

23-263

No. _____

ORIGINAL

In The
Supreme Court of the United States

— ♦ —
BARRY J. SMITH, SR.,

Petitioner,

v.

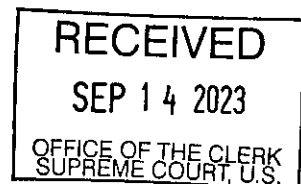
UNITED STATES CONGRESS
AND WISCONSIN LEGISLATURE,

Respondents.

— ♦ —
**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit**

— ♦ —
PETITION FOR A WRIT OF CERTIORARI

— ♦ —
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QUESTIONS PRESENTED

1. Is there a time limit to file a Rule 60(b)(4) motion to vacate a judgment order as void for lack of subject-matter jurisdiction; after the trial court has ruled that it does not have subject-matter jurisdiction of the case, does it have judicial authority to grant a motion by defendant to bar petitioner out of court based on the merits of the complaint?
2. Is the standard of review de novo when a circuit court of appeals reviews a district court's denial of a Rule 60(b)(4) motion to vacate a judgment order as void for lack of subject-matter jurisdiction?
3. Is petitioner, who has been duly convicted of a crime under the Thirteenth Amendment and has completely paid the judicially pronounced punishment, a Thirteenth Amendment citizen who only has those rights the government chooses to grant him, or, is petitioner a Fourteenth Amendment citizen who is entitled to equal protection of America's laws?

PARTIES TO THE PROCEEDING

Petitioner, Barry J. Smith Sr., was the plaintiff in the district court proceedings and the appellant in the circuit court of appeals proceedings. Respondents, United States Congress and the Wisconsin Legislature were the defendants in the district court proceedings and the appellees in the circuit court of appeals.

CASES DIRECTLY RELATED TO THIS CASE

Eastern District of Wisconsin, *Smith v. United States of America, et al.*, Case No. 17-CV-1419 (dismissed January 29, 2018) (not published); Seventh Circuit Court of Appeals No. 18-2408 (affirmed January 17, 2019) (not published). Eastern District of Wisconsin, *Smith v. Community Care Inc., et al.*, Case No. 20-CV-1482 (dismissed November 17, 2020) (not published); Seventh Circuit Court of Appeals No. 20-3363 (affirmed May 6, 2022) (not published).

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STATEMENT OF JURISDICTION

On May 22, 2023 the Seventh Circuit Court of Appeals affirmed the subject district court Order. On June 20, 2023 the Seventh Circuit Court of Appeals denied petitioner's motion for rehearing and rehearing en banc. Copy of orders in appendix.

This Court has jurisdiction based on Title 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AMENDMENTS INVOLVED

Article VI [2] **This Constitution**, and the **Laws of the United States** which shall be made in Pursuance thereof; and all treaties made, or which shall be 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, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Amendment XIII [1865] Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

Amendment XIV [1868] Section 1. All persons born or naturalized in the United States, and Subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they Reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

STATEMENT OF THE CASE

The trial court determined that it lacked subject matter jurisdiction of petitioner's complaint in Case No. 19-CV-1001, and dismissed this case on November 14, 2019. Plaintiff identifies himself at page 1 of this complaint as "a descendant of American slaves." In that order of dismissal, the trial court granted the

motion of defendant, the United States Congress, to prohibit petitioner from initiating further pro se suits Dkt. No. 5(III). "The court orders that the plaintiff is barred from filing any further pleadings or lawsuits in the Eastern District of Wisconsin bringing claims (in any form) arising out of his status as a descendant of slaves. . . ." The Seventh Circuit Court of Appeals affirmed and fined petitioner \$2000. See appended Seventh Circuit Order dated May 22, 2023 at page 2. Petitioner filed his Rule 60(b)(4) motion in the trial court based on the fact that the court granted the motion of defendant, United States Congress, to bar him initiating any further pro se complaints, even though the court had before determined, at page 2 of its subject order, that it lacked subject matter jurisdiction of the case. The Rule 60(b)(6) part of the motion was primarily based on the fact that the trial court barred petitioner out of court based on his race/ethnic group. "The court **ORDERS** that the plaintiff is **BARRED** from filing any further pleadings or lawsuits in the Eastern District of Wisconsin bringing claims (in any form) arising out of his status as a descendant of slaves. . . ." The Seventh Circuit affirmed the trial court's denial of his motion for relief from judgment and fined Petitioner \$5000.00 for filing it: "Within fourteen days of this order, Smith must tender a check payable to the clerk of this court for the full amount of this sanction. Further, the clerks of all federal courts in this circuit shall return unfiled any papers submitted either directly or indirectly by or on behalf of Smith unless and until he pays the full sanction that has been imposed against him. . . ." In the directly related Case No. 20-CV-1482,

petitioner filed a civil complaint on September 22, 2020, in the Eastern district of Wisconsin, arising out of the federal Fair Labor Standards Act. Pursuant to Federal Rule of Civil Procedure 15(a)(1)(B), petitioner amended that complaint on October 21, 2020, and presented that the court had jurisdiction based on 42 U.S.C. sec. 1981 and the federal Fair Labor Standards Act. On November 17, 2020 the trial court dismissed petitioner's amended complaint as it stated: "On November 14, 2019 Chief District Judge Pamela Pepper ordered that Plaintiff Barry Joe Smith ("Smith") be "barred from filing any further pleadings or lawsuits in the Eastern District of Wisconsin bringing claims (in any form) arising out of his status as a descendant of slaves or his status as a convicted felon." Petitioner then filed, on November 24, 2020, a Rule 59(e) motion to allow petitioner to amend his complaint by removing the prohibited self-identification of "descendant of American slaves" and replacing it with the self-identification "American Negro", he attached to his motion a certified copy of his birth certificate which verified that he was born in America and that his race/color is Negro. The trial judge denied that motion by stating: "Plaintiff's replace the phrase "Black descendants of American slaves" with "American Negro." (Docket #20-1). Plaintiff's may not circumvent Smith's restricted-filer status by replacing the violating phrase but maintaining its spirit. Thus, for the reasons stated in its order dismissing this action (Docket #18), the court will deny plaintiff's motion. Accordingly, it is ordered that Plaintiffs' motion for leave to amend their complaint (Docket #20) be and the same is hereby Denied." The Seventh

Circuit Court of Appeals affirmed the trial court's dismissal of Case No. 20-CV-1482 based on Chief Judge Pamela Pepper's grant of Congress motion, in Case No. 19-CV-1001, to permanently bar plaintiff filing any further pro se complaints in the Eastern District of Wisconsin. The Seventh Circuit affirmed by stating: Next, Smith argues that the filing bar should not block this suit because he asked the district court for leave to amend his first claim to replace "Black descendant of American slaves" with "American Negro," so as to avoid the language that triggers the filing bar. But in his previous suits, and in this one, Smith uses the phrase "descendant of American slaves" to describe his race. See, e.g., *Smith*, 2019 WI6037487, at *2 (quoting Smith's allegation of "racism directed against him as a descendant of the slaves"). The filing bar therefore blocks any suit, like this one, that includes a claim arising out of Smith's race, regardless of how he labels it. Appeal No. 2020cv03363." Petitioner has been barred by the respondent, the United States Congress, from claiming the protection of laws including the Thirteenth and Fourteenth Amendments among others, and any statutes that were enacted to protect descendants of American slaves from unlawful race or ethnic discrimination.

REASON TO GRANT THE PETITION

It appears that the Supreme Court has only once, in *United Student Aid Funds v. Espinosa*, 130 S. Ct. 1367 (2010), addressed the standard for applying Rule

60(b)(4) motions to void a judgment order for lack of subject-matter jurisdiction. Your Circuit Courts of Appeals are divided on whether there is a time limitation for filing a Rule 60(b)(4) motion to vacate a judgment order as void for lack of subject-matter jurisdiction; on whether a judgment order is void that grants a motion of a party, a motion based on the merits of the case, after the court has determined that it lacks subject-matter jurisdiction of the case? Petitioner cannot find any cases on whether Rule 60(b)(6) should apply to a trial court order that permanently bars a plaintiff out of court on any complaint wherein he identifies as a descendant of American slaves or American Negro. Is de novo the standard of review to be applied to a district court's denial of a Rule 60(b)(4) motion to vacate a judgment order as void for lack of subject-matter jurisdiction?

Both the Eastern District of Wisconsin and the Seventh Circuit Court of Appeals have determined that "over two and a half years" is not "within a reasonable time" to file a Rule 60(b)(4) motion to vacate a judgment order as void for lack of subject-matter jurisdiction. Other Circuit Courts of Appeals have determined that there is no time limit for filing a Rule 60(b)(4) motion for relief from a judgment order that is void for lack of subject-matter jurisdiction: *Crosby v. Bradstreet Co.*, 312 F.2d 483 (2d Cir. 1963) cert. denied, 373 U.S. 911 (Where the court vacated a judgment as void thirty years after entry); *Marquette Corp. v. Priester*, 234 F.Supp. 799 (E.D.S.C. 1964); *New York Life Ins. Co. v. Brown*, 84 F.3d 137, 142 (5th Cir. 1996);

Precision Etchings Findings, Inc. v. LGP Gem, Ltd., 953 F.2d 21, 23 (1st Cir. 1992); *Meadows v. Dominican Republic*, 817 F.2d 517, 521 (9th Cir.) cert. denied, 484 U.S. 976, 108 S. Ct. 486, 487, 98 L. Ed. 2d 485 (1987); see also 12 James Wm. Moore, et al., *Moore's Federal Practice* 60.44[5][c], 60.65[1] (1998); 11 Charles Alan Wright, et al., *Federal Practice and Procedure* 2862, 2866 (1995). "[T]here is and can be no time limit on judicial relief from a judgment that is, in fact, already a nullity and always subject to direct and collateral attack," and therefore "[a]nytime is a 'reasonable' time to set aside a void judgment." 12 Moore, supra 60.65[1], at 60-197.

The Seventh Circuit Court of Appeals reviewed the trial court's denial of petitioner's Rule 60(b)(4) motion for abuse of discretion. Inexplicably, they have ruled that they review Rule 60(b)(4) motions de novo: "[W]e review denials of 60(b)(4) motions de novo to the extent they turn on errors of law. *Federal Election Comm'n v. Al Salvi for Senate Comm.*, 205 F.3d 1015 (7th Cir. 2000). "This court reviews de novo a district court's denial of a Rule 60(b)(4) motion to set aside a judgment as void. *Callon Petroleum Co. v. Frontier Ins.*, 351 F.3d 204, 208 (5th Cir. 2003). Rule 60(b)(4) motions leave no margin for consideration of the district court's discretion as the judgments themselves are by definition either legal nullities or not." *Brumfield v. La. State Bd. of Educ.*, 806 F.3d 289, 296 (5th Cir. 2015) **Sua sponte**, the trial court found, at page 2 of its dismissal order, that "the plaintiff's claims against the legislature are obviously frivolous, the court will dismiss

those claims *sua sponte* for lack of subject-matter jurisdiction." Neither the Appeals court nor the trial court claimed, in their affirmance and denial of petitioner's Rule 60(b)(4) motion, that the trial court had subject-matter jurisdiction over the complaint against either the United States Congress or the Wisconsin Legislature. Nevertheless, both courts defend the trial court's grant of the merits based motion by the United States Congress to permanently "preclude the plaintiff from initiating further *pro se* suits . . . It also ask the court to bar the plaintiff from filing any further cases, given his history of litigation on the claims he raised in the complaint." See Dkt. Entry #8 at page 2. In granting the motion of the United States Congress, the trial court ruled on the merits of the case over which it had determined that it did not have subject-matter jurisdiction. Without subject-matter jurisdiction, the trial court did not have authority to grant the merits based motion of the United States Congress. See *Steel Co. v. Citizen's for a Better Environment*, 523 U.S. 83, 101-02, 118 S. Ct. 1003, 140 L.Ed.2d 210 (1998) ("For a court to pronounce upon the [merits] when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires."); *State of Illinois v. City of Chicago*, 137 F.3d 474, 478 (7th Cir. 1998) ("[A] court is not free to decide the merits when there is no justiciable controversy. Subject-matter jurisdiction is the first question in every case, and if the court concludes that it lacks jurisdiction it must proceed no further."). "Subject-matter jurisdiction, because it involves the court's power to hear a case, can never be forfeited or waived. *United States v. Cotton*, 535, U.S. 625, 630 (2002).

[W]hen a federal court concludes that it lacks subject-matter jurisdiction, the complaint must be dismissed in its entirety.” *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006). “Once a court expresses the view that it lacks jurisdiction, the court thereafter does not have the power to rule on any other matter.” *Muscardin v. Brownell*, 227 F.2d 31, 32 (D.C. Cir. 1955); *Arrowsmith v. United Press International*, 320 F.2d 219, 221 (2d Cir. 1963); *Bunker Ramos Corp. v. United Business Forms, Inc.*, 713 F.2d 1272 (7th Cir. 1983). “Rule 60(b)(4) allows a party to seek relief from a final judgment that “is void,” but only in the rare instance where a judgment is premised either on a certain type of jurisdictional error or on a violation of due process . . . jurisdictional and notice failings . . . define void judgments qualifying for Rule 60(b)(4) relief. . . .” *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010).

The pro se plaintiff/petitioner also argues for relief pursuant to Rule 60(b)(6) that allows relief for “any other reason justifying relief from operation of the judgment.” The subject judgment order granted the motion of defendant to permanently “ . . . preclude the plaintiff from initiating further pro se suits. Dkt. No. 5. . . . It also asks the court to bar the plaintiff from filing any further cases, given his history of litigation on the claims he raised in the complaint. (Dkt. No. 8 at page 2) . . . The court GRANTS IN PART the United States Congress’s motion requesting an order prohibiting the plaintiff from initiating further *pro se* suits. Dkt. No. 5(III) . . . The court **ORDERS** that the plaintiff is **BARRED** from filing any further pleadings or

lawsuits in the Eastern District of Wisconsin bringing claims (in any form) arising out of his status as a descendant of slaves. . . ." (Dkt. 8 at page 24). Petitioner had been told in Case No. 17CV-1419 that the federal courts do not monitor the race of litigants: "Finally, within his complaint, Mr. Smith moves the Court to take judicial notice of his true identity as a "Descendant of American Slaves," as opposed to his official birth certificate in 1953 that said "Negro" and his current government identity as "African American" in 2017. ECF No. 1 at 3. The Court does not monitor the race of litigants so there is no need for the Court to take judicial notice in this case of how Mr. Smith self-identifies." See Case No. 17-CV-1419 Dkt. 16 at 5. Petitioner did not understand Judge Pepper's order, filed November 14, 2019, to mean that he was barred from filing a suit against a private corporation for violating his right to make and enforce contracts under 42 U.S.C. sec. 1981. Petitioner did not understand this until Judge Staudtmueller, in Case No. 20-CV-1482, dismissed his complaint based solely on the fact that he self-identified as a non-white descendant of American slaves. This case presents extraordinary circumstances where petitioner is a pro se litigant who, since the dismissal of Case No. 20-CV1482, is led thereby to believe he is not a Fourteenth Amendment citizen entitled to equal protection of America's laws; he is led to believe he will forever be a Thirteenth Amendment citizen, whether emancipated or not, entitled only to the protection of America's laws that the government chooses to grant him. According to Article VI [2] the U.S. Constitution is the Supreme Law of the Land, and according to the

Fourteenth Amendment petitioner is entitled to equal protection of that law. To petitioner, these are **extraordinary circumstances**. The Thirteenth and Fourteenth Amendments were created primarily to protect descendants of American slaves; there are many federal statutes like 42 U.S.C. sec. 1981 that were enacted to protect descendants of American slaves. Is the legal concept of due process of law based on fundamental fairness? Under the totality of these circumstances, is it fundamentally fair for the federal courts to deny petitioner his Fourteenth Amendment right to equal protection of America's laws?

◆

CONCLUSION

Petitioner wishes for this Honorable Court to confirm that he has paid in full for any Thirteenth Amendment punishment to which he had been judicially sentenced; to confirm that he is a Fourteenth Amendment citizen entitled to all of the Constitutional rights, privileges and immunities guaranteed by it to him; under Rule 60(b)(4) to vacate the subject judgment order that was rendered without subject-matter jurisdiction; to vacate the subject judgment order under Rule 60(b)(6): "In simple English, the language of the 'other reason' clause, for all reasons except the five particularly specified, vests power in courts adequate to enable them to vacate judgments whenever such action is

appropriate to accomplish justice." *Klapprott v. United States*, 69 S. Ct. 384, 390 (1949).

Respectfully submitted,

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