No.

IN THE

SUPREME COURT OF THE UNITED STATES

DORIAN FAULKNER, Petitioner,
-vs-

PEOPLE OF THE STATE OF ILLINOIS, Respondent.

On Petition For Writ Of Certiorari

To The Appellate Court Of Illinois

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

This Court in *Custis v. United States*, 511 U.S. 485 (1994), limited collateral attacks on a defendant's previous convictions to alleged constitutional violations rising to the level of a jurisdictional defect resulting from the failure to appoint counsel (*Gideon v. Wainright*, 372 U.S. 335, 344 (1963)). Since that decision, state courts have split as to whether *Custis* limited collateral challenges solely to *Gideon* violations. *State v. Young*, 863 N.W.2d 249, 255 (Ia. 2015). As the Supreme Court of Montana has stated, "the *Custis* Court did not articulate a standard, let alone a workable one, for distinguishing between constitutional rights that are 'jurisdictional' and those that are 'nonjurisdictional,' or for determining whether a flaw in the proceedings underlying a convictions rises to a 'jurisdictional defect.'" *State v. Maine*, 255 P.3d 64, 73 (Mt. 2011).

The question presented in Dorian Faulkner's case is whether he may collaterally attack his predicate conviction that served as a basis of his conviction under a recidivist statute where that prior conviction resulted from an unconstitutional statute found to be void *ab initio*.

TABLE OF CONTENTS

INDEX TO APPENDIX

TABLE OF AUTHORITIES

Page

Federal Cases:

State Cases:

Statutes:

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The petitioner, Dorian Faulkner, respectfully requests that a writ of certiorari issue to review the judgment below.

OPINION BELOW

The decision of the Illinois Appellate Court (Appendix A) in response to the Illinois Supreme Court's supervisory order is reported at 2017 IL App (1st) 132884, 73 N.E.3d 25, and is published. A copy of order denying rehearing (Appendix B) is not reported. The order of the Illinois Supreme Court denying leave to appeal (Appendix C) is reported. *People v. Faulkner*, No. 122204; 2017 WL 4391802.

JURISDICTION

On February 10, 2017, the Appellate Court of Illinois issued an opinion reversing its prior decision pursuant to an Illinois Supreme Court supervisory order. A petition for rehearing was timely filed and denied on March 28, 2017. The Illinois Supreme Court denied a timely filed petition for leave to appeal on September 27, 2017. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Second Amendment to the United States Constitution

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Fifth Amendment to the United States Constitution, Due Process Clause

> No person shall be ... deprived of life, liberty, or property, without due process of law[.]

Fourteenth Amendment to the United States Constitution, Due Process Clause

> No state shall ... deprive any person of life, liberty, or property, without due process of law[.]

720 ILCS 5/24-1.6(a)(1)/(3)(a) Aggravated unlawful use of a weapon.

> A person commits the offense of aggravated unlawful use of a weapon when he or she knowingly carries on or about his or her person or in any vehicle or concealed on or about his or her person except when on his or her land or in his or her abode, legal dwelling, or fixed place of business, or on the land or in the legal dwelling of another person as an invitee with that person's permission, any pistol, revolver, stun gun or taser or other firearm and the firearm possessed was uncased, loaded, and immediately accessible at the time of the offense. (held facially unconstitutional in *People v. Aguilar,* 2 N.E.2d 321 (Ill. 2013); *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012)).

720 ILCS 24-1.7 Armed habitual criminal.

> (a) A person commits the offense of being an armed habitual criminal if he or she receives, sells, possesses, or transfers any firearm after having been convicted a total of 2 or more times of any combination of the following offenses:
>
> (1) a forcible felony as defined in Section 2-8 of this Code;
>
> (2) unlawful use of a weapon by a felon; aggravated unlawful use of a weapon; aggravated discharge of a firearm; vehicular hijacking; aggravated vehicular hijacking; aggravated battery of a child as described in Section 12-4.3 or subdivision (b)(1) of Section 12-3.05; intimidation; aggravated intimidation;

gunrunning; home invasion; or aggravated battery with a firearm as described in Section 12-4.2 or subdivision (e)(1), (e)(2), (e)(3), or (e)(4) of Section 12-3.05; or

(3) any violation of the Illinois Controlled Substances Act or the Cannabis Control Act that is punishable as a Class 3 felony or higher.

(b) Sentence. Being an armed habitual criminal is a Class X felony.

STATEMENT OF THE CASE

Dorian Faulkner was previously pled guilty to one offense based on possessing a handgun: aggravated unlawful use of a weapon (AUUW) in 2008. (C. 18) In 2012, Faulkner was arrested for possessing a handgun. (C. 5) In 2013, the Illinois Supreme Court held that the subsection of the AUUW statute under which Faulkner had been convicted in 2008 was facially unconstitutional and void *ab initio* because it amounted to a wholesale statutory ban on the exercise of Second Amendment rights. *People v. Aguilar*, 2013 IL 112116, 2 N.E.3d 321, 327-28 (Ill. 2013). In a 2015 clarification of *Aguilar*, the Illinois Supreme Court declared that "[a]n unconstitutional statute does not 'become constitutional' simply because it is applied to a particular category of persons who could have been regulated had the legislature seen fit to do so." *People v. Burns*, 2015 IL 117387, ¶ 29, 79 N.E.3d 159 (Ill. 2015).

In 2013, Illinois relied on Faulkner's prior AUUW conviction to prove him guilty of the recidivist offense of armed habitual criminal (AHC). (R. I45) On appeal from the 2013 conviction, Faulkner argued in the Illinois Appellate Court that the State failed to prove him guilty beyond a reasonable doubt of AHC because one of the two predicate offenses the State relied upon to prove AHC had been rendered void *ab initio* and could be afforded no legal recognition under *Aguilar*, *Burns*, and the precedent from this Court on which those cases relied.

In 2015, the Illinois Appellate Court agreed and held that Faulkner's void AUUW conviction could not be used to establish an element of the offense of AHC. *People v. Faulkner*, 2015 IL App (1st) 132884, ¶¶ 20-22. The State filed a petition for leave to appeal (PLA) in the Illinois Supreme Court.

The Illinois Supreme Court denied the State's petition but issued a supervisory order instructing the Appellate Court of Illinois to reconsider its decision in light of is decision in *People v. McFadden*, 2016 IL 117424, 61 N.E.3d 74, 824-84 (Ill. 2016), certiorari denied. *People v. Faulkner*, No. 119924, 60 N.E.3d 74. In *McFadden*, the Illinois Supreme Court held a conviction under a statute subsequently held unconstitutional could serve as a predicate felony under Illinois's unlawful use of a weapon by a felon ("UUWF") statute. *Id. McFadden* relied on this Court's reasoning in *Lewis v. United States*, 445 U.S. 55 (1980), which upheld a federal felon-in-possession-of-firearm conviction even though the defendant's prior felony conviction was constitutionally infirm under *Gideon v. Wainright*, 372 U.S. 335 (1963). *McFadden*, 61 N.E.3d at 80-82. *McFadden* further held the Illinois UUWF statute "does not require the State to prove the predicate offense at trial" but only defendant's "felon status" and that it was immaterial if the predicate offense was subsequently found invalid. *Id.* at 82.

In 2017, after allowing supplemental briefing, the Illinois Appellate Court relied on *McFadden* to hold that even though Faulkner's prior AUUW conviction violated his Second Amendment right to bear arms, it was nonetheless valid to prove him guilty of AHC because the void conviction had not been vacated at the time that Faulkner committed the offenses of which he was convicted in this case. *People v. Faulkner*, 2017 IL App (1st) 132884, ¶¶ 33, 73 N.E.3d 254 (Ill. App. 2017).

Faulkner timely filed a petition for rehearing, which was denied. (Appendix B) Faulkner timely filed a petition for leave to appeal in the Illinois Supreme Court, arguing his prior AUUW conviction obtained pursuant to a statute that had been

declared facially unconstitutional could not properly serve as the predicate felonies for AHC. The Illinois Supreme Court denied leave to appeal. *People v. Faulkner*, No. 122423, 2017 WL 4386847 (Ill. September 27, 2017). (Appendix C)

REASON FOR GRANTING CERTIORARI

This case presents the opportunity to resolve the uncertainty after *Custis v. United States*, 511 U.S. 485 (1994), as to what constitutional errors, beside the total deprivation of counsel, may be attacked collaterally. Lower courts have taken divergent approaches. Where the State of Illinois has determined that Dorian Faulkner's predicate offense resulted from a statute held void *ab initio*, this Court can announce a clear standard without the need to determine whether Faulkner's predicate offense was unconstitutional.

The State of Illinois has found that Dorian Faulkner's prior felony conviction was based on the portion of a statute for aggravated unlawful use of a weapon that was held on its face to violate the Second Amendment. *People v. Faulkner*, 2017 Il App (1st) 132884, ¶¶ 1, 33 (Ill. App. 2017) (*citing People v. Aguilar*, 2013 IL 112116, ¶¶ 21-22, 2 N.E.2d 321 (Ill. 2013)). Despite that prior conviction being void *ab initio*, the State of Illinois has allowed Faulkner to be sentenced to six years in prison for a recidivist offense that used the void *ab initio* conviction to satisfy a predicate element of the offense. *Faulkner*, 2017 Il App (1st) 132884, ¶¶ 26-33.

In *United States v. Bryant*, this Court affirmed that a conviction obtained in violation of a defendant's Sixth Amendment right to counsel (*Gideon v. Wainwright*, 372 U.S. 335, 339 (1963)), cannot be used in a subsequent proceeding "either to support guilt or enhance punishment for another offense." 136 S. Ct. 1954, 1962 (2016), *quoting Burgett v. Texas*, 389 U.S. 109, 115 (1967). The *Bryant* Court analyzed whether non-counseled convictions could be used to satisfy the predicate elements for a recidivist domestic-violence offense. While ultimately concluding the prior convictions (that did not violate the Sixth Amendment) could be used to satisfy the predicate elements of the new offense, *Bryant* confirmed that prior convictions gained in violation of *Gideon*

cannot be used in such a manner. *Compare Lewis v. United States*, 445 U.S. 55 (1980) (allowing conviction obtained in violation of *Gideon* to establish defendant's felon status for a federal firearm disability statute).

Twenty-two years before *Bryant*, this Court limited collateral attacks upon a defendant's prior convictions to alleged constitutional violations that rose to the level of a *Gideon* violation. *Custis v. United States*, 511 U.S. 485, 496 (1994) (declining to extend the *Burgett* rationale to claims of ineffective assistance of counsel or involuntary and unknowing guilty pleas). Since *Custis*, state and federal courts have split as to whether *Custis* limited collateral challenges to solely *Gideon* violations. *See State v. Young*, 863 N.W.2d 249, 255 (Ia. 2015); *see also People v. Smith,* 2017 IL App (1st) 151643, ¶ 22, ___ N.E.3d __ (Ill. App. 2017) (Illinois appellate court finding *Custis* limited collateral attacks on a prior conviction to solely *Gideon* violations). As the Supreme Court of Montana has recognized, "the *Custis* Court did not articulate a standard, let alone a workable one, for distinguishing between constitutional rights that are 'jurisdictional' and those that are 'nonjurisdictional,' or for determining whether a flaw in the proceedings underlying a convictions rises to a 'jurisdictional defect.'" *State v. Maine*, 255 P.3d 64, 73 (Mt. 2011).

Review is warranted for this Court to espouse the standard lacking from *Custis*, *i.e.*, what constitutional challenges rise to the level of a *Gideon* violation and thus allow for collateral attacks on such convictions.

A. The offense Faulkner was convicted of is a recidivist offense, which is the same type analyzed by this Court in *United States v. Bryant*.

The State of Illinois charged Faulkner in part with armed habitual criminal ("AHC"), for possessing a handgun. (C.I. 25 *et seq.*) 720 ILCS 5/24-1.7(a) (2012). The AHC offense makes it a Class X felony, punishable from six to thirty years in prison, for a person to possess a firearm "after having been convicted a total of 2 or more times" of a forcible felony, certain drug offenses, or one of several enumerated offenses such as aggravated unlawful use of a weapon ("AUUW"). 720 ILCS 5/24-1.7(a), (b) (2012). Not all felonies in Illinois can be used to satisfy the predicate elements of AHC. Illinois has held that the particular qualifying felonies for the AHC offense are elements of the crime. *People v. Davis*, 408 Ill. App. 3d 747, 947 N.E.2d 813, 817-18 (Ill. App. 2011); *compare People v. McFadden*, 2016 IL 117424, 61 N.E.3d 74, 78 (Ill. 2016) (for offense of unlawful use of a weapon by a felon, "[t]his court has explained that to prove the prior felony conviction, the prosecutor need only establish the 'defendant's felon status'" and does not "require proof of a specific felony conviction"). The AHC offense is therefore a recidivist offense: the crime is directed at "repeat offenders," *(People v. Johnson*, 2015 IL App (1st) 133663, 44 N.E.3d 486, 494 (Ill. App. 2015)). The legislature's "unmistakeable purpose" in enacting the offense was to "criminalize recidivist offenders" who possess guns. *People v. Adams*, 404 Ill. App. 3d 405, 935 N.E.2d 693, 699 (Ill. App. 2010).

18 U.S.C. § 117(a), "Domestic Assault by an Habitual Offender," is similarly a recidivist statute that requires the government to prove the defendant "on at least [two] separate prior occasions" committed a domestic assault or other serious violent felonies against a family, household member, or intimate partner. In *Bryant*, this Court analyzed whether non-counseled tribal-court convictions could be used to satisfy the

predicate elements for a recidivist domestic violence offense. 136 S. Ct. at 1961 ("Having two prior convictions for domestic-violence crimes–including tribal-court convictions–is thus a predicate of the new offense."). Affirming the rule established 50 years ago in *Burgett*, 389 U.S. at 115, the *Bryant* Court affirmed last year that, "It is undisputed that a conviction obtained in violation of a defendant's Sixth Amendment right to counsel cannot be used in a subsequent proceeding 'either to support guilt or enhance punishment for another offense.'" *Bryant*, 136 S. Ct. at 1962, *quoting Burgett.* After *Bryant*, it is evident that in Illinois an AHC conviction could be collaterally attacked if it resulted from the State using a predicate felony conviction that violated *Gideon*. *See Smith*, 2017 IL App (1st) 151643 at ¶ 21. Left open after *Bryant* is what other constitutionally deficient predicates, if any, can be challenged collaterally.

B. State and federal courts have split on whether this Court limited collateral review of prior convictions to solely *Gideon* violations.

With it being established in *Burgett* that *Gideon* violations cannot be used to either support guilt or enhance punishment for another offense, this Court in 1994 addressed whether non-*Gideon* constitutional errors could be challenged collaterally. In *Custis*, the challenge arose in a federal sentencing proceeding. Custis was convicted of two federal offenses, and the government moved to have his sentence enhanced under the Armed Career Criminal Act of 1984 ("ACCA") based on three prior state-court convictions. Custis challenged the use of two of those convictions on the grounds that he had received ineffective assistance of counsel and had not been adequately advised of his rights. *Custis*, 511 U.S. at 487-88.

This Court determined, however, that unlike other federal statutes which permit repeat offenders to challenge prior convictions used for enhancement purposes,

Congress had not authorized such challenges under the ACCA. *Id.* at 490-93. This Court held that, absent statutory authorization, a defendant may not attack a prior conviction in the course of a federal sentencing proceeding. *Id.* at 490-97. This Court cited two policy concerns in support of this holding: ease of administration (related to the difficulties in obtaining state-court transcripts and records) and promoting the finality of judgments. *Id.* at 496-97.

This Court acknowledged its holdings in *Burgett* and *United States v. Tucker*, 404 U.S. 443, 447-49 (1972), but recognized only one exception to the bar on collateral attacks: i=If the prior conviction is alleged to have been obtained in violation of the right to appointed counsel. *Custis*, 511 U.S. at 493-96. This Court stated that such violations are "unique" and rise to the level of a "jurisdictional defect." *Id.* at 496; *see also Johnson v. Zerbst*, 304 U.S. 458, 468 (1938) ("If this requirement of the Sixth Amendment is not complied with, the court no longer has jurisdiction to proceed.").

Moreover, *Gideon* violations are generally easy to verify from the record. *Custis*, 511 U.S. at 496. As a final matter, this Court noted that Custis still had other means of attacking the prior state convictions in question, and if he were successful he could then apply to reopen any federal sentence enhanced by those convictions. *Id.* at 497; *see also Johnson v. Mississippi*, 486 U.S. 578, 581-83, 586-87 (1988) (Mississippi death sentence vacated where sole aggravating factor was defendant's New York conviction that was later reversed). Courts have extended the rationale in Custis to preclude collateral attacks in cases where the prior conviction served as an element of the crime charged. *See, e.g., United States v. Gutierrez- Cervantez*, 132 F.3d 460, 462 (9th Cir. 1997); *State v. Johnson*, 38 A.3d 1270, 1278 (Me. 2012).

Presaging the current dilemma, Justice Souter noted in his dissent the problem with the "jurisdiction" theory: "the Court skips over the very difficulty that led to its abandonment, of devising a standard to tell whether or not a flaw in the proceedings leading to a conviction counts as a 'jurisdictional defect.'" *Custis*, 511 U.S. at 509 (Souter, J., dissenting); *see also Custis*, 511 U.S. at 500 (Souter, J., dissenting) ("Courts of Appeals consistently read [*Burgett* and *Tucker*] as requiring courts to entertain claims that prior convictions relied upon for enhancement were unconstitutional for reasons other than *Gideon* violations.").

Less than a decade later, this Court extended the rationale of *Custis* to post-sentencing claims raised pursuant 28 U.S.C. §§ 2255 and 2254. In *Daniels v. United States,* 532 U.S. 374 (2001) a federal prisoner filed a section 2255 motion to modify his federal sentence alleging that his prior state convictions used to enhance that sentence were unconstitutional. In *Lackawanna County Dist. Attorney v. Coss*, 532 U.S. 394 (2001), the state prisoner filed a section 2254 petition for writ of *habeas corpus* alleging his prior state conviction used to enhance his state sentence was unconstitutional. Both prisoners asserted ineffective assistance of counsel claims, and Daniels also claimed that his guilty pleas were not knowing and voluntary. *Daniels*, 532 U.S. at 376-77, 379; *Lackawanna*, 532 U.S. at 397-99. This Court applied the rationale of *Custis* to both cases and held that the prisoners could not collaterally challenge their prior alleged unconstitutional sentences. *Daniels*, 532 U.S. at 382; *Lackawanna*, 532 U.S. at 403-04. This Court subsequently clarified the statute of limitations to one year for filing such pleadings once the prisoner has had the state conviction(s) vacated. *Johnson v. United States*, 544 U.S. 295, 302-09 (2005).

After *Custis*, state courts have been left to grapple with this Court's decision to limit collateral challenges of predicate/enhancing prior convictions to *Gideon* violations or ones that rise to the same level of a jurisdictional defect. Most courts have taken the path of least resistance and found *Custis* established the one and only scenario where a prisoner could collaterally challenge a prior conviction. *See United States v. Aguilar-Diaz*, 626 F.3d 265, 269-70 (6th Cir. 2010); *United States v. Daniels*, 195 F.3d 501, 503 (9th Cir. 1999); *Camp v. State*, 221 S.W.3d 365, 369-70 (Ark. 2006); *State v. Veikoso*, 74 P.3d 575, 582 (Haw. 2003); *State v. Weber*, 90 P.3d 314, 319-20 (Idaho 2004); *State v. Delacruz*, 899 P.2d 1042, 1049 (Kan. 1995); *McGuire v. Commonwealth*, 885 S.W.2d 931, 937 (Ky. 1994); *State v. Johnson*, 38 A.3d 1270, 1278 (Me. 2012); *People v. Carpentier*, 521 N.W.2d 195, 199-200 (Mich. 1994); *State v. Louthan*, 595 N.W.2d 917, 923-26 (Neb. 1999); *State v. Weeks*, 681 A.2d 86, 89-90 (N.H. 1996); *State v. Mund*, 593 N.W.2d 760, 761-62 (N.D. 1999); *State v. Hahn*, 618 N.W.2d 528, 535 (Wis. 2000); *Vester v. Commonwealth*, 593 S.E.2d 551, 596-97 (Va. Ct. App. 2004); *see also People v. Padilla*, 907 P.2d 601, 606 (Colo. 1995) (applying the *Custis* restriction as a matter of federal constitutional law in the discretionary sentencing context, as opposed to in the context of mandatory sentencing enhancements); *State v. Boskind*, 807 A.2d 358, 360, 362-64 (Vt. 2002) (discussing *Custis* and holding that, when not based on a violation of the right to counsel, collateral challenges to a prior conviction used to enhance a sentence may not be brought during sentencing proceedings but may be brought in a post-conviction proceeding based on the enhanced sentence). The State of Illinois is one of those states that has recently found that *Custis* limited collateral

attacks to *Gideon* violations. *People v. Smith*, 2017 IL App (1st) 151643, ¶ 22, ___ N.E.3d __ (Ill. App. 2017).

Other courts have either explicitly or implicitly rejected a *Gideon*-only application of *Burgett/Tucker*. *See People v. Allen*, 981 P.2d 525, 535-37 (Cal. 1999); *Nash v. State*, 519 S.E.2d 893, 896 (Ga. 1999); *State v. Balsano*, 11 So.3d 475, 479, 482 (La. 2009); *State v. Maine*, 255 P.3d 64, 72-73 (Mt. 2011); *Commonwealth v. Lopez*, 690 N.E.2d 809, 814 (Mass. 1998); *Paschall v. State*, 8 P.3d 851, 852 n.2 (Nev. 2000); *State v. Moeller*, 511 N.W.2d 803, 809-10 (S.D. 1994) (permitting collateral attack based on invalid guilty plea); *contra State v. Burkettt*, 849 N.W.2d 624 (S.D. 2014); *State v. Jusino*, 137 A.3d 65, 72 (Conn. App. 2016); *see also United States v. Hoggard*, 61 F.3d 540, 542 (7th Cir. 1995) (holding that "a defendant may not collaterally attack a prior state conviction at sentencing unless the conviction is presumptively void-that is, the lack of constitutionally guaranteed procedures is plainly detectable from the face of the record"). The lower courts have been given sufficient time to flesh out the various permutations of *Custis*, and the divergent approaches, not lessening with time, warrant review by this Court.

C. This case presents an excellent vehicle for this Court to resolve the split in post-*Custis* authority and enunciate which constitutional errors rise to the "jurisdictional defect" level of a *Gideon* violation.

The *Custis* Court did not articulate a standard for identifying which constitutional rights are jurisdictional. *See State v. Maine*, 255 P.3d 64, 73 (Mt. 2011). Faulkner's case presents an ideal vehicle for this Court to conclusively resolve the lingering question from *Custis*: What constitutional errors, if any, rise to the level of the jurisdictional defect of a *Gideon* violation that would allow a prior conviction to be

collaterally attacked? The State of Illinois agrees that Faulkner's predicate conviction for AUUW from 2007 was void *ab initio* under *People v. Aguilar*, 2013 IL 112116, 2 N.E.3d 321, 327-28 (Ill. 2013). *People v. Faulkner*, 2017 IL App (1st) 132884, ¶ 33, 73 N.E.3d 25 (Ill. App. 2017). Given the Illinois Appellate Court's holding that Faulkner's conviction was based upon an unconstitutional statute, no independent resolution by this Court is necessary as to whether the prior conviction was unconstitutional.

In *Custis*, this Court suggested that "[e]ase of administration" was a concern and that it would not require "sentencing courts to rummage through frequently nonexistent or difficult to obtain state-court transcripts or records that may date to another era, and may come from any one of the 50 States." 511 U.S. at 496; *see also United States v. Martinez-Cruz*, 736 F.3d 999, 1004 (D.C. Cir. 2013) ("By the same token, in cases where the defendant had no counsel for the prior conviction, the only issue will be whether he validly waived counsel. If that involves 'rummaging,' it is only with respect to a relatively narrow issue."). On the other hand, this Court has put *Gideon* violations on par with other structural errors mandating reversal of a conviction no matter the strength of evidence against the defendant. *See Washington v. Recuenco*, 548 U.S. 212, 218, n.2 (2006) (enumerating structural errors to include complete denial of counsel, a biased trial judge, racial discrimination in selection of grand jury, denial of self-representation at trial, denial of public trial, and a defective reasonable-doubt instruction).

Wherever this Court draws the line, Faulkner should be allowed to collaterally attack his AUUW conviction because "[a]n unconstitutional law is void, and is as no law. . . because, if the laws are unconstitutional and void, the Circuit Court acquired

no jurisdiction of the causes." *Ex parte Siebold*, 100 U.S. 371, 376-77 (1879); *accord Montgomery v. Louisiana*, 136 S. Ct. 718, 730-31 (2016) ("A penalty imposed pursuant to an unconstitutional law is no less void because the prisoner's sentence became final before the law was held unconstitutional. There is no grandfather clause that permits States to enforce punishments the Constitutional forbids. To conclude otherwise would undercut the Constitution's substantive guarantees.").

"If a law is invalid as applied to the criminal defendant's conduct, the defendant is entitled to go free." *Bond v. United States*, 564 U.S. 211, 227 (2011) (Ginsburg, J., concurring). "In short, a law 'beyond the power of Congress,' for any reason, is 'no law at all.'" *Id.* at 227-28, *quoting Nigro v. United States*, 276 U.S. 332, 341 (1928). "Due process, moreover, is a guarantee that a man should be tried and convicted only in accordance with valid laws of the land. If a conviction is not valid under these laws, statutory and constitutional, a man has been denied due process and has a constitutional right to have the conviction set aside, without being deprived of life, liberty, or property as a result." *North Carolina v. Pearce*, 395 U.S. 711, 739 (1969) (Black, J., concurring).

Lower courts have found predicate acts/convictions alleged under an unconstitutional law to violate the right to due process. *See MacDonald v. Moose*, 710 F.3d 154, 167 (4th Cir. 2013) (holding the state's anti-sodomy law was unconstitutional and thus the state could not convict an individual for violating a criminal solicitation statute where the predicate felony was the unconstitutional anti-sodomy law); *Green v. Georgia*, 51 F.Supp.3d 1304, 1312-16 (N.D. Ga. 2014) (11th Cir. appeal pending) (in granting *habeas* relief, court found counsel ineffective for failing to challenge the use

of a facially unconstitutional sodomy conviction as the predicate offense for failing to register as a sex offender); *see also In re N.G.*, 2017 IL App (3d) 160277, 72 N.E.3d 436, 442-43 (Ill. App. 2017), *appeal allowed* No. 121961, consolidated with No. 121939 (March 27, 2017) (relying upon *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600 (2015), court allowed collateral attack upon unconstitutional prior conviction in a parental rights case). Granting review in this matter would allow this Court the unencumbered opportunity to address the ambiguity of *Custis* and provide clarity for the lower courts.

CONCLUSION

For the foregoing reasons, petitioner, Dorian Faulkner, respectfully requests that a writ of certiorari issue to review the judgment of the Illinois Appellate Court.

Respectfully submitted,

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