

ORIGINAL

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21-5901

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IN THE
SUPREME COURT OF THE UNITED STATES

SHAWN R. ERPELDING,

Petitioner,

v.

SCOTT R. FRAKES, Director,
Nebraska Department of Correctional Services,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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PRO SE PETITIONER

QUESTIONS PRESENTED

1. Whether pro se applications to vacate and set aside a state criminal nonsupport judgment and its direct counterpart civil judgment tolls the limitation period under the "properly filed" clause of 28 U.S.C. § 2244(d)(2), Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA")?

2. Whether pro se postconviction relief movants in Nebraska should be held to the same stringent standards as one who is represented by counsel?

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APPENDIX C:	Opinion and Judgment from the United States District Court for the District of Nebraska, Erpelding v. Frakes , No. 8:20CV167 (D.Neb. 11/04/2020), unpublished (Filing Nos. 23-1 and 24-1).

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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 and decision of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The judgment on appeal from the United States Court of Appeals appears at Appendix A to the petition and is unpublished. The opinion and judgment of the United States District Court appears at Appendix C to the petition and is unpublished (8:20CV167/Filing Nos. 23-1 & 24-1).

JURISDICTION

The order of the United States Court of Appeals denying timely petition for rehearing by the panel was entered on June 28, 2021 (Appendix B). There was no extension of time to file this petition for writ of certiorari and it is timely filed by not later than September 27, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, that: "No state shall make or enforce any law which will abridge the privileges or immunities of the 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."

28 U.S.C § 2244(d)(2) provides that: "The time during which a properly filed application for State postconviction 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

A. PROCEDURAL HISTORY

On June 5, 2014, a Buffalo County, Nebraska jury convicted Petitioner Shawn R. Erpelding of four (4) counts of criminal nonsupport in violation of Neb.Rev.Stat. § 28-706. The trial court on August 22, 2014 sentenced Petitioner to enhanced concurrent terms of 12½ to 15 years imprisonment on each count with a 10 year mandatory minimum under the habitual criminal statute, Neb.Rev.Stat. § 29-221 (Reissue 2008). On direct appeal, the Nebraska Supreme Court affirmed Petitioner's convictions and sentences on December 31, 2015 in *State v. Erpelding*, 292 Neb. 351 (2015). Erpelding did not petition this Court for a writ of certiorari on his direct appeal.

Petitioner subsequently sought postconviction relief in the state trial court on September 6, 2016 pursuant to Neb.Rev.Stat. § 29-3001 et seq. On March 3, 2017, the trial court denied Petitioner postconviction relief and also denied his request for an evidentiary hearing. The Nebraska Court of Appeals affirmed the trial court's denial of Petitioner's postconviction relief motion without an evidentiary hearing on August 7, 2018 in *State v. Erpelding*, No. A-17-332, 2018 WL 3752164 (Neb.App. 2018), unpublished, further review denied November 15, 2018.

Petitioner also filed in the Nebraska Supreme Court on November 19, 2018, a petition for writ of habeas corpus pursuant to Article I, § 8 and Article V,

§ 2 of the Constitution for the State of Nebraska. The Nebraska Supreme Court summarily denied Petitioner's writ of habeas corpus petition on December 12, 2018 in **Erpelding v. Frakes, No. S-18-1111 (Neb 2018)**, unpublished, rehearing denied January 28, 2019. Petitioner filed a motion and complaint to vacate and set aside judgment in the trial court on January 21 and 23, 2019 pursuant to **Neb.Rev.Stat. § 25-2001 et seq.** with respect to both his criminal nonsupport Case No. CR 13-204 and its counterpart civil Case No. CI 12-291 for collateral review of the same pertinent State court judgment. The trial court entered its order denying Petitioner's motion to vacate in Case No. CR 13-204 on February 26, 2019. The trial court entered its order denying Petitioner's complaint to vacate in Case No. CI 12-291 on July 26, 2019. The Nebraska Court of Appeals dismissed the appeal with respect to the trial court's denial of Petitioner's motion to vacate on February 12, 2020 in **State v. Erpelding, No. A-19-258 (Neb.App. 2020)**, unpublished, further review denied May 4, 2020. The Nebraska Court of Appeals affirmed the trial court's denial of Petitioner's complaint to vacate on May 14, 2020 in **Shawn E. behalf Grace E. v. Diane S., No. A-19-825 (Neb.App. 2020)**, unpublished, further review denied August 13, 2020.

On April 23, 2020, Petitioner timely filed in the United States District Court a petition under 28 U.S.C. § 2254 for federal habeas corpus relief from his conviction and sentence imposed by the State of Nebraska court judgment (8:19CV167/Filing No. 1). Petitioner also filed in the district court on April 23, 2020, a motion for stay and abeyance of 28 U.S.C. § 2254 proceedings due to ongoing or pending State court proceedings with respect to the same pertinent State court judgment (*id.*/Filing No. 2). The district court denied Petitioner's motion to stay on June 22, 2020, and denied him habeas corpus relief by granting Respondent's summary judgment motion on January 8, 2021,

finding Petitioner's section 2254 habeas petition time barred under 28 U.S.C. § 2244(d) (id./Filing Nos. 13-1, 23-1 & 24-1) (Appendix C). On January 7, 2021, Petitioner timely filed his notice of appeal in the district court, after leave for an extension of time was granted pursuant to Fed. R. App. P. 4(a)(1)(A), along with his application for a certificate of appealability to the Eighth Circuit Court of Appeals pursuant to 28 U.S.C. § 2253(c) (id./Filing Nos. 27-1, 28, 29, & 32-1). The United States Court of Appeals for the Eighth Circuit entered its judgment on March 19, 2021 denying Petitioner a certificate of appealability (Appendix A). Petitioner also timely filed a petition for rehearing by the panel that was denied on June 28, 2021 (Appendix B).

B. STATEMENT OF FACTS

Shawn R. Erpelding was convicted in 2014 for allegedly failing to pay his child support on the word of the State prosecution whose assertions were inherently fraudulent. The State of Nebraska sought to enforce an invalid temporary child support order that was previously dismissed by the trial court for lack of prosecution. Despite the prosecution's failure to prove beyond a reasonable doubt that said order in question was even valid, the jury instructions omitted necessary elements of the alleged crime to accurately reflect law. There was no evidence adduced at Erpelding's trial to even suggest that he intentionally failed to provide support for his dependent child. In fact, the evidence adduced at trial established that Erpelding did pay child support in the amount of \$250.00 per month (S-14-813/B.O.E. 248:2-7).

Since 2003, Erpelding and his girlfriend Diane had been cohabiting with their children like that of a common-law marriage. Due deterioration of their relationship, Erpelding filed a complaint in the trial court on May 14, 2012 to establish paternity, custody, visitation, and support for his then four year

old daughter. On August 2, 2012, however, the court awarded Diane temporary custody and support for \$225.00 per month. Shortly thereafter the entry of this order, Erpelding and Diana reconciled as a couple and resumed normal child rearing responsibilities. On April 4, 2013, the trial court entered an "Order to Show Cause" why the case should not be dismissed in twenty (20) days for lack of prosecution. Diane then furtively files a "Notice of Final Hearing" in the trial court on May 3, 2013, violating or misrepresenting her previous agreement with Erpelding concerning the care, custody, and management of their child.

Erpelding and his attorney were not notified prior to any hearings in the trial court, nor served by Diane with any responsive pleadings, which prompted Erpelding's attorney to later withdraw from the case in belief that it was settled. Furthermore, neither party nor the trial court ever motioned to reinstate the case before its summary dismissal on April 24, 2013, or to vacate the "Order to Show Cause" which divested the trial court to take any further action in the matter. See, **Tilson v. Tilson**, 307 Neb. 275, 291-92 n.10 (2020). On August 5, 2013, Erpelding was falsely charged with criminal non-support along with the habitual criminal enhancement and then maliciously prosecuted by the State of Nebraska in complete lack of all jurisdiction. Erpelding, throughout state court proceedings, had the misfortune of being represented by ineffective counsel who did virtually no investigation on his behalf. Consequently, Erpelding went to trial without any reasonable, independent investigation into his actual innocence.

Erpelding filed in the trial court a motion for new trial, motion for postconviction relief, motion to vacate and set aside judgment, and complaint to vacate and set aside judgment for collateral review of both the criminal

judgment and its counterpart civil judgment that the alleged nonsupport allegations were based upon. These postconviction motions and Erpelding's federal petition under 28 U.S.C. § 2254 for writ of habeas corpus raised 20-plus constitutional violation claims—including his colorable actual innocence claim, jurisdictional claims, and requested evidentiary hearings (8:20CV167/Filing No. 1). The trial court denied all of Erpelding's post-conviction motions and the United States District Court denied his section 2254 petition finding that the filing of a motion to vacate in state court did not toll the limitations period under 28 U.S.C. § 2244(d)(2). See, (8:20CV167/Filing No. 23-1, at CM/ECF pp.5-6) (Appendix C, at pp.5-6).

The United States Court of Appeals for the Eighth Circuit denied Mr. Erpelding's application for a certificate of appealability on March 19, 2021 in *Erpelding v. Frakes*, No. 21-1058 (8th Cir.2021), unpublished (Appendix A), rehearing denied June 28, 2021 (Appendix B). The present petition for writ of certiorari is now before this Court for its consideration.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED TO ALLOW THIS COURT TO ADDRESS WHETHER PRO SE APPLICATIONS TO VACATE AND SET ASIDE A STATE CRIMINAL NONSUPPORT JUDGMENT AND ITS DIRECT CIVIL COUNTERPART JUDGMENT TOLLS THE LIMITATIONS PERIOD UNDER THE "PROPERLY FILED" CLAUSE OF AEDPA, 28 U.S.C. § 2244(d)(2).

This Court has held that adjudication upon the underlying merits of claims asserted by a prisoner attacking his sentence under which he is held in custody is not hampered by reliance upon titles the prisoner puts upon his documents. *Andrews v. United States*, 373 U.S. 334, 338 n.2 (1963).

The facts in this case present this Court with an ideal opportunity to resolve the confusion of Nebraska courts regarding pro se applications for postconviction relief and "properly filed" determinations. In *State v.*

Erpelding, No. A-19-258 (Neb.App. 02/12/2020), unpublished, the Nebraska Court of Appeals summarily dismissed Petitioner's postconviction appeal finding:

Motion to vacate pursuant to § 25-2001(2) and (4) is limited to civil proceedings, there being no mention of such remedy in Neb.Rev.Stat. § 29-2101 to 29-2106 which details remedies dealing with criminal procedure after a guilty verdict is entered in a criminal action.

Id. And with no analysis whatsoever, the Appellate Court held:

For that reason, Appellant's motion to vacate pursuant to § 25-2001(2) and (4) may be characterized as a procedural and legal nullity and this court lacks subject matter jurisdiction over appeal. See, *State v. Louthan*, 257 Neb. 174, 186, 595 N.W.2d 917, 925 (1999) ("where a criminal procedure is not authorized by statute, it is unavailable to a defendant in a criminal proceeding"); *State v. Miller*, 240 Neb. 297, 481 N.W.2d 580 (1992).

Id. (8:20CV167/Filing No. 10-3, at CM/ECF p.4).

In *Pace v. DiGuglielmo*, 544 U.S. 408 (2005), this Court looked to state law to determine whether a pleading filed in state court had been "properly filed" for purposes of a federal time limit. Clearly established state law in Nebraska is supposed to treat motions according to their substance and not their title. See, *Tilson v. Tilson*, 307 Neb. 275, 291-92 n.10 (2020); *Gerber v. P&L Finance Co.*, 301 Neb. 463 (2018); *Dugan v. State*, 297 Neb. 444, 452 (2017) ("How a motion should be regarded for purposes of determining whether its denial is a final order depends upon the substance of the motion and not its title."); *State v. Loyd*, 269 Neb. 762, 768 n.15 (2005) (a determination as to how a motion should be regarded depends upon the substance of the motion, not its title.). However, the Nebraska Court of Appeals disregarded its own laws by placing characterization of labels over substance when making determinations of Erpelding's pro se postconviction applications.

Contrary to this Court's holding in *Castro v. United States*, 540 U.S. 375 (2003), the United States District Court also placed characterization of

labels over substance when making a determination of Erpelding's section 2254 petition. With virtually little legal analysis whatsoever, the district court found that:

To be clear, Petitioner's reliance on a civil law statute unrelated to criminal matters to set aside a criminal conviction lacks support in any of the cases that I have found. It is also illogical. I am not persuaded that I have the authority to, or should, impute into a Nebraska civil law statute an escape hatch for avoiding the consequences of the federal habeas corpus statute of limitations that deals with criminal convictions but not general civil actions. If this is to be done, it is for those higher on the food chain than me. Frankly, I do not think the case is close. (emphasis added).

(8:20CV167/Filing No. 23-1, at CM/ECF p.6, ¶13) (Appendix C, at p.6, ¶13). In *Castro*, this Court held that federal courts may ignore the legal label that a pro se litigant attaches to a motion and recharacterize the motion and place it within a different legal category, in order to avoid inappropriately stringent application of formal labeling requirements, or to create a better correspondence between the substance of a pro se motion's claim and its underlying legal basis. *Id.*, 540 U.S. at 387 n.4. Instead of less stringent standards, the Nebraska courts and federal district court held Erpelding's pro postconviction motion to vacate to higher stringent standards than that of pleadings drafted by licensed attorneys.

The plain language of 28 U.S.C. § 2244(d)(2) provides that: "The time during which a properly filed application for State postconviction 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." This Court has stated that "[a] prisoner seeking state postconviction relief might avoid [federal limitations period] predicament ... by filing a 'protective' petition in federal court and asking the federal court to stay and abey the federal habeas proceedings until state remedies are exhausted."

Pace, 544 U.S. at 416-17; citing *Rhines v. Weber*, 544 U.S. 269 (2005).

Petitioner Erpelding followed this Court's directive in *Pace* and *Rhines* precisely by moving the district court for stay and abeyance of 28 U.S.C. § 2254 proceedings when he filed his habeas petition on August 23, 2020 to exhaust his state court remedies (8:20CV167/Filing No. 2). However, the district court erroneously denied both of Erpelding's motions to stay and for reconsideration of motion to stay (*id.*/Filing Nos. 13-1, 18 & 20-1). Erpelding's state court appeals with respect to the trial court's denials of his postconviction applications to vacate the criminal nonsupport judgment and, its counterpart civil judgment that it was spawned from, were still pending when Erpelding filed his protective section 2254 petition in federal district court. See, (8:20CV/Filing No. 1, at pp.6-10). Jurists of reason would find it debatable whether Erpelding's habeas petition states a valid claim of the denial of a constitutional right, and jurists of reason would also find it debatable whether the district court was correct in its procedural rulings in denying Erpelding's motions to stay and ruling his habeas petition is barred by the limitations period set out in 28 U.S.C. § 2244(d) (*id.*/Filing Nos. 1 & 23-1) (Appendix C). See, *Slack v. McDaniel*, 529 U.S. 473, 484 n.7 (2000).

The federal district court also committed plain error in finding that Mr. Erpelding's postconviction motion to vacate in state court is "a procedural and legal nullity" and "also illogical" and that it "did not toll the statute of limitations because [it] was not a 'properly filed application for State postconviction or other collateral review.'" 28 U.S.C. § 2244(d)(2) (*id.*/Filing No. 23-1) (Appendix C). It is well established that courts should correct plain error that effects substantial rights "if the error seriously

affects the fairness, integrity or public reputation of judicial proceedings." *Rosales v. United States*, 138 S.Ct. 1897, 1906 (2018). At the very least, the district court should have exercised its equity powers by granting Erpelding tolling of the AEDPA limitations period under this Court's holding in *Holland v. Florida*, 560 U.S. 631 (2010). Flexibility inherent in equitable procedure enables courts to meet new situations that demand equitable intervention, and to accord all relief necessary to correct particular injustices. *Id.*, 560 U.S. at 650 n.10. The correction of all the injustices in Erpelding's case demands equitable intervention with special treatment of his section 2254 petition and tolling should have been warranted. Jurists of reason would find it debatable whether the district court was correct in denying Erpelding equitable tolling under *Holland*.

Certiorari should be granted to address whether the procedures of Nebraska courts of placing characterization of labels over substance when making determinations of pro se postconviction motions violates the due process clause of the Fourteenth Amendment. This Court's discretionary intervention is necessary to address this important issue that will undoubtedly recur in future cases.

II. CERTIORARI SHOULD BE GRANTED TO ADDRESS WHETHER THE FOURTEENTH AMENDMENT PROHIBITS STATE COURTS FROM HOLDING PRO SE POSTCONVICTION MOVANTS TO THE SAME STRINGENT STANDARDS AS ATTORNEYS.

The manner in which the Nebraska Court of Appeals and the United States District Court summarily disposed of Erpelding's postconviction motion and section 2254 petition without affording him an evidentiary hearing and in failing to follow its own and this Court's clearly established law implicates several constitutional concerns under the Fourteenth Amendment. First and foremost, because Erpelding was not afforded a hearing in state or federal

court to evaluate the substance of his constitutional violation claims, this Court should intervene to address whether the due process clause prohibits courts from holding a pro se postconviction movant to the same standard as one who is represented by counsel. See, **Erickson v. Pardus**, 551 U.S. 89 (2007) (PER CURIAM). This Court has held that "[a] document filed pro se is to be liberally construed, and a pro se complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers." *Id.*, 551 U.S. at 94; citing **Estelle v. Gamble**, 429 U.S. 97, 106 (1976). The Eighth Circuit Court of Appeals has also held that "[p]ro se habeas filings are to be construed liberally." **Earl v. Fabian**, 556 F.3d 717, 723 (8th Cir. 2009), which is equivalent to Erpelding's postconviction motion to vacate and set aside judgment (A-19-258/T3-58) (8:20CV167/Filing No. 10-6, at CM/ECF pp.4-59). The Nebraska Supreme Court has held that a pro se postconviction movant is held to the same standard as one who is represented by counsel, see **State v. Marshall**, 272 Neb. 924 (2007), which is contrary to this Court's holdings in **Erickson** and **Estelle**. In 2011, the Nebraska Legislature enacted a one year statute of limitation for filing a postconviction relief motion. Laws 2011, LB 137, § 1, effective August 27, 2011. See, **Neb.Rev.Stat. § 29-3001(4)**. Most convicted prisoners cannot afford to hire postconviction counsel to objectively evaluate trial counsel's effectiveness or trial errors. Consequently, most prisoners must learn legal procedures, case law (and its application to the individual prisoner's circumstance), and then must apply what was learned to a cogent postconviction motion before the lapse of the 1-year statute of limitation. The state-law procedures in Nebraska of holding a pro se postconviction movant to the same stringent standards as an attorney is inconsistent with traditional principles of justice and recognized

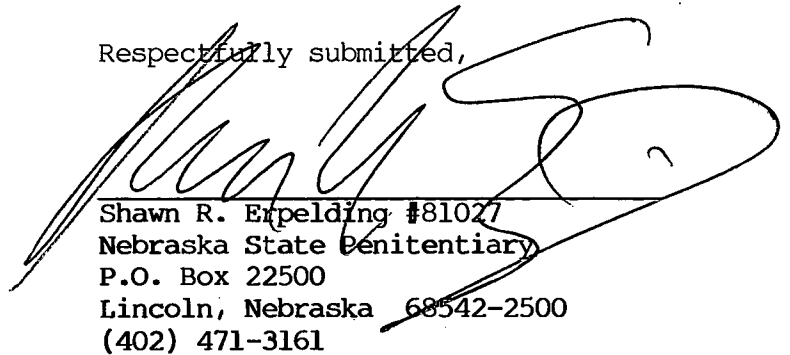
principles of fundamental fairness, thus violates Erpelding's federal due process rights. Law students do not even gain the knowledge to perfect a postconviction relief petition in their first year of study, whereas convicted prisoners with often limited education must do so.

This Court held in **Kimmelman v. Morrison**, 477 U.S. 365, 378 (1986), that "[a] layman will ordinarily be unable to recognize counsel's errors and to evaluate counsel's professional performance, consequently a criminal defendant will rarely know that he has not been represented competently until after trial or appeal, usually when he consults another lawyer about his case." (citations omitted). The state-law postconviction relief procedures in Nebraska are unquestionably contrary to the fundamental principles of fairness and violates convicted prisoners, such as Erpelding, federal constitutional rights to due process of law, as guaranteed by the Fourteenth Amendment to the United States Constitution. Even Erpelding's first postconviction motion was determined by the Nebraska courts to be procedurally inadequate. See, **State v. Erpelding**, No. A-17-332, 2018 WL 3752164 (Neb.App. 2018), further review denied November 15, 2018. The Nebraska state courts and federal district court's summary dismissal of Erpelding's timely meritorious postconviction relief applications undermines the integrity of the criminal justice system and, if left undisturbed, will result in a constitutionally intolerable conviction or the most egregious of all situations—the conviction of an innocent man. A writ of certiorari should issue on this basis.

CONCLUSION

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

Respectfully submitted,



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PRO SE PETITIONER

September 24, 2020