioner had

violated, but DOC did not discipline those named comparators, and those named comparators were not terminated by DOC and were allowed to continue working and/or return to work after their arrest, and all of those named comparators were outside of the petitioner's protected class, "the petitioner is African American and all of those similarly situation comparators were not African American." The case was dismissed in February 2009 by the District Court after two separate summary judgments.

In March 2009 the petitioner filed a timely appeal of the District Court's decision with the Second Circuit Court of Appeals see *Everson v. Lantz, Comm'r of Corrections*, case No. 09-0903cv the petitioner was incarcerated at the time he filed his appeal, the petitioner was incarcerated from May 2008 until April 2012 for a matter unrelated to the termination or the lawsuit, the petitioner's appeal cited that among other things: at summary judgment the plaintiff/petitioner's admissible evidence i.e. "the names of his similarly situated comparators" were excluded and/or omitted from the examination analysis of the February 2009 ruling and order/final judgment "case doc #131" for summary judgment, that is to say that in the petitioner's motion for summary judgment "case doc's # 121, 123 and 124, the petitioner listed the names of his twenty eight similarly situated named comparators, but the February 2009 ruling and order in error did not examine or mention any of the plaintiff/petitioner's named comparators, the

ruling and order" doc # 131" examined and mentions a list of names provided from the defendant's motion for summary judgment and in error "by accident or mistake" identifies and refers to the defendant's evidence I.e. names of individuals provided by the defendant, as being the plaintiff's named comparators, and attributes the facts and circumstances of the defendant's named individuals as being the same facts and circumstances as the plaintiff's named comparators, whereas the facts and circumstances of the defendant's named individuals were completely different than the facts and circumstances of the plaintiff's named comparators, the plaintiff/petitioner's named comparators appear to have been overlooked or disregarded and omitted from the summary judgment process/examination and analysis for an unknown reason.

While the petitioner was incarcerated "during the time of his appeal" he was not receiving his legal mail, prison/DOC officials were withholding the petitioner's legal mail, specifically, several notices sent to the petitioner from the Court of Appeals were not delivered to the petitioner, because the petitioner was not receiving his legal mail the petitioner was "effectively unable to protect his appeal and unable to monitor his appeal", this resulted in the petitioner missing important filings and missing important court imposed deadlines. The petitioner's appeal was dismissed on June 9, 2009 after the petitioner failed to respond to two notices sent to him from the Court of Appeals, both notices instructed the petitioner to complete and return to the court an enclosed

"in forma pauperis motion" forms for New York State, the petitioner did submit with his notice of appeal, an approved Connecticut "in forma pauperis motion" granted by the Connecticut District Court "case doc # 140". The petitioner was not aware that his appeal was dismissed, because legal mail was not being delivered to the petitioner. The petitioner learned that his appeal had been dismissed 3 weeks after the time period to serve and file a motion for reconsideration with the district court had expired, the petitioner learned his appeal had been dismissed when he received a "bill of cost, case doc# 142" from the defendant's attorney. The petitioner immediately filed a motion requesting to have the case reopened, and requesting a recall of the mandate both were denied. For the remainder of the petitioner's incarceration his legal mail was often withheld or delayed. The petitioner filed Writ of Certiorari with the United States Supreme Court, that was denied "as filed untimely", the untimeliness was attributed to ongoing delays of the petitioner's incoming mail, the petitioner filed a request for rehearing, that was denied, the petitioner filed an Extraordinary Writ, in late 2011 it was denied.

On or about April 3, 2012 the appellant was released from his incarceration, on or about the same day as the petitioner's release from incarceration the petitioner met with an Attorney "Paul Reynolds of Wallingford CT", Attorney Reynolds agreed to represent the appellant in his wrongful termination case against DOC. The petitioner relied on his

attorney's representation from April 2012 until October 2015, during that time the petitioner was unaware that his attorney was suffering with serious and debilitating health problems that hindered the attorney's ability to work on the petitioner's case; during that time period the petitioner made ongoing and frequent inquiries with his Attorney has to the status and any progress of his wrongful termination case, on every communication the petitioner's Attorney assured the petitioner that the wrongful termination case was being properly handled and going well, and, "illness caused" the attorney to almost completely neglect the petitioners business "wrongful termination case", while at the same time the attorney was reassuring the petitioner that the matter was in hand. On or about October 27, 2015 the petition's Attorney passed away, a few days before his attorney passed away the petitioner spoke by telephone to his attorney, during that telephone conversation the petitioner's attorney told the petitioner that he "the attorney" would be entering the hospital for a few days for some procedures and after his release from hospital he would be able to do a much better job on handling the petitioner's wrongful termination case, during that conversation the petitioner's attorney told the petitioner that he "the attorney" had for some time, been suffering with serious and debilitating health problems and those health problems had been slowing him down and hindering him and effecting his ability to work on the petitioner's case, but while in hospital he would have procedures that would help him get better "improve his health" and he would be able to work better, the petitioner's attorney

passed away while in hospital, his death was caused by those same health problems. After the sudden and unexpected death of his attorney the petitioner was upset, and disorientated about the death of his attorney, as a result of his attorney's death the petitioner was experiencing anxiety and emotional turmoil, the petitioner spoke with his attorney's office about the death and about the case and the office notified and instructed the petitioner that soon the court would authorize the release of his files from the office and he could pick up his files. After the death of his attorney the petitioner has actively pursued his legal judicial remedies; in January of 2016 the appellant filed a new action "pro se" in the district court as mandamus see *Everson v. Semple, Comm'r of Correction, Docket No. 3:16-cv-77 (RNC) Connecticut District Court*, the petitioner intended the mandamus to be given the same docket number as the first case 3:04-cv-387(RNC), citing Title 28 U.S. Code section 1651(a) all writs act to address and set aside and vacate the final judgment in the case, the petitioner also requested an attorney be appointed, the court assigned the new action a new docket number, the new action was dismissed citing "res judicata", and the request for an attorney was denied, the petitioner appealed the trial court's decision see *Everson v. Semple, Docket No. 16-3381cv Second Circuit Court of Appeals,* the court of appeals upheld the trial court's decision, the petitioner filed a Writ of Certiorari that was denied on April 16 2018 , the petitioner filed a petition for rehearing that was denied on June 11, 2018. On July 27 2018 the appellant/petitioner filed a Motion for Relief from a Final Judgment

and Order pursuant to Federal Rules of Civil Procedure Rule 60 (b)(6) under the first, original docket number, 3:04 cv-387(RNC) that motion was denied, the petitioner appealed the decision of the trial court the Court of Appeals upheld the trial court's decision citing; Appeal "lacks an arguable basis In law or fact", the petitioner filed a motion for panel reconsideration and reconsideration En banc, that was denied; the petitioner filed a Petition for Writ of Certiorari with this court it was denied. The petitioner filed a Petition for Rehearing that was denied.

The petitioner then filed two separate Independent Actions, on April 6, 2020 the petitioner filed an Independent Action pursuant to Federal Rules of Civil Procedure Rule 60 (d)(1) under Case: Everson v. Lantz, No 3:04cv387(RNC) "doc #169" that Independent Action was docketed as a Motion to vacate the final Judgment and was denied on January 6, 2021 see order "doc #172 and 174", the petitioner filed a notice of appeal on February 4, 2021 and that appeal Everson v. Lantz, Comm'r of Correction Case No. 21-228 (2d Cir.) was dismissed on July 14, 2021 the Appeals court cited: appeal "lacks an arguable basis in law and in facts", and on July 28, 2021 the petitioner filed a Motion for reconsideration and reconsideration en banc and also included in that motion a request to "recall the mandate" in the original appeal case number 09-0903cv (2d Cir.), and the petitioner also filed an identical Independent Action, pursuant to Federal Rules of Civil Procedure Rule 60(d)(1), that was docketed as a new action Everson v. Lantz, No.

3:20cv885(AVC) "doc #1" and that Independent action was dismissed on November 30, 2020 "doc #17" the petitioner filed a notice of appeal on January 4, 2021, that appeal Everson v. Lantz, No. 21-17 (2d Cir.) was dismissed on April 17 2021 the appeals court cited: appeal "lacks an arguable basis in law and in facts" , the petitioner filed a motion for reconsideration and reconsideration en banc the motion was denied on June 2 2021, the petitioner herein now Petitions for a Writ of Certiorai with this court.

REASONS TO GRANT THE PETITION

There are opposing positions and conflicting decisions held within the circuit courts, on the issues of: the correct application of the doctrine of "res judicata" to an independent action in equity filed pursuant to Federal Rules of Civil Procedure Rule 60 (d)(1) and this is conjoined with the application of Federal Rules of: Civil Procedure, Rule 12 (b)(6) "frivolous standard" of "failure to state a claim upon which relief can be granted", and "lacks an arguable basis in law or in fact" of *Neiztke v. Williams, 490 U.S. 319 at 325 (1989),* as it specifically applies to cases where a litigant files an independent action in equity, with the district court pursuant to Rule 60 (d)(1), seeking "relief from a final judgment or proceeding"; and whether or not and under what circumstances the doctrine of "res judicata" applies to the Rule 60(d)(1) independent action in equity and should the independent action be construed as frivolous under *Neiztke's* standard, based on the preclusive effect of the doctrine of "res judicata."; and 2. There is no straightforward guidance as to the correct procedural method for filing an independent action in equity pursuant to Federal Rules of Civil Procedure, Rule 60 (d) (1); "that is to say": whether an independent action should be correctly filed under the original docket number of the prior lawsuit as akin to a motion to vacate the final judgment, or should an independent action be correctly filed as a completely new action or new lawsuit and with a new docket number. The correct interpretation of the law on deciding both of these issues for an independent action in equity filed pursuant to Rule 60 (d) (1) is frustrated in both the district courts and in the circuit courts of appeals "on if" and when the "frivolous" standard "lacks an arguable basis in law or in facts" under *Neiztke v. Williams, 490 U.S. 319 at 325 (1989)* is applicable to the independent

action, based on the preclusive effect of res judicata, and if the Rule 60 (d)(1) independent action is filed incorrectly "as a new action with a new docket number" "intended to be a direct attack upon the judgment" then the frivolous standard of "lacks an arguable basis in law or in facts" may be applicable under *Neiztke at 325* because of the preclusive effect of "res judicata". This lack of clarity creates uncertainty and contributes to judicial inefficiency, whereas a straightforward answer on the correct procedural filing method of an independent action in equity under Rule 60 (d)(1) would prevent unnecessary filings and subsequent refilings of Rule 60 (d)(1) independent actions in equity by litigants seeking to avoid the preclusive effects of the doctrine of res judicata. Additionally, the two different approaches in the circuit courts on the doctrine of "res judicata" contradict and conflict with each other; and having a correct answer on the proper method of filing an independent action in equity would promote judicial efficiency. This necessitates the guidance of the Supreme Court.

For both answers to: "the correct application of res judicata, conjoined with "fails to state a claim on which relief may be granted", i.e., "lacks an arguable basis in law or fact' to an independent action in equity"; and "the correct procedural method of filing an independent action under Federal Rules of Civil Procedure Rule 60 (d)(1);" and should be made clear moving forward; that lack of clarity has frustrated the basic issue of "a litigant filing a document pursuant to Rule 60 (d)(1) in the trial court; and also regarding the interpretation of the law on deciding independent actions in equity pursuant to Rule 60 (d) (1), there is a recognized uncertainty on which approach reflects the correct interpretation of the governing law regarding both of these issues. The court should grant certiorari in this case to resolve both

conflicts. The questions present are important as preserving the substantive right of due process may be at issue and this uncertainty in the judiciary recurs periodically.

Previous decisions in this court have provided the basis for the court's jurisdiction to allow the independent action in equity to proceed and addressed the issue of under what a set of facts and circumstances present the instance of "grave miscarriage of justice" of *United States v. Beggerly, 524 U.S. 38 at 47 (1998);* in which an independent action in equity is applicable and can be granted as a judicial remedy to a litigant seeking to have a final judgment set aside under Rule 60 (d)(1), this instant case focuses on asking the court to provide guidance on the correct application of "res judicata" to a Rule 60 (d)(1) independent action in equity and specifically, if , and when, an independent action is frivolous under Rule 12 (b)(6) and *Neiztke at 325,* "lacks an arguable basis in law and in fact". See *Wright & Miller, section 2868 independent action for relief, 11 Federal Practice & Procedure, Civil section 2868 (3d ed.),(April 2021 update) n.7-8 "The Supreme Court .... In United States v. Beggerly, a 1998 action, when it held that the remedy is only available to prevent a grave miscarriage of justice;...Independent actions must: if Rule 60 (b) in to be interpreted as a coherent whole, be reserved for those cases of "injustices which, in certain instances, are deemed sufficiently gross to demand a departure" from rigid adherence to the doctrine of "res judicata."* The Second Circuit has held: the preclusive effect of the doctrine of Res judicata bar an Independent action in equity filed as a new action with a new docket number in the district court pursuant to Rule 60 (d)(1) and apply "lacks an arguable basis in law or in facts" under *Neiztke* at 325 and "holding', "if" the Independent action involves the same transaction or "common nucleus of operative of facts" as the prior original action and

require considerations of the claims forming the basis of the court's prior decision, previously litigated in the first action, See *AmBase Corp. v. City Investing Liquidating Trust, 326 F.3d 63, 73 (2d Cir 2003) and Waldman v. Village of Kiryas Joel, 207 F.3d 105, 108 (2d Cir. 2000);* and any appeal of a judgment dismissing an independent action in the district court under "res judicata" can be dismissed by summary affirmance of the district court's decision by the appellate court "in place of a full merits briefing" in the appellate court without any development of the facts of the case as "res judicata" bars the independent action); also the Second Circuit holds a "three requirement" approach, in granting any independent action, see *Campaniello Imports, Ltd. v. Saporiti Italia S.p.A., 117 F.3d 655 at 662 (1997)* "claimants seeking equitable relief through independent actions must meet three requirements: claimants must, 1. Show that they have no other available or adequate remedy, 2. Demonstrate that the movant's own fault, neglect or carelessness did not create the situation for which they seek equitable relief, and 3. Establish a recognized ground such as fraud, accident or mistake... for the equitable relief." The D.C. Circuit has adopted the approach with expressed "well recognized" uncertainty that to correctly allow the district court to hear or grant a Rule 60 (d) (1) independent action the appellate court needs to recall the mandate. The D.C circuit held in *Greater Boston Television Corp. v. FCC., 463 F.2d 268 at 279 (D.C. Cir. 1971) quoting,* (with well recognized uncertainty an independent action is available to avoid an unconscionable injustice and requires the recall of the mandate by the appellate court) quoting *Greater Boston Television Corp. at 279* "Historically there was an "independent" equity action to restrain enforcement of a judgment to avoid an unconscionable injustice, "fraud on the court" being the best known but not the

exclusive ground for relief; Rule 60 expressly provides that it does not eliminate an "independent" action in the district court either "to set aside a judgment for fraud upon the court" or "to relieve a party from a judgment" on other grounds. *7J. Moore, Federal Practice 60.36 et seq.* it is not clear whether the concept of an independent action is strictly limited to "extrinsic fraud," as was often said, but it is clear that the exception for equitable interposition by independent suit rests on "stringent" rules limited to circumstance "which render it manifestly unconscionable that a judgment be given effect." 7J. *Moore Federal Practice 60.37[1], p. 623.* if a case involves the kind of injustice that would support an independent suit in the trial court, but presents an instance where action is needed from the appellate court, which cannot entertain a new "independent" action, the remedy of recall of mandate may well be appropriate." Other Circuits hold a different approach than the Second Circuit, to an independent action in equity which focus more on the equitability of the independent action and in determining if *Beggerly at 47* "grave miscarriage of justice" is present, and identify five elements a claimant seeking relief through an independent action equity must show ; adding two additional elements not included in the Second Circuit three prong approach, the two additional elements being: (1) a prior judgment "which in equity and good conscience" should not be enforced and (2) a meritorious claim in the underlying case, this "five element" approach also necessitates a full development of the facts of both the prior action and the new independent action in equity together and require full consideration of the claims forming the basis for the court's prior decision to determine if there was a meritorious claim in the underlying case and if the prior judgement in "equity and good conscience" should not be

enforced, this approach conflicts with the approach in the Second Circuit, "as it necessitates consideration and examination of the original lawsuit, and the doctrine of "res judicata" must yield to a well plead "independent action in equity" which reveals a "grave miscarriage of justice" does exist; whereas, in the Second Circuit the same consideration and examination of the original lawsuit would bar the Independent action under the doctrine of "res judicata" conjoined with applying the frivolous standard of "lacks an arguable basis in law or in facts"; and this "five element" approach of requiring "consideration of the claims forming the basis for the court's prior judgment" is followed in the Forth, Fifth and Sixth circuits and The Tenth Circuit holds to the three requirements approach same as the Second Circuit, but the Tenth Circuit allows the Independent action as a "motion to vacate the judgment, under the prior lawsuit" and with the original docket number and does not preclude the Independent action in equity under the doctrine of "res judicata" and allows a full evidentiary hearing, where the claimant is permitted to present evidence on every ground asserted and for consideration of the claims forming the basis for the court's prior judgment See *Winfield Associates Inc. v. W.L. Stonecipher, 429 F.2d 1087 at 1090 (10th Cir. 1970).* The five element approach creates an entirely different species of decisions that allow the prior underlying case to receive a full examination. The Forth circuit in *Asterbadi v. Leitess, 176 Fed.Appx. 426 at 430 (4th Cir. 2006)* "in order to sustain in independent action in equity....the five factors set forth are: 1 the judgment in ought not, "in equity and good conscience" be enforced; 2 he had a good defense to the allege cause of action, underlying the judgment; 3 that fraud, accident or mistake prevented him from obtaining the benefit of his defense; 4 "the absence of fault or negligence"

on his part; and 5 the absence of any adequate remedy at law", see *Great Coastal Express Inc., v. Int'l Bhd. of Teamsters, 675 F. 2d 1349 at 1358 (4th Cir. 1982).* The Fifth Circuit has held under the "five element approach" that "res judicata" and Rule 12 (b)(6)'s frivolous "lacks an arguable basis in law or in facts" is not applied to an independent action filed pursuant to Rule 60 (d)(1) without first conducting a comprehensive development of the facts and circumstances and a Rule 60 (d) (1) independent action will be granted if: (The plaintiff presents facts indicating that the issues raised in the independent action were not open to litigation in the former action or that he was denied a fair opportunity to make his claim or defense in the original lawsuit) see *Turner v. Pleasant RPIA., 663 F.3d 770 at 775 (5th Cir. 2011)* "Res judicata at times must yield to a well pled independent action in equity, the Federal Rules preserved the court's power to hear an independent action to grant relief from a judgment, In our analysis, we identified five elements of an independent action in equity, *Turner at 776* (citing *Addington v. Farmer's Elevator Mut. Ins. Co., 650 F.2d 663 at 667-68 (5th Cir. 1981))* 1 a prior judgment which in "equity and good conscience" should not be enforced, 2 a meritorious claim in the underlying case, 3 Fraud, accident or mistake which prevented the party from obtaining the benefit of their claim, 4 the absence of fault or negligence on the part of the party, and 5 the absence of an adequate remedy at law." The Sixth Circuit in: *See Giasson Aerospace Science Inc. v. RCO Engineering Inc. 872 F. 3d 336 (6th Cir. 2017)* follows the five element approach, see *Giasson Aerspace Science Inc., at 339 "such an independent action is available only under unusual and exceptional circumstances to prevent a "grave miscarriage of justice"; Relief is reserves for those cases of injustices which in certain instances, are deemed sufficiently gross to demand a*

departure from rigid adherence to the doctrine of res judicata.", citing *Mitchell v. Rees, 651 F.3d 593 at 595 (6th Cir. 2011) "the indisputable elements of an Independent action are: 1 a judgement which, ought not, in equity and good conscience, to be enforced; 2. A good defense to the allege cause of action on which the judgment is founded; 3. Fraud, accident or mistake which prevented the defendant in the judgment from obtaining the benefit of his defense; 4. The absence of fault or negligence on the part of the defendant, and 5, the absence of any adequate remedy at law."* The two different approaches "for a litigant seeking relief from a judgment" , mean the difference of whether the Independent action in equity would be heard by the court or not, under the five element approach the litigant will have an opportunity to be heard In court, but under the approach that applies "res judicata' conjoined with Rule 12 (b) (6) frivolous "lacks an arguable basis in law or in facts" if the independent action requires consideration of the underlying prior case, the litigant's independent action in equity will never be heard, and the litigant's right to appeal the decision is also taken away, under this approach the litigant is "effectively shutout of court" and the determination of whether or not a "grave miscarriage of justice' was present will not be made.

The questions presented are important, "Substantive right of Due Process" at issue here

The questions present are important, because the substantive right of due process may be at issue and the court should make that determination. This court said in *Christopher v. Harbury, 536 U.S. 403 at 415 n. 12 (2002) "*Recognition that the right to access the courts is ancillary to the underlying claim a plaintiff cannot be shutout of court", "right of access to court is

grounded in the 5th and 14th amendment Due Process clause"; also This Court said in *Boddie v. Connecticut, 401 U.S. 371 at 377, (1971)* "Due Process at a minimum requires, persons forced to settle their claims of right and duty through the judicial process, must be given a meaningful opportunity to be heard" and *Boddie at 383-84,* "access to the courts is a Substantive Right under the Due Process Clause", also see *Erwin Chemerinsky, Constitutional Law: Principles and Policies 419-420 (1997)* "Right of access is grounded in 5th and 14th Amendments, Right to Due Process." If the doctrine of 'res judicata' is conjoined with the Rule 12 (b)(6) "Frivolous" standard "lacks an arguable basis in law or in facts" is being incorrectly applied to Independent actions in equity, filed pursuant to Rule 60 (d)(1) in the district court and the Rule 60 (d)(1) actions are being dismissed in the district court, without a hearing or any consideration of the matter and the subsequent appeals of those decisions are not being allow to be heard, by dismissing those appeals by summary affirmance of the district courts decisions, then litigants are being incorrectly shutout of court and that would "effectively be a violation of the litigant's substantive right to due process"; and if that were to continue as a common practice in the judiciary, this would necessitate the guidance of this court to determine if, in fact, that is occurring. In most instances the litigant has already made a "Prima facia case" in the underlying claim, under the correct legal standard. As the intended purpose of the Rule 60 (d)(1) independent action in equity is to prevent a "grave miscarriage of justice", the questions presented in this petition are worthy of being answered for the sake of maintaining and securing our substantive rights and not allowing "grave miscarriages of justice' to go

unanswered. Our Democracy depends on our maintaining and securing the fundamental and substantive rights of our citizenry.

Other Circuits treatment of motions to vacate a final judgment under Rule 60 (b): *Buckeye Cellulose Corp v. Braggs Electric Construction Co., (CA8th, 1975), 569 F.2d 1036 "no notice was sent to parties, ordered the judgment vacated and re-entered to preserve plaintiff's appeal"; Clarke v. Burkle, 570 F.2d [824] at 831-832 (8th Cir. 1978) at 831(*six year delay not unreasonable), at 832 "to have held the hearing would have consumed little time and effort, and In ruling upon the motion and amendments the district court would have had the benefit of all of the facts, and we would have had the benefit of those facts in reviewing the action of the trial court in failing to hold a hearing legally amounted to abuse of discretion, and we think that a hearing must now be held by the district court." *Fidelity Deposit Co. of Md. v. Usaform Hail Pool Inc. (CA5th 1975), 523 F.2d 744, "the trial court properly vacated and re-entered judgment under Rule 60(b)(6) so timely, appeal could be taken"; and Expeditions Unlimited Aquatic Enterprises, Inc. v. Smithsonian Institute, (CADC 1974) 500 F.2d 808, "ordered to vacate and re-enter judgment in order to preserve right of appeal"; and, FDIC v. Alker, (CA. 3d, 1956) 234 F.2d 113 (* abuse of discretion where no hearing was conducted)*; and Boughner v. Secretary of H.E.W. (CA, 3d 1978) 572 F.2d 976; Held,(* abuse of discretion there was no assessment of the circumstance).

Other Circuit in addressing the "frivolous" standard, "fails to state a claim on which relief can be granted", I.e. "lacks an arguable basis in law or fact." *The 7th circuit*, In *Castillo v. Cook County*

Mail Room Dept., 990 f.2d 304, 306, (7th Cir. 1993) "We reverse and remand with instructions that counsel be appointed for Castillo", "An "arguable basis in law" is a very low standard to meet", *Castillo at 306 the 7th* Circuit court of appeals specifically discusses that the district court in deciding *Castillo* relied on the approach of the 2nd Circuit in deciding the case; and the 7th Circuit indicates that by the district court using that approach in applying 1915 (d) "fails to state a claim upon which relief can be granted", "no arguable basis in law or fact", and in regards to the case before them and in reviewing the 2nd Circuit's approach in which the district court relied upon in deciding the case before them, quoting the 7th Circuit, *Castillo at 306*, "we cannot, nor can anyone" make a determination", "a fact finder faced with this meager record has no way to determine."

The two different approaches in both of these legal doctrines yield two substantively and materially different outcomes depending upon the opposing interpretations. Moreover, these two issues in which the Circuit Courts are in conflict over and contradicting each other are not merely hypothetical federal court puzzles, they can arise in every case where a litigant files an independent action in equity, to access the courts to exercise his or her constitutional rights and to protect his or her civil rights and it can continue to arise until it is resolved by this Court.

CONCLUSION

The petition for Writ of Certiorari should be granted.

Respectfully submitted,

Christopher Everson

Christopher Everson,

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