

IN THE  
SUPREME COURT OF THE UNITED STATES  
October Term, 2018

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No.

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JIMMY THOMPSON  
Petitioner,

v.

UNITED STATES OF AMERICA,  
Respondent.

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PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

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## **QUESTION PRESENTED FOR REVIEW**

Whether a conviction based on a statute that has been held void *ab initio* can be used to increase punishment as a predicate felony pursuant to 18 U.S.C. §922(g), charging felon in possession of a firearm.

## TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW.....	ii
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES.....	iv
OPINION BELOW.....	2
JURISDICTIONAL STATEMENT.....	2
RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS.....	2
STATEMENT OF THE CASE.....	2
I. Proceedings in the District Court.....	3
II. The Seventh Circuit Opinion.....	4
REASONS FOR GRANTING THE WRIT.....	5
I. The Seventh Circuit decision decides an important federal question in a way that directly conflicts with a decision by the Illinois Supreme Court and United State Supreme Court precedent.....	5
CONCLUSION.....	11
APPENDIX.....	12
Opinion of Seventh Circuit, <i>United States v. Jimmy Thompson</i> .....	A-1

## TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Class v. United States</i> , 138 S.Ct. 798 (2018).....	8
<i>Ex parte Seibold</i> , 100 U.S.371 (1880).....	5
<i>Ezell v. City of Chicago</i> , 651 F.3d 684 (7th Cir. 2011).....	8
<i>In Re N.G.</i> , 2018 IL 121939.....	4, 5, 6, 7
<i>Lewis v. United States</i> , 45 U.S. 55.....	4, 5, 6, 7, 8
<i>Montgomery v. Louisiana</i> , 136 S.Ct. 718 (2016).....	6
<i>Moore v. Madigan</i> , 702 F.3d 933 (7 <sup>th</sup> Cir. 2012).....	3
<i>People v. Aguilar</i> , 2013 IL 112116 (2013).....	3, 7, 9, 10
<i>People v. McFadden</i> , 2016 IL 117424.....	4, 5
<i>United States v. Gill</i> , 824 F.3d 653 (7th Cir. 2016).....	9
<i>United States v. Hayes</i> , 872 F.3d 843 (7th Cir. 2017).....	9
<i>United States v. Jenkins</i> , 772 F.3d 1091 (7 <sup>th</sup> Cir. 2014).....	3, 4, 9
<i>United States v. Johnson</i> , 457 U.S. 537, 550 (1982).....	5
<i>United States v. Lee</i> , 72 F.3d 55 (1995).....	5, 8
<i>United States v. Thompson</i> , 901 F.3d 785 (7 <sup>th</sup> Cir. 2018).....	1, 2, 4
<i>United States v. U.S. Coin &amp; Currency</i> , 401 U.S. 715 (1971).....	5, 6
<i>United States ex rel. v. Williams</i> , 497 F.2d 337 (2 <sup>nd</sup> Dist. 1974).....	5
 <u>Statutory Provisions</u>	
U.S. Const. amend. II .....	3

U.S. Const. amend. V.....	2
18 U.S.C. §922 .....	3
720 ILCS 5/24-1.6.....	3
 <u>Sentencing Guidelines</u>	
U.S.S.G. §4A1.2.....	3, 9

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Petitioner, Jimmy Thompson, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered on August 24, 2018, as a published opinion in *United States v. Jimmy Thompson*, 901 F.3d 785 (7<sup>th</sup> Cir. 2018).

## **OPINION BELOW**

The opinion of the Court of Appeals is reported at 901 F.3d 785. That opinion is attached as Appendix A to this petition. The opinion of the district court is not reported.

## **JURISDICTIONAL STATEMENT**

The Court of Appeals for the Seventh Circuit entered its judgment on August 24, 2018, and petitioner did not seek rehearing. The jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. §1254(1).

## **RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS**

The Fifth Amendment to the United States Constitution guarantees a citizen's right to due process of law. U.S. Const. amend. V.

## **STATEMENT OF THE CASE**

A conviction based on a statute declared void *ab initio* – as if it never existed – has no legal effect. Such a conviction, whether or not it has been vacated, cannot serve to enhance a sentence. Mr. Thompson was charged with being a felon in possession of a firearm. His only prior felony conviction was based on a statute that was declared void *ab initio*. The court below, by holding that an unconstitutional conviction can be used as a predicate felony unless it has been vacated, violated Mr. Thompson's constitutional right to due process. The decision of the Seventh Circuit

directly contradicts the law of the Illinois Supreme Court, which has held that such convictions cannot be used to enhance a sentence, and United States Supreme Court precedent regarding unconstitutional convictions.

## **I. Proceedings in the District Court**

Mr. Thompson was charged with being a felon in possession of a firearm in violation of 18 U.S.C. §922(g)(1). Thompson’s only prior felony offense was a conviction for Aggravated Unlawful Use of a Weapon (AUUW) in violation of 720 ILCS 5/24-1.6(a)(1).

On May 11, 2017, Thompson pleaded guilty to the single count indictment. Prior to sentencing, the presentence investigation report (PSR) raised the issue of whether Mr. Thompson’s prior conviction could be a qualifying offense prohibiting him from possessing a firearm in light of the Seventh Circuit and Illinois Supreme Court decisions declaring the AUUW statute unconstitutional as void *ab initio*. *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012); *People v. Aguilar*, 2013 IL 112116 (2013). In *Moore* and *Aguilar*, the AUUW statute was found to be unconstitutional on its face as a violation of the Second Amendment. *Id.* In accordance with the sentencing guidelines, the PSR assessed no criminal history points for this conviction, as convictions that have been ruled constitutionally invalid are not to be counted. §4A1.2, comment. (n. 6).

Based on the PSR, Thompson filed a Motion for Ruling on the Validity of the Plea, asserting that a statute declared void *ab initio* — “as if the law never existed” — cannot serve as a predicate felony under §922(g). *United States v. Jenkins*, 772



F.3d 1092, 1098 (2014). In opposition, the government argued *Lewis v. United States*, 445 U.S. 55, 100 S.Ct. 915 (1980), which held that a constitutionally infirm prior felony conviction could be used in such a manner. Thompson distinguished *Lewis* as the predicate conviction was unconstitutional based upon a procedural issue rather than an entire statute declared void *ab initio*. Following briefing, the district court ruled there is no principal difference between a conviction vacated because of a constitutional defect in a statute and a conviction based on a different constitutional infirmity.

The district court acknowledged that the Supreme Court did not address void *ab initio* statutes in *Lewis* and noted that the issue was an open question, but found that it was not within the court's power to make a distinction. As a result, the motion to reconsider Mr. Thompson's plea of guilty was denied.

On September 5, 2017, the district court sentenced Thompson to a term of imprisonment of sixteen (16) months, to be followed by three (3) years of supervised release.

## **II. The Seventh Circuit's Opinion**

The Seventh Circuit affirmed Mr. Thompson's conviction. *United States v. Thompson*, 901 F.3d 785 (7<sup>th</sup> Cir. 2018). In both the district and appellate courts, the government cited and argued the Illinois case of *People v. McFadden*, 2016 IL 117424, which held that a prior unconstitutional conviction can serve as a predicate felony unless it has been vacated. Following oral argument, *McFadden* was overruled. In *In Re N.G.*, 2018 IL 121939, the Illinois Supreme Court acknowledged

the erroneous logic of *McFadden*, and held that constitutionally defective convictions based on the void *ab initio* doctrine cannot serve to enhance a punishment. The case was presented to the Seventh Circuit as additional authority. Nonetheless, the Seventh Circuit affirmed the conviction. Relying on *Lewis*, and adhering to its precedent in *United States v. Lee*, 72 F.3d 55 (7<sup>th</sup> Cir. 1995), the Court held the fact that a statute was held void *ab initio* is meaningless unless affirmative steps are taken to vacate the conviction.

### REASONS FOR GRANTING THE WRIT

**The Seventh Circuit decision decides an important federal question in a way that directly conflicts with a decision by the Illinois Supreme Court and United State Supreme Court precedent.**

The United States Supreme Court has held that “any statute defining criminal conduct, if declared unconstitutional is void *ab initio*.” *U.S. v. U.S. Coin & Currency*, 401 U.S. 715, 732-33 (1971); *United States v. Johnson*, 457 U.S. 537, 550 (1982), (recognizing that the Court has relied on void *ab initio* to invalidate inconsistent prior judgments where its reading of a particular constitutional guarantee immunizes defendant’s conduct from punishment); *Ex parte Seibold*, 100 U.S. 371 (1880) (“an unconstitutional law is void, and is no law”). A statute declared void *ab initio* — “void from the beginning” — is treated as if it never existed. *Jenkins*, 772 F.3d at 1097; *United States ex rel. Williams*, 497 F.2d 337 (2<sup>nd</sup> Cir. 1974) (Supreme Court decision finding abortion statute unconstitutional applied retroactively to invalidate doctor’s conviction). As noted in *U.S. Coin*, “no circumstances call more for the invocation of a rule of complete retroactivity than

when the conduct being penalized is constitutionally immune from punishment.”  
*U.S. Coin*, 401 U.S. at 724.

Relying on federal constitutional law and principles, the Illinois Supreme Court found that the United States Supreme Court “has consistently and without exception recognized an obligation to afford relief to a person convicted under an unconstitutional (void) statute.” *In Re N.G.* at ¶48; *See e.g., Montgomery v. Louisiana*, 136 S.Ct. 718, 730-31 (2016). As a result, the Illinois Supreme Court reasoned that where “a conviction is based on an unconstitutional law, that conviction is not only erroneous but is illegal and void and cannot be the legal cause of punishment.” *In Re N.G.* at ¶38. A conviction based on a void statute could not be relied upon in any manner as a facially invalid statute means the state had no authority and the courts never acquired jurisdiction to impose punishment. *Id.* *In re N.G.* made clear that courts had an obligation to correct the wrongs perpetrated by unconstitutional statutes:

Accordingly, not only must the State stop charging defendants under the invalidated law in future prosecutions, it is precluded from using past convictions under the facially unconstitutional law in any subsequent proceedings to support guilt or enhance punishment for another offense.

*Id.* at ¶38.

The Seventh Circuit ruled contrary to United States Supreme Court precedent, the Illinois Supreme Court, and the plain reading of void *ab initio*. Its reliance on the United States Supreme Court decision in *Lewis* was misplaced, as *Lewis* never addressed the effect of a statute that was void *ab initio*.

In *Lewis*, the defendant was charged with a weapons offense and challenged his prior conviction asserting it was obtained without the benefit of counsel in violation of his Sixth and Fourteenth Amendments. *Lewis*, 445 U.S. at 57. The Supreme Court found that until the conviction is vacated, it might be used in a subsequent prosecution. *Id.* at 61. The *Lewis* decision was not unanimous. Three justices dissented, as the majority decision was contrary to almost every Court of Appeals decision at the time. *Id.* at 68. The dissent would have decided the case pursuant to the rule of lenity, since “petitioner has once already been imprisoned in violation of the Constitution.” *Lewis* at 68, 70.

Nonetheless, *Lewis* addressed the specific constitutional infirmity of uncounseled convictions as applied in a particular case. It did not address the effect of a successful facial challenge to the law. *In re N.G.* specifically differentiated the prior conviction in *Lewis* which was unconstitutional based on a deficient procedure with prior convictions which were facially unconstitutional:

A facially unconstitutional statute and any conviction based on the statute must be treated as if they *never existed*. Because they are nonexistent, as a matter of federal constitutional law, and must therefore be ignored by the courts, using them against a defendant in any subsequent proceeding, civil or criminal, is not only conceptually impossible (if something has no legal existence how can it be given any legal recognition?) but would subvert the very constitutional protections that resulted in the statute being found facially invalid to begin with and is incompatible with the United States Supreme Court’s command that when, as under *Aguilar* and here, the conduct penalized by a statute constitutionally immune from punishment, that determination must be given complete retroactive effect. Nothing in *Lewis* or any other United States Supreme Court decision of which we are aware supports a different conclusion,” (citations omitted) (emphasis in original).

*Id.* at ¶71, 74. Claims of a constitutional dimension are “markedly different” from claims that strike at the very power of a court to enter a conviction or impose sentence. *Class v. United States*, 138 S.Ct. 798, 803-804 (2018).

Despite its factual distinction, the Seventh Circuit relied on *Lewis* in affirming Thompson’s conviction. The appellate court reasoned its precedent in *Lee* necessitated the outcome. However, *Lee* was also factually distinguishable from Thompson’s case. In *Lee*, a defendant’s prior conviction was expunged after arrest but prior to trial. 72 F.3d at 55. Relying on *Lewis*, the Court affirmed the conviction, as the expungement was not completed prior to the time of the offense. *Id.* at 58. However, expungement is a legal mechanism that may be granted for several reasons and is distinct from an entire statute deemed void. The expungement voided the prior conviction, but the conduct underlying the conviction was still deemed illegal. Unlike *Lee*, the conduct underlying Thompson’s AUUW is not criminal in nature.

The Seventh Circuit’s decision also conflicted with its own precedent. In *Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011), the Court emphasized the effect of a facial challenge to a statute with an as-applied challenge to a prior conviction, finding that the difference was reflected in the remedy. The Court recognized that a facial challenge to a statute “means the statute is wholly invalid and cannot be applied *to anyone*.” *Id.* at 698 (emphasis in original).

The Seventh Circuit’s opinion not only conflicts with state law, but with the federal sentencing guidelines. Acknowledging the significance of void *ab initio*, the

sentencing guidelines prohibit using such convictions for criminal history, regardless of whether the conviction was actually vacated. U.S.S.G. §4A1.2; *United States v. Hayes*, 872 F.3d 843 (7th Cir. 2017) (plain error to assess criminal history points based on a conviction under an unconstitutional statute); *United States v. Gill*, 824 F.3d 653 (7th Cir. 2016) (district court erred in assessing criminal history points based on AUUW conviction). In *Jenkins*, the defendant challenged the assessment of three criminal history points for his prior AUUW conviction, which was held unconstitutional under *Aguilar*. *Jenkins*, 772 F.3d at 1097-98. Under the plain error standard, the Seventh Circuit held that because the statute was held void *ab initio* — “as if the law never existed” — his federal sentence must be vacated and remanded for resentencing with a properly calculated guideline range. *Id.* Because the guidelines adhere to the plain meaning of void *ab initio* and prohibit using the convictions for criminal history, regardless of whether the conviction was actually vacated, the felon in possession statute should be treated in the same manner.

It is contradictory to recognize the void *ab initio* doctrine in calculating criminal history points, but not in determining an underlying predicate felony. In both instances, the conviction is unconstitutional and the defendant was being punished for engaging in conduct that was not a crime.

Moreover, the Seventh Circuit’s decision places the burden on a citizen to vacate his prior conviction, but makes no concession for the lack of notice he receives about the legislature’s unlawful statute. Thompson, like most citizens, had

no legal background, and was unaware of the *Aguilar* decision and its effect. While a defendant may seek to vacate his conviction for purposes of employment or background checks, imposing such a duty to avoid criminal prosecution as a result of the government's overreach is unfair. Further, the argument that a defendant should have vacated the conviction before possessing the firearm ignores the literal language of void *ab initio* – as if it never existed. This outcome punishes citizens for the government's attempt to criminalize lawful conduct, thus placing undue burdens on citizens. The Seventh Circuit's decision to penalize Thompson, because he has not gone through the formality of having the prior case vacated, is unconstitutional, inequitable, and unfair.

Declaring statutes unconstitutional as void *ab initio* is rare. Such action carries great significance with clear legal consequences. Despite United States Supreme Court precedent, Illinois Supreme Court rulings, the Federal Sentencing Guidelines, and the void *ab initio* doctrine, the Seventh Circuit erroneously ruled that convictions based on statutes declared void *ab initio* could be used as predicate offenses. Thus, this Court should grant certiorari to resolve this conflict.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated this 19<sup>th</sup> day of November, 2018, at Chicago, Illinois.

Respectfully submitted,

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## APPENDIX

Opinion of Seventh Circuit, <i>United States v. Jimmy Thompson</i> .....	A-1
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