

20-713

SUPREME COURT OF THE UNITED STATES

Lamont R. Reed — PETITIONER

(Your Name)

FILED

JAN 16 2021

OFFICE OF THE CLERK  
SUPREME COURT, U.S.

Scott Frakes, Director — RESPONDENT(S)

Nebr. Dept. of Corr. Svcs.

ON PETITION FOR A WRIT OF CERTIORARI TO

The United States Court of Appeals for the Eighth Circuit  
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Lamont R. Reed #83510

(Your Name)

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(City, State, Zip Code)

N/A

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QUESTION(S) PRESENTED

Is the AEDPA one year statute of limitations for filing a Federal Petition for a Writ of Habeas Corpus statutorily or equitably tolled when a State Court delays the filing of a State Postconviction Petition by scheduling a hearing for a necessary discovery motion for three months later and then denying the discovery motion without any hearing after a two month delay?

## **LIST OF PARTIES**

All parties appear in the caption of the case on the cover page.

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

## TABLE OF CONTENTS

OPINIONS BELOW.....	1
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED .....	3
STATEMENT OF THE CASE .....	4
REASONS FOR GRANTING THE WRIT .....	7
CONCLUSION.....	12

## INDEX TO APPENDICES

APPENDIX A	Judgment of the Eighth Circuit Court of Appeals
APPENDIX B	Memorandum and Order of the U.S. District Court for the District of Nebraska
APPENDIX C	Order of the Eighth Circuit Court of Appeals denying the Petition for Hearing and Rehearing en banc.
APPENDIX D	
APPENDIX E	
APPENDIX F	

TABLE OF AUTHORITIES CITED

Burns v. United States, 501 U.S. 129 (1991) . . . . .	12
Case v. Nebraska, 381 U.S. 336 (1965) . . . . .	11
Gardner v. Florida, 430 U.S. 349 (1977) . . . . .	12
Gonzalez v. Thaler, 565 U.S. 134 (2012) . . . . .	9
Hodge v. Greiner, 269 F.3d 104 (2nd Cir. 2001) . . . . .	7, 8
Holland v. Florida, 560 U.S. 134 (2010) . . . . .	11, 12
Hutson v. Quartermann, 508 F.3d 236 (5th. Cir. 2012) . . . . .	8
Kyles v. Whitley, 498 U.S. 931 (1995) . . . . .	11
Ramirez v. Yates, 571 F.3d 993 (9th Cir. 2009) . . . . .	7
State v. Jackson, 275 Neb. 434 (Neb. 2008) . . . . .	9
State v. Robertson, 294 Neb 29 (Neb. 2016) . . . . .	9
State v. Soukarith, 260 Neb 478 (Neb. 2000) . . . . .	9
State v. Thomas, 236 Neb 553 (Neb. 1990) . . . . .	9
Wall v. Kholi, 562 U.S. 545 (2011) . . . . .	7, 8, 10, 11
Woodward v. Cline, 693 F.3d 1289 (10th Cir. 2012) . . . . .	7
 Statutes	
28 U.S.C. §2244(d)(2) . . . . .	3, 7, 10, 11

IN THE  
SUPREME COURT OF THE UNITED STATES  
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

**OPINIONS BELOW**

For cases from federal courts:

The opinion of the United States court of appeals appears at Appendix A\_\_\_\_ to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

The opinion of the United States district court appears at Appendix B\_\_\_\_ to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

For cases from state courts:

The opinion of the highest state court to review the merits appears at Appendix \_\_\_\_ to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

The opinion of the \_\_\_\_\_ court appears at Appendix \_\_\_\_ to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

## JURISDICTION

For cases from federal courts:

The date on which the United States Court of Appeals decided my case was 8/25/2020.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: 10/20/2020, and a copy of the order denying rehearing appears at Appendix c.

An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

For cases from state courts:

The date on which the highest state court decided my case was \_\_\_\_\_. A copy of that decision appears at Appendix \_\_\_\_\_.

A timely petition for rehearing was thereafter denied on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The 5th Amendment to the U.S. Constitution guarantees the right to the

Due Process of Law:

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

The 6th Amendment to the U.S. Constitution guarantees the right to (effective) assistance of counsel:

In all criminal prosecutions, the accused shall enjoy the right to  
... the Assistance of Counsel for his defense.

These rights apply to the Petitioner in State Courts through the guarantees  
of the 14th Amendment:

Section 1. ... 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; ....

28 U.S.C. §2244(d)(2) provides for the tolling of the AEDPA one year statute  
of limitations:

(2) The time during which a properly filed application for state  
post-conviction or other collateral review with respect to the pertinent  
judgment or claim is pending shall not be counted toward any period  
of limitation under this subsection.

## STATEMENT OF THE CASE

The Petitioner was arrested and charged with ten different felonies related to the possession and selling of drugs. At issue here are three charges for the possession and selling of heroin. One count charged the delivery or possession with intent to deliver heroin, with a firearm, in the amount of at least 28 grams; a Class IB felony with a minimum 20 year sentence to a maximum of life imprisonment. Two other charges were for the delivery or possession with intent to deliver heroin in the amounts of at least 28 grams but less than 140 grams; Class IC felonies punishable with a mandatory minimum of 5 years up to a maximum of 50 years. The original information claimed the Petitioner sold, during controlled buys, 29.5 grams of heroin and then two weeks later sold 30.4 grams of heroin.

Petitioner informed his counsel that none of his sales were for more than 2 grams of heroin. Counsel negotiated a plea agreement to six counts and the three at issue were reduced to the sale of less than 10 grams; Class II felonies punishable with a minimum of 1 year up to a maximum of 50 years.

However, during the plea hearing, the State offered as its factual basis the originally charged sales amounts; 29.5 and 30.4 grams. Although Petitioner complained about this to his counsel, counsel failed to object to this by explaining that the charges had been reduced to "less than 10 grams." Using this false factual basis the State Court then sentenced the Petitioner to the maximum sentence allowed for these charges; a minimum of 50 years to a maximum of 50 years, a sentence with no parole eligibility.

On direct appeal a different counsel argued not only an excessive sentence but trial counsel's failure to object to the State's false factual basis. That appeal was denied but preserved the ineffective assistance of counsel

claims for postconviction (because the record was not sufficient to rule on those claims). (An unpublished opinion by the Nebraska Court of Appeals). The mandate from that appeal was filed on 1/4/2017 and the one year AEDPA time limit began running 30 days later on 2/3/2017.

Petitioner believed that the police procedures for controlled buys would result in the police reports (which he had not had access to) having evidence of the actual amounts of heroin purchased and would undermine the State's false factual basis. Nebraska's Postconviction process requires the allegations of specific facts. In Nebraska the police reports containing these facts are made a part of the Presentence Investigation Report (PSR). Therefore, to prepare his Postconviction Relief Petition, the Petitioner filed a Motion to View his PSR on 7/13/2017.

The State Court set the Petitioner's Motion to View the PSR for a hearing scheduled for 11/29/2017, some three months after the motion was filed. But on 9/12/2017 the State Court denied the Motion without any hearing, having taken nearly two months to do so.

Petitioner proceeded to timely file his State Postconviction Petition arguing that his trial counsel's failure to examine the police reports and to object to the State's false factual basis that had resulted in the Petitioner receiving a sentence based upon false information. But the Petitioner could only make general allegations of what would be found in the police reports regarding the amounts of the sales in the controlled buys. The Postconviction Petition asked for discovery of the police reports in the PSR and for the opportunity to file an amended Petition after that discovery.

The Postconviction Petition was denied without a hearing, without discovery

of the police reports, and without the opportunity to amend. The State Court denied the Postconviction "because [the Petitioner's] arguments for relief ... are not pled with specific facts...." [Federal Habeas Record Filing #10-5, p.20]. The appeal of that decision was affirmed by the Nebraska Supreme Court (an unpublished opinion) on 5/31/2019. The mandate was issued on 9/11/2019, not the 9/9/2019 date the U.S. District Court will later cite on p.2, ¶4 of Appendix B. (See, Federal Habeas Record Filing #10-1, p.4 of 10).

Petitioner's Federal Petition for a Writ of Habeas Corpus was filed on 10/9/2019. The Respondent filed a Motion for Summary Judgment arguing that it was not timely filed. The Federal District Court refused to toll the time for filing while the Petitioner's State Motion for Viewing the PSR was pending for a hearing that was later cancelled. The U.S. District Court did so based upon the blanket finding: (1) under Nebraska law, the Petitioner was not entitled to any discovery without first filing a postconviction action (p.4, Appendix B), and (2) under federal law discovery motions submitted prior to postconviction actions do not stop the clock (p.5, n.5, Appendix B).

Without the tolling the Petitioner claimed, the Court found the Petition was filed 372 days after the State actions were final (p.2, ¶6, Appendix B), some 7 days out of time. (Actually only 5 days out of time when the Court's two day error on the Nebraska Supreme Court's mandate is considered.)

The U.S. District Court granted the Respondent's Motion for Summary Judgment dismissing the Petition and refusing to issue a certificate of appealability (COA). Petitioner filed an application for a COA to the Eighth Circuit Court of Appeals. That application was denied (Appendix A) and a Petition for Rehearing and Rehearing en banc was also denied (Appendix C).

## REASONS FOR GRANTING THE PETITION

There are two reasons for granting the Writ. First, the U.S. District Court fabricated a split between the Circuits with its' blanket determination that "under federal law discovery motions submitted prior to postconviction motions do not stop the clock." This decision puts the Eighth Circuit in a position that is contrary to this Court's decision in Wall v. Khali, 562 U.S. 545 (2011). Second, Nebraska's unique Postconviction procedures require statutory tolling under this Court's definition of "collateral review" in Wall v. Khali, *supra*, and the State Court's response to the Petitioner's Motion to View the PSR lulled the Petitioner into inaction through reliance on the State Court's conduct which entitles the Petitioner to equitable tolling.

### I

The U.S. District Court cited to three cases to support its' blanket conclusion that "under federal law discovery motions submitted prior to post-conviction actions do not stop the clock" under 28 U.S.C. §2244(d)(2); i.e., statutory tolling. These are: Ramirez v. Yates, 571 F.3d 993, 1000 (9th Cir. 2009)(discovery motions filed in the state court by habeas petitioner convicted of residential burglary did not statutorily toll the habeas limitations period, since they did not challenge his conviction, but simply sought material that could help in later state proceedings....); Woodward v. Cline, 693 F.3d 1289, 1294 (10th Cir. 2012)(state court Motion for DNA Testing did not toll AEDPA's one-year limitations period); Hodge v. Greiner, 269 F.3d 104, 107 (2nd Cir. 2001)(holding that a petitioner's motion to obtain discovery was not an application for State Postconviction or other collateral review within the meaning of subsection 2244(d)(2)).

Two of the cases cited by the U.S. District Court were from before the decision in Wall v. Kholi, *supra*. Even so, the 2001 Hodge court recognized there may be circumstances where a discovery motion might be "collateral review":

We need not decide whether, on facts differing from those in the pending matter, an Article 78 proceeding might be deemed the functional equivalent of an "application for state postconviction or other collateral review" within the meaning of subsection 2244(d)(2).

Hodge, *supra*, 269 F.3d at 107.

This was not, even then, a blanket rule against tolling for "discovery" motions.

In Wall v. Kholi, *supra*, this Court stated "Collateral review" as used in 28 U.S.C. §2244(d)(2) meant "judicial reexamination of a claim in a proceeding outside of the direct review process"; Wall, *supra*, at 553. The more recent rulings that are in conflict with this Eighth Circuit decision's "blanket rule" follow the Wall decision. In Hudson v. Quarterman, 508 F.3d 236, 239 (5th Cir. 2012) found that Texas' DNA Testing procedure DOES toll the AEDPA time limitation and that, "Some consideration of state law is inevitable when analyzing the AEDPA's limitations." Federal Circuit decisions following the decision in Wall examine the state law procedure to determine statutory tolling. It appears that the Eighth Circuit has not yet decided to comply with this Court's decision in Wall v. Kholi and seeks to create this split between the Federal Circuits with this "blanket" rule.

## II

The U.S. District Court's only examination of Nebraska's Postconviction procedures is, "[U]nder Nebraska law, Petitioner ws not entitled to any discovery without first filing a post-conviction action. *Id.*" That is NOT a

citation to state case law, but to this Court's decision in Gonzalez v. Thaler, 565 U.S. 134 (2012). (See, p.4, Appendix B). It is NOT a correct statement of Nebraska law.

An examination of Nebraska's postconviction procedures may require tolling of discovery motions filed prior to Postconviction Relief Motions under this Court's definition in Wall v. Khali, *supra*. Nebraska's postconviction procedures require the allegation of specific facts for claims of ineffective assistance of counsel; State v. Soukarith, 260 Neb 478, 487 (2000). Once the Postconviction Motion is filed a defendant can only present the evidence he already has: State v. Jackson, 275 Neb 434, 436 (2008). While the State Courts have broad discretion to grant discovery motions prior to the filing of a Postconviction Motion, there is no precedent that permits a Defendant, in a postconviction proceeding to request additional discovery which would facilitate making that same postconviction claim; Jackson, *supra*, (emphasis added) citing to State v. Thomas, 236 Neb 553 (1990). Worse yet, once a Postconviction Motion is filed, Nebraska law does not permit amending that Motion if new evidence had been discovered; State v. Robertson, 294 Neb 29, 44 (2016). Therefore, the Petitioner's ONLY means of obtaining the necessary specific facts of the amounts of drugs in the controlled buys (in the police reports) was to resort to the State Court's "broad discretion" to grant discovery requests PRIOR to the filing of his Postconviction Motion. Waiting until AFTER that Motion was filed would allow the Court to easily deny, for any reason, that request under State v. Jackson, *supra*.

These procedures leave Nebraska defendants between a rock and a hard place. When you have to allege specific facts on Postconviction Petitions and can't

discovery once a Petition is filed, our only recourse is to rely upon the broad discretion of the State Court and request discovery prior to filing our Postconviction Motions. But it is the connecting those requests to the specific postconviction claims that invokes the judicial reexamination of those claims; a "collateral review" under the definition from Wall v. Kholi, supra. If that did not toll the AEDPA limitation the State Courts could arbitrarily run out that clock without meaningful exhaustion of a Defendant's claims.

Petitioner's State Court Motion to View the PSR stated both the CLAIM and the purpose for the PSR information:

The Defendant is preparing a Postconviction Relief Motion pursuant to Neb.Rev.Stat. §29-3001 et seq. to raise issues including the ineffective assistance of trial counsel regarding their failure to review the Presentence Investigation report with me. ... The Defendant needs to view the Presentence Report to make the complete allegations of fact to show prejudice from trial counsel's failure to review that Report with the Defendant prior to sentencing.

[Federal Habeas Record Filing #16-1, p.1]

The Petitioner raised the same claim of ineffective assistance of trial counsel that was raised and preserved on direct appeal. The State Court then took two months to reexamine that claim before denying the Petitioner's Motion. Those 60 days from 7/13/2017 to 9/12/2017 should be statutorily tolled under 28 U.S.C. §2244(d)(2) and the definition of "collateral review" in Wall, supra.

The Federal Courts have never decided whether Nebraska's Postconviction procedures are adequate to meet the requirements of the Due Process Clause.

See, Case v. Nebraska, 381 U.S. 336 (1965). This Court did recognize Nebraska did NOT adopt the Uniform Postconviction Procedures Act; Case, *supra* (Brennan concurring, at 345, n.8). The Court has also stated that the scope of the States' obligation to provide collateral review is [STILL] shrouded in so much uncertainty; Kyles v. Whitley, 498 U.S. 931, 932 (1995)(Stevens, concurring).

The Eighth Circuit needs to be brought into line with this Court's decision in Wall v. Kholi, *supra*, and the writ should be granted to remind U.S. District Courts that an examination of state postconviction procedures must be done carefully to determine if State Court proceedings meet the Court's definition of "other collateral review" is uniformly followed when considering AEDPA tolling under 28 U.S.C. §2244(d)(2).

Furthermore, the Petitioner should be given credit for the 60 day delay created by the State Court as a matter of equitable tolling. Even if there truly was no discovery before a postconviction motion was filed then why did the State Court (1) set a hearing date in the first place and then (2) wait 60 days to deny the discovery motion without any hearing? The equitable tolling of these 60 days should apply to the Petitioner's case under this Court's standard in Holland v. Florida, 560 U.S. 631 (2010). The Petitioner had been pursuing his rights diligently; his Federal Petition would have been nearly two months EARLY if the State Court's action had not lulled him into preparation for a hearing that would never happen. The extraordinary circumstance here is that the Judge who denied the discovery motion was the same Judge who sentenced the Petitioner and accepted the State's (false) factual basis. If that Judge examined the police reports and found that the State's factual basis was indeed false that would result in vacating the sentence HE had imposed.

Is that why it took 60 days to decide to claim he could not grant discovery prior to a postconviction motion being filed? Something smells here.

Full disclosure: In December of 2020 another inmate here at the Nebraska State Penitentiary told the Petitioner that he had been represented by the same lawyer and that the lawyer was now retiring. I called the lawyer, being cordial and congratulating him on his retirement, and I asked him if he had the police reports from my case. He admitted that he did but he was reluctant at first to provide them to me. But I succeeded in cajoling him into sending me copies of the police reports. These reports do show that the controlled buys were NOT for the amounts the State claimed, and the sentencing court used as their factual basis. Considering that sentencing with known false information is a violation of due process; see, Burns v. U.S., 501 U.S. 129, 146 (1991) (abrogated on other grounds) citing to Gardner v. Florida, 430 U.S. 349 (1977); this kind of petty corruption should be the "extraordinary circumstance" to warrant special treatment in this case; Holland, *supra*, at 650.

The Eighth Circuit should have considered these circumstances as applied to the Petitioner's claim for equitable tolling under this Court's precedent in Holland, *supra*. The Court should grant the writ to illustrate such extraordinary circumstances.

#### CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

  
\_\_\_\_\_  
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Date: 01/16/2021