No. 21-527

ORIGINAL

In The

Supreme Court of the United States

JEFFERY MITCHELL,

Petitioner,

vs.

LEONTA JACKSON,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

Counsel of Record for Petitioner:

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Doc. # R74032
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QUESTIONS PRESENTED FOR REVIEW

1) Has the Supreme Court of the United States Abandoned its own precedent in Norton v. Shelby County, 118 U.S. 425, 6 S.Ct. 1121, 30 L.Ed. 178 (1886), where this court formulated the void ab initio doctrine?

2) If the first question is in the negative, then, whether in light of Norton; ex parte Siebold, 100 U.S. 371 (1879); and Montgomery v. Louisiana, 136 S.Ct. 718 (2016), can a claim of illegal conviction based on alleged facially unconstitutional (void) statute, if well taken, overcome Antiterrorism and Effective Death Penalty Act's (AEDPA) one-year statute of limitations pursuant to 28 U.S.C. § 2244(d)(1) for filing habeas corpus petitions?

3) Did the Seventh Circuit of the United States Court of Appeals err by denying Petitioner a Certificate of Appealability (COA) from the denial of his Rule 60(b) Motion, contrary to Buck v. Davis, 137 S.Ct. 759 (2017); and Slack v. McDaniel, 529 U.S. 473 (2000)?

LIST OF ALL PROCEEDINGS IN STATE AND FEDERAL TRIAL AND APPELLATE COURTS

Proceedings in State Courts:

Arraignment – Circuit Court of Cook County, Illinois, Criminal Division. People of the State of Illinois v. Jeffery Mitchell, Case No. 08-CR-2316801. Judgment of Conviction, entered on January 9, 2012.

Collateral Review – Circuit Court of Cook County, Illinois, Criminal Division. People of the State of Illinois v. Jeffery Mitchell, Case No. 08-CR-16801. Order of dismissal of Petition for Relief from Judgment, entered on June 14, 2016.

Collateral Review – Circuit Court of Cook County, Illinois, Criminal Division. People of the State of Illinois v. Jeffery Mitchell, Case No. 08-CR-16801. Order of denial of Second Amendment to Petition for Relief from Judgment entered on September 16, 2016.

Appellate Review – Illinois Appellate Court, First Judicial District, First Division. People of the State of Illinois v. Jeffery Mitchell, Appellate Case Nos. 1-16-2677 and 1-16-2677 (consolidated). Summary Order affirming Circuit Court's Judgment entered on November 19, 2018.

Discretionary Appellate Review – Illinois Supreme Court. People of the State of Illinois v. Jeffery Mitchell, Case No. 125306. Summary Order denying Petition for Leave to Appeal, entered on November 26, 2019.

LIST OF ALL PROCEEDINGS IN STATE AND FEDERAL TRIAL AND APPELLATE COURTS
– Continued

Proceedings in Federal Courts:

Collateral Review – United States District Court, Northern District of Illinois, Eastern Division. Jeffery Mitchell v. Alex Jones, Case No. 20-CV-1563. Dismissal Order dismissing 28 U.S.C. § 2254 action for untimeliness, entered on June 22, 2020.

Appellate Review – United States Court of Appeals for the Seventh Circuit. Jeffery Mitchell v. Leonta Jackson, Case No. 20-2649. Order denying application for a Certificate of Appealability (COA), entered on December 8, 2020.

Collateral Review – United States District Court, Northern District of Illinois, Eastern Division. Jeffery Mitchell v. Leonta Jackson, Case No. 20-CV-1563. Order denying Rule 60(b) Motion for relief from Judgment as untimely, entered on December 24, 2020.

Appellate Review – United States Court of Appeals for the Seventh Circuit. Jeffery Mitchell v. Leonta Jackson, Case No. 21-1118. Order denying application for a Certificate of Appealability (COA), entered on April 9, 2021.

Appellate Review – United States Court of Appeals for the Seventh Circuit. Jeffery Mitchell v. Leonta Jackson, Case No. 21-1118. Order denying Petition for Rehearing with Suggestion of Rehearing En Banc, entered on May 24, 2021.

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Jeffery Mitchell, respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The order of the United States Court of Appeals appears at Appendix A to the petition and is unpublished. A copy of order denying rehearing (Appendix B) is not reported. The opinion of the United States

District Court denying motion for relief from judgment (Appendix C) is unpublished.

JURISDICTION

On December 24, 2020, the United States District Court issued its decision. Dist. Ct. Doc. 32. The District Court had jurisdiction under 28 U.S.C. § 1331, and Fed. R. Civ. P. 60. A timely notice of appeal was filed on January 21, 2021, and an application for Certificate of Appealability (COA) was timely filed on March 10, 2021. The United States Court of Appeals denied the application for a COA on April 9, 2021. Cir. Ct. Doc. 9. A petition for rehearing with suggestion of rehearing en banc was timely filed on April 23, 2021, and the United States Court of Appeals denied the petition on May 24, 2021.[1] Cir. Ct. Docs. 10 & 11. Appellate Jurisdiction was conferred upon the United States Court of Appeals under 28 U.S.C. § 1291. The Jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254(1).

[1] On April 23, 2021, Petitioner deposited his Motion in the institutional mail system at Pontiac Correctional Center, and it was accompanied by a declaration in compliance with 28 U.S.C. § 1746 setting out the date of deposit and stating that first-class postage is being prepaid. See Fed. R. App. P. 25(a)(2)(c)(i). However, for reasons unknown the Court of Appeals erroneously construed Petitioner's Motion to be filed on May 24, 2021, which would make the Motion untimely filed.

CONSTITUTIONAL, STATUTORY, AND RULES PROVISIONS INVOLVED

Article VI of the United States Constitution

The Constitution, and the Laws of the United States which shall be made in pursuance thereof, and all treaties made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every state shall be bound thereby, anything in the Constitution or Laws of any state to the contrary notwithstanding.

Fifth Amendment to the United States Constitution

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.

Fourteenth Amendment to the United States Constitution

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.

Title 28 U.S.C., Part VI, Chapter 153, Sec. 2244(d)(1)

Title 28 U.S.C., Part VI, Chapter 153, Sec. 2253

Fed. R. Civ. P. 60(b)(1), (4)

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(4) the judgment is void.

Fed. R. Civ. P. 60(c)(1)

(c) Timing and effect of the motion.

(1) Timing. A motion under Rule 60(b) must be made within a reasonable time – and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.

STATEMENT OF THE CASE

Habeas Corpus Proceedings

Petitioner filed a jurisdictionally-based petition for a writ of habeas in the district court that attacked his 2012 state court judgment of conviction in Cook County, Illinois, as void for lack of jurisdiction. See Dist. Ct. Doc. 1; Cir. Ct. Doc. 11.

The allegations and exhibits set forth in Jeffery Mitchell's pro se § 2254 asserted, inter alia, that the judgment of the circuit court of Cook County, Criminal Division, is void ab initio because its jurisdictional power to bring himself and other similarly situated juveniles (15, 16, & 17-year olds) into its adjudicative process to be criminally charged and prosecuted depends on facially unconstitutional state statutes – i.e., the state statutes (705 ILCS 405/5-120 (West 2008) and 705 ILCS 405/5-130(1)(a) (West 2008)) deprived himself and other similarly situated juveniles at the time in 2008 of due process of law and equal protection of the laws in violation of the United States Constitution. Id.

The District Court reviewed the petition under Rule 4 of the rules governing Section 2254 cases, and determined that the information of the face of the petition and exhibits appeared to establish the statute of limitations defense. Consequently, the court directed Mitchell to show cause in writing by May 18, 2020, why the petition should not be dismissed pursuant to the statute of limitations set forth under 28 U.S.C. § 2244(d). See Dist. Ct. Doc. 7.

Petitioner timely filed a motion in response to the District Court's show cause order. In relevant part, Mitchell argued that his constitutional claims raised in his habeas corpus petition are "jurisdictional in nature and therefore was not subject to dismissal or procedural bar based on statute of limitation under 28 U.S.C. § 2244(d)." Dist. Ct. Doc. 10 at p. 3-6.

The District Court rejected Mitchell's argument holding that this argument "rested on a principle of Illinois law, but there is no corresponding [federal] standard excusing the application of the statute of limitations in a federal habeas corpus proceeding" and dismissed the habeas corpus petition as untimely under 28 U.S.C. § 2244(d), and denied Petitioner's Rule 59(e) motion to alter or amend the judgment. Dist. Ct. Doc. 18, and the United States Court of Appeals denied his request for a certificate of appealability, Cir. Ct. Doc. 9, Mitchell v. Wills, No. 20-2649 (7th Cir. Dec. 8, 2020).

Rule 60(b) Motion Proceedings

While his appeal was pending, on November 17, 2020, petitioner timely filed a Rule 60(b) motion for relief from judgment. Dist. Ct. Docs. 29, 30. Petitioner's motion raised two separate grounds warranting relief from judgment under the relief from judgment rule's excusable neglect and void judgment provisions. See Fed. R. Civ. P. 60(b)(1), (4).

Excusable Neglect Ground

With respect to his request for relief under the relief from judgment rule's excusable neglect provision Mitchell presented new facts that in 2012 the Illinois state circuit court denied him access to court transcripts as an indigent and argued this was a state created impediment in violation of the United States Constitution that prevented him from filing his habeas corpus petition sooner in the District Court. Dist. Ct. Doc. 30. Therefore, Mitchell further argued that his § 2254 petition was subject to statutory tolling pursuant to 28 U.S.C. § 2244(d)(1)(B) or equitable tolling, and thus his petition under § 2254 was timely filed. Id. Petitioner alleged that he could not initially present the statutory or equitable tolling arguments during the habeas corpus proceedings due to excusable neglect.

More specifically, Petitioner explained that all relevant court records needed to consider making and substantiate his new tolling arguments were contained in his excess legal correspondence storage boxes that were held in a storage room at Menard Correctional Center, and was inaccessible to him during the entire time period of his habeas corpus proceedings due to administrative restrictive inmate movement and quarantine decision by prison officials in response to COVID 19 outbreaks within the prison system. Id. On September 25, 2020, Petitioner was transferred from Menard to Pontiac Correctional Center, and on October 11, 2020, he was allowed access to review his excess legal boxes held in storage and retrieve the

pertinent court records therefrom to bring his new statutory and equitable tolling arguments. Id.

Void Judgment Ground

With respect to his request for relief under the relief from judgment rule's void judgment provision, this ground related back to the District Court's previous dismissal order that disposed of his petition for writ of habeas corpus as untimely pursuant to 28 U.S.C. § 2244(d). See, e.g., Dist. Ct. Docs. 12 & 30.

In sum, Mitchell had pointed out that the District Court missed the historical fact that Illinois' void ab initio doctrine is not simply based in unique state history or constitutional law, but actually derives from Article VI [U.S. const. art. VI] jurisprudence and federal precedent as determined by the Supreme Court of the United States in the early case of Norton v. Shelby County, 118 U.S. 425 (1886). Dist. Ct. Doc. 30. In light of the historical fact that Illinois' void ab initio doctrine is dictated by well settled federal precedent, Petitioner implored the District Court to agree that such historical fact completely undermined its earlier procedural ruling in its dismissal order "that there is no corresponding standard excusing the statute of limitations in a federal habeas corpus proceeding." (Appendix D). Again, Petitioner reiterated to the District Court that it had no legal authority to dismiss his § 2254 petition on procedural grounds (without first addressing the merits of his claims) since it would be leaving in place a state court judgment of conviction that is facially

unconstitutional which the United States constitution itself prohibits. Dist. Ct. Doc. 30. The District Court denied the motion on December 24, 2020. (Appendix C). In its order denying the Petitioner's motion for relief from judgment the court found that the Petitioner's new arguments were "made much too late" and "overruled" his attempt to raise the new argument for the first time at this late stage. (Appendix C). However, the court's ruling failed to explain or show that it had taken into account all relevant circumstances for Petitioner bringing the motion, including the length of any delay caused by the neglect and whether the reason for the delay was within the reasonable control of Petitioner. Id. Petitioner filed a timely notice of appeal on January 21, 2021. Dist. Ct. Doc. 30.

Appellate Proceedings

On application for Certificate of Appealability (COA) before the United States Court of Appeals for the Seventh Circuit, Mitchell argued, inter alia, that the District Court abused its discretion in denying his Rule 60(b) motion as untimely and overruling the Federal Rules of Civil Procedure, Rule 60, itself to reach its finding. Cir. Ct. Doc. 7. Mitchell v. Jackson, No. 21-1118. The Court of Appeals denied his request for a certificate of appealability. (Appendix A). Mitchell then timely filed a petition for rehearing with suggestion of rehearing en banc, which the appellate court denied. (Appendix B).

REASONS FOR GRANTING CERTIORARI

This Court should Grant Certiorari to Decide a Question of Significant National Importance with which Federal and State Courts Are Divided: Has the Federal void Ab Initio Rule That was Announced in Norton v. Shelby County – Been Abandoned by the Supreme Court of the United States – a Lawful Doctrine Both Now Abandoned and Still Followed Among certain Federal and State Court Jurisdictions?

This case lies at the center of Article VI of the United States Constitution and the federal void ab initio doctrine which was established by this court in the early case of Norton v. Shelby County, 118 U.S. 425, 442, 6 S.Ct. 1121, 1125, 30 L.Ed. 178 (1886). Traditionally, when interpreting Article VI, this court has invariably echoed the existence of a void ab initio doctrine, although unclear, even before Norton was decided. See, e.g., United States v. Germaine, 99 U.S. 508 (1878) ("This Constitution is the Supreme law of the land, and no Act of Congress is of any validity, which does not rest on authority conferred by that instrument."). Indeed, this doctrine is a fundamental precept of American jurisprudence that existed before the ratification of the United States Constitution itself. See The Federalist No. 78 (McLean's ed.) ("As this doctrine is of great importance in all the American constitutions, a brief discussion of the ground on which it rests cannot be unacceptable. There is no clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is

void. No legislative act, therefore, contrary to the constitution, can be valid. To deny this, would be to affirm, that the deputy is greater than his principal, that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid.")

After Norton was decided in 1886 and its void ab initio rule became clearly established federal law, federal and state constitutional courts all over the country unanimously followed the Norton rule whenever confronted with cases involving unconstitutional legislative enactments. Since this court's decisions in Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371, 60 S.Ct. 317, 84 L.Ed. (1940), and Lemon v. Kurtzman, 411 U.S. 192, 93 S.Ct. 1463, 36 L.Ed.2d 151 (1973), recognizing that inequities may result from strict application of the Norton rule, however, the vitality of the rule has become in need of rejuvenation. Indeed, numerous federal and state courts are in conflict over the question of whether the Norton rule has been abandoned by this court and thus whether the rule is still valid precedent. See, e.g., Perlstien v. Wolk, 218 Ill.2d 448, 844 N.E.2d 923, 300 Ill. Dec. 480 (Ill. 2006) (collecting cases in conflict over whether the Norton rule is still valid precedent.). This case vividly represents the need for this court to reconcile Norton with this court's more recent decisions on retroactivity such as Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), which can easily be done.

Given the concerns for the orderly administration of justice, and the divide among federal and state court jurisdictions over the vitality of the Norton rule and its apparent erosion, resolution of this issue is of critical national importance. For these reasons, this court should grant certiorari in this case.

I. Brief History of the Nature and Scope of the Great Writ for State Prisoners

While the writ of habeas corpus has a very long history, state prisoners could not avail themselves of the federal writ until 1867, when congress first made habeas corpus available by statute to prisoners held under state authority. See Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977).

The habeas corpus statute permits a federal court to entertain a petition from a state prisoner "only on the ground that he is in custody in violation of the constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). The courts must "dispose of the matter as law and justice require." 28 U.S.C. § 2243. Traditionally, this court has interpreted these bare guidelines and their predecessors to reflect the common-law principle that a prisoner seeking a writ of habeas corpus could challenge only the jurisdiction of the court that had rendered the judgment under which he was in custody. See, e.g., Ex parte Watkins, 3 Pet. 193, 202 (1830). Gradually, this court expanded the definition of jurisdiction for habeas corpus purposes which occurred primarily in two classes of cases: (1) those in which the

conviction was for violation of an alleged unconstitutional law, and (2) those in which the court viewed the detention as based on some claimed illegality in the sentence imposed, as distinguished from the judgment of conviction. See, e.g., Ex parte Siebold, 100 U.S. 371, 377, 25 L.Ed. 717 (1879) (court without jurisdiction to impose sentence under unconstitutional statute); Ex parte Lange, 18 Wall. 163, 176, 21 L.Ed. 872 (1874) (court without jurisdiction to impose sentence not authorized by statute). Next, this court began to recognize federal claims by state prisoners if no state court had provided a full and fair opportunity to litigate those claims. See, e.g., Moore v. Dempsey, 261 U.S. 86, 91-92, 43 S.Ct. 265, 67 L.Ed. 543 (1923); Frank v. Mangum, 237 U.S. 309, 335-36, 35 S.Ct. 582, 590, 59 L.Ed. 969 (1915).

By 1963, this court's definition of the scope of the writ had developed into the form citizens recognize today: "It is of the historical essence of habeas corpus that it lies to test proceedings so fundamentally lawless that imprisonment pursuant to them is not merely erroneous but void." Fay v. Noia, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963).

Indeed, this court reaffirmed the foregoing principles announced in Siebold just 5 years ago in Montgomery v. Louisiana, 577 U.S. ___, 136 S.Ct. 718, 193 L.Ed.2d 599 (2016). Congress first began codifying habeas corpus remedy that became Title 28 U.S.C. §§ 2241-2255 on June 25, 1948, followed by major revisions in 1949, 1996, and 2008. The controversial 1996 Antiterrorism and Effective Death Penalty Act

(AEDPA) revisions limited prisoners to filing their claims within one-year of exhaustion of state remedies. See 28 U.S.C. § 2244(d)(1).

Despite such revisions by congress, however, this court has reminded that "Equitable principles have traditionally governed the substantive law of habeas corpus," and affirmed that "it will not construe these statutory revisions to displace court's traditional equitable authority absent the clearest command." See, e.g., McQuiggin v. Perkins, 569 U.S. 383, 133 S.Ct. 1924, 185 L.Ed.2d 1019 (2013) (quoting Holland v. Florida, 560 U.S. 631, 130 S.Ct. 2549, 177 L.Ed.2d 130 (2010)); Fay v. Noia, 372 U.S. 391 (1963) ("we repeat what has been so truly said of the federal writ: there is no higher duty than to maintain it unimpaired, and unsuspended, save only in the cases specified in our constitution.") (omissions in original and citations omitted).

In sum, this court has consistently and without exception recognized an obligation to afford relief to a person convicted under an unconstitutional (void) statute (Ex parte Siebold, 100 U.S. 371), and it continues to do so, as Montgomery illustrates.

II. The Court of Appeals for the Seventh Circuit has sanctioned the decision by a lower court which decided an important federal question in a way that conflicts with relevant decisions of this court and Illinois Supreme Court as to call for an exercise of this court's supervisory power

In this case, the District Court has made a determination that unlike Illinois law, "there is no corresponding standard excusing the one-year statute of limitations in a federal habeas corpus proceeding," where the claims assert an illegal conviction based on alleged facially unconstitutional (void) statutes, (Appendix C & D), and a 2-judge panel for the Seventh Circuit, United States Court of Appeals, have effectively sanctioned this lower court decision when it denied Petitioner's request for a COA challenging such lower court procedural ruling. (Appendix A).

The decisions by the United States Court of Appeals, and District Court is erroneous and conflicts with relevant decisions of this court and Illinois Supreme Court as to call for an exercise of this court's supervisory power for the foregoing reasons.

First, since 1879 following this court's decision in Ex parte Siebold, 100 U.S. 371, 376, 25 L.Ed. 717 (1879), the nature and scope of the Great Writ has always been available to persons to contest jurisdictional defects based on alleged unconstitutional (void) statutes. See Ex parte Siebold, 100 U.S. 371, 25 L.Ed. 717 (1879); Ex parte Royall, 117 U.S. 241, 248, 6 S.Ct. 734, 29 L.Ed. 868 (1886); Fay v. Noia, 372 U.S. 391, 83 S.Ct.

822, 9 L.Ed.2d 837 (1963) (Harlan, J., dissenting, joined by Clark, J., and Stewart, J.) ("Even when the concept of jurisdiction expanded the matters open on habeas were still limited to those which were believed to have deprived the sentencing court of all competence to act, and therefore could [always] be raised on collateral attack.") (omissions in original) (citing Siebold, supra, 100 U.S. 371).

In Siebold, the petitioners attacked their judgments of conviction on the ground that they had been convicted under unconstitutional statutes. Although no lower courts had ever addressed the merits of their allegations and actually declared the statutes in question in that case unconstitutional this court still granted the writ to inquire as to the truth of the petitioners allegations and legality of imprisonment because, if true, their claims would mean that the lower court had no jurisdiction to act in the first instance and the whole proceedings had against them were void. Id.

Just 5 years ago in 2016, this court decided Montgomery v. Louisiana, 577 U.S. ___, 136 S.Ct. 718, 193 L.Ed.2d 599 (2016), and reaffirmed Siebold. See Montgomery, 577 U.S. ___, 136 S.Ct. at 730-31.

Mitchell suggests that this court's decisions in Siebold and Montgomery reasonably appears to create an inference in the law that jurisdictional defects based on alleged unconstitutional (void) statutes 'must' be able to overcome § 2244(d)(1)'s one-year statute of limitations as a matter of federal constitutional law. Montgomery, supra, 136 S.Ct. at 731.

In any event, this court should grant certiorari in this case given that the United States Court of Appeals has sanctioned the decision by a lower court which has decided an important federal question that has not been, but should be, settled by this court. See U.S. Sup. Ct. R., Rule 10(c).

Second, the District Court and Seventh Circuit panel decisions are in conflict with this court's decision in Norton v. Shelby County, 118 U.S. 425 (1886), and Illinois Supreme Court decisions in Perlstein v. Wolk, 218 Ill.2d 448, 844 N.E.2d 923, 300 Ill. Dec. 480 (Ill. 2006); In re N.G., 115 N.E.3d 102, 120 (Ill. 2018).

In this case, both inferior federal courts misapprehended the historical fact that Illinois' void ab initio doctrine finds its roots in this court's decision in Norton v. Shelby County, 118 U.S. 425, 6 S.Ct. at 1125, 30 L.Ed. at 186 (1886). See Perlstein v. Wolk, 218 Ill.2d 448, 844 N.E.2d 923 (Ill. 2006) ("The classic formulation of the void ab initio doctrine, and the one followed in Illinois, is found in the early case of Norton v. Shelby County, 118 U.S. 425, 6 S.Ct. 1121, 30 L.Ed. 178 (1886).")

The Illinois Supreme Court, in interpreting Norton, has ruled that a claim of illegal conviction predicated on alleged facially unconstitutional (void ab initio) statute can be impeached at any time, in any proceeding or in any court. See, e.g., In re N.G., 115 N.E.3d 102, ¶ 56 ("where a person has been convicted under an [alleged] unconstitutional statute, he or she may obtain relief from any court that otherwise has

jurisdiction.") (omissions in original); accord, Montgomery v. Louisiana, 136 S.Ct. at 731 ("A court has no authority to leave in place a conviction or sentence that violates a substantive rule [of constitutional law].") (omissions in original).

Petitioner implores this court to agree that since Illinois' void ab initio doctrine is directly dictated by the void ab initio rule announced in Norton v. Shelby County, 118 U.S. at 422, 6 S.Ct. at 1125, 30 L.Ed. at 186, then, consistent with the concept of federalism and the doctrine of stare decisis, it must follow, that the Illinois Supreme Court's interpretation of the Norton rule may be considered as being authoritative on the important federal question of whether an equitable exception can be applied in a federal habeas corpus proceeding to overcome 28 U.S.C. § 2244(d)(1)'s one-year statute of limitations based on a claim of illegal conviction predicated on alleged facially unconstitutional (void) statutes. See, e.g., In re N.G., 115 N.E.3d 102, ¶ 50 ("Although the terminology may differ in certain respects, Illinois follows the same basic approach as the United States Supreme Court when dealing with the consequences of a facially unconstitutional statute."); Howlett by and through Howlett v. Rose, 496 U.S. 356, 110 S.Ct. 2430, 110 L.Ed.2d 332 (1990) (quoting Minneapolis & St. Louis R. Co. v. Bombolis, 241 U.S. 211, 222, 36 S.Ct. 595, 598, 60 L.Ed. 961 (1916)); Colby v. J.C. Penny Co. Inc., 811 F.2d 1119 (7th Cir. 1987) (citing Erie R.R. v. Thompkins, 304 U.S. 64, 78-80, 58 S.Ct. 817, 822-23, L.Ed. 1188 (1938)).

Given these conflicts, as well as the lack of any straightforward guidance from this court on the issue of whether a claim of illegal conviction based on alleged facially unconstitutional (void) statute can overcome § 2244(d)(1)'s one-year statute of limitations, this court should grant certiorari to resolve this import federal question. See U.S. Sup. Ct. R., Rule 10(a).

III. The Panel of the Seventh Circuit departed from the accepted and usual course of Certificate of Appealability (COA) process

In reviewing the facts and circumstances set out in Mitchell's Rule 60(b) motion, the Seventh Circuit panel "paid lip service to the principles guiding issuance of a Certificate of Appealability (COA)", Tennard v. Dretke, 542 U.S. 274, 283 (2004), but in actuality the panel held Mitchell to a for more stringent standard.

This court held in Slack v. McDaniel, 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000)," when the district court denies a habeas corpus petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a Certificate of Appealability (COA) should issue, and an appeal of the district court's order may be taken, if the petitioner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling, or that jurists of reason could conclude that the issues presented are

adequate to deserve encouragement to proceed further." See also Buck v. Davis, 580 U.S. ___, 137 S.Ct. 759, 197 L.Ed.2d 1 (2017).

The appeal of a denial of a motion for relief from a federal habeas court's final judgment is independent of the appeal of the original petition. See Banister v. Davis, 140 S.Ct. 1698, 197 L.Ed.2d 1 (2020) (quoting Browder v. Director, Department of Corrections of Illinois, 434 U.S. 257, 263 n.7, 98 S.Ct. 556, 54 L.Ed.2d 521 (1978)).

The Rule 60(b) ruling Mitchell challenges would be reviewed for abuse of discretion during a merits appeal. See Browder, 434 U.S. at 263 n.7 (1978) ("The Court of Appeals may review the [Rule 60(b)] ruling only for abuse of discretion.") The COA question is therefore whether a reasonable jurist could conclude that the District Court abused its discretion in declining to reopen the judgment.

Mitchell brought his Rule 60(b) motion under the Rule's excusable neglect and void judgment categories, subdivisions (b)(1) & (4), which permits a court to reopen a judgment for "mistake, inadvertence, surprise, or excusable neglect" or "the judgment is void." See Fed. R. Civ. P. 60(b)(1), (4).

Excusable neglect defense

In 1993 in the case of Pioneer Investment Services Company v. Brunswick Associates Limited Partnership, 507 U.S. 380 (1993), this court provided guidance

as to the meaning of the term "excusable neglect." See, e.g., Pioneer Investment Services Company v. Brunswick Associates Limited Partnership, 507 U.S. 380 (1993) (interpreting "excusable neglect" in context of Fed. R. Bankr. P. 9006(b)(1), but analyzing term as used in other federal rules, including Fed. R. Civ. P. 60(b)(1)).

In making the determination whether relief based on excusable neglect is appropriate, "a court must take account of all relevant circumstances, including (1) the danger of prejudice to the adverse party; (2) the length of any delay caused by the neglect and its effect on the proceedings; (3) the reason for the delay, including whether it was within the reasonable control of the moving party; and (4) whether the moving party acted in good faith. The district court need not explicitly evaluate each of these factors, so long as the court's ruling shows that the factors informed its analysis." Id.

In this case, abuse of discretion by the District Court in its procedural ruling is self-evident. The court's ruling failed to: 1) cite Pioneer; 2) to take account of all relevant circumstances for Mitchell's neglect; and 3) its ruling lacked any showing that the Pioneer factors informed its analysis. (Appendix C). Because the District Court erred in not exercising its discretion reasonably according to the accepted principles established in Pioneer and "overruled" Rule 60(b), (c)(1), Mitchell suggests that the District Court necessarily abused its discretion in determining he was not entitled to relief based on excusable neglect. See, e.g., Schlup v. Delo, 513 U.S. 298, 333, 115 S.Ct. 851, 870, 130 L.Ed.2d 808 (1995) (O'Connor, J., concurring) ("It

is a paradigmatic abuse of discretion for a court to base its judgment on an erroneous view of the law.") (citing Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405, 110 S.Ct. 2447, 2460-2461, 110 L.Ed.2d 359 (1990)). Indeed, the District Court had no power to overrule Mitchell's motion for relief from judgment outside the framework of the Federal Rules of Civil Procedure, Rule 60. See, e.g., 28 U.S.C. § 2072(a)-(b).

Void judgment defense

The merit in Mitchell's Rule 60(b)(4) defense is clearly obvious. He made the District Court aware that its prior procedural ruling in its dismissal order "that there is no corresponding standard excusing the statute of limitations in a federal habeas corpus proceeding" was erroneous; that his state court indictment and conviction resulted from constitutionally deficient procedures [void state statutes]; and that the court had no authority to leave in place his alleged unlawfully obtained conviction. Dist. Ct. Doc. 30. The District Court failed to address this defense. (Appendix C).

Mitchell filed an application in the Seventh Circuit seeking a certificate of appealability, so that he may appeal the District Court's denial of his Rule 60(b) motion. Cir. Ct. Doc. 7. A 2-judge panel however, determined that "we find no substantial showing of the denial of a constitutional right." (Appendix A). Thus, the panel concluded that Mitchell should be denied a certificate of appealability because the appeal was obviously meritless.

The panel of the Seventh Circuit appears to have impermissibly sidestepped the COA inquiry in this manner by deciding the merits of Petitioner's appeal, which was not properly before the court, and then justifying its denial of a COA based on its full consideration and adjudication of the actual merits. "The certificate of appealability (COA) statute sets forth a two-step process: an initial determination of whether a claim is reasonably debatable and, then – if it is – an appeal in the normal course." See Buck v. Davis, 137 S.Ct. 759 (2017) (quoting Miller-El v. Cockrell, 537 U.S. 322, at 327, 348, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003)). Mitchell contests that the panel's departure from § 2253(c)(2)'s statutory requirement is a denial of due process of law protected under the 5th Amendment to the United States constitution. See U.S. Const. amend. V. As demonstrated above, the Court of Appeals should have issued a certificate of appealability (COA) in this case because pursuant to 28 U.S.C. § 2253(c)(2), Mitchell had at least shown: (1) that jurists of reason could disagree with the district court's procedural ruling or (2) the issues presented are adequate to deserve encouragement to proceed further. See 28 U.S.C. § 2253(c)(2); Fed. R. Civ. P. Rule 22(b); Buck v. Davis, 137 S.Ct. 759 (2017); Slack v. McDaniel, 529 U.S. 473, 481 (2000).

The Supreme Court should intervene now to correct an egregious misapplication of settled law in an area of great public concern.

CONCLUSION

For the foregoing reasons, petitioner, Jeffery Mitchell, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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