

21-7642

ORIGINAL

No. \_\_\_\_\_

Supreme Court, U.S.  
FILED

FEB 25 2022

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IN THE

SUPREME COURT OF THE UNITED STATES

BRANDON J. WEATHERS — PETITIONER  
(Your Name)

vs.

STATE OF NEBRASKA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

SUPREME COURT OF NEBRASKA  
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

BRANDON J. WEATHERS  
(Your Name)

P.O. BOX 22800  
(Address)

LINCOLN, NE 68542-2800  
(City, State, Zip Code)

\_\_\_\_\_  
(Phone Number)

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SUPREME COURT, U.S.

## QUESTION PRESENTED

1. Is the Petitioner, a state prisoner, entitled to an exidentiary hearing in a state District Court habeas corpus proceeding, where the petitioner has alleged in his habeas petition that his state court conviction was void because he was denied counsel in the proceedings leading to his convictions and sentences and did not waive his right to counsel in violation of the due process clause of the Fourteenth Amendment?

## LIST OF PARTIES

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

[X] 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:

1. Scott Frakes, Director of the Nebraska Dept. of Corrections

2. Taggart Boyd, Warden of Lincoln Correctional Center

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner Brandon J. Weathers respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Nebraska in Case No. A-21-403.

## OPINIONS BELOW

The decision of the Lancaster County District Court is unreported and is set forth in Appendix D. The decision of the Nebraska Court of Appeals is unreported and set forth in Appendix C. The decision of the Supreme Court of Nebraska denying further review is unreported and is set forth in Appendix B. The decision of the Supreme Court of Nebraska denying rehearing is unreported and is set forth in Appendix A.

## STATEMENT OF JURISDICTIONAL GROUNDS

The judgment of the Supreme Court of Nebraska denying further review was entered on January 7, 2022, a copy of that decision appears at Appendix B.

A timely petition for rehearing was thereafter denied

on February 7, 2022, and a copy of the order denying rehearing appears at Appendix A.

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

#### CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. Amend. VI . . . . . passim

U.S. Const. Amend. XIV . . . . . passim

#### STATEMENT OF THE CASE

Following a jury trial, the petitioner, without counsel, was convicted on 2 counts of First-degree sexual assault of a child, and on February 17, 2016, the petitioner was sentenced to 50-80 years on each count to be served consecutively to each other. (Writ of Certiorari, Appendix E.)

The petitioner filed in the District Court of Lancaster County, Nebraska, on April 28, 2021, his petition for a writ of habeas corpus.

This petition was in the nature of an application,

alleging that the petitioner's trial and conviction deprived him of his liberty without due process of law, and praying that a writ of habeas may issue to bring the petitioner before the court forthwith, together with the true cause of his detention, to the end that inquiry might be had in the premises, and that the Court proceed in summary fashion to determine the facts and legality of the petitioner's imprisonment.

The District Court of Lancaster County dismissed this petition and denied the application on June 9, 2021, stating that, "it is the same allegations made in a previous habeas corpus." (Writ of Certiorari, Appendix D)

The petitioner appealed to the Nebraska Court of Appeals which entered judgment on December 3, 2021, finding, "the regularity of the proceedings leading up to the sentence in a criminal case cannot be inquired into on an application for writ of habeas corpus, for that matter is available only in a direct proceeding." (Writ of Certiorari, Appendix C).

The petitioner sought further review from the Supreme Court of Nebraska which was denied on



January 7, 2022. (Writ of Certiorari, Appendix, B)

The Petitioner's motion for rehearing was denied on February 7, 2022. (Writ of Certiorari, Appendix, A)

There is no showing in the record of any answer or objections of any sort filed in response to the petitioner's petition and application for a writ of habeas corpus in the District Court of Lancaster County, Nebraska.

In affirming the District Court, the Nebraska Court of Appeals answered the contention by stating in its opinion that the "regularity of the proceedings leading up to the sentence in a criminal case cannot be inquired into on an application for writ of habeas corpus, for that matter is available only in a direct proceeding." (Writ of Certiorari, Appendix C)

The Nebraska Supreme Court denied the petitioner's petition for further review without opinion and denied the petitioner's motion for rehearing without opinion.

## SUMMARY OF ARGUMENT

The right to the assistance of counsel is one of the most fundamental human rights protected under the Fourteenth Amendment of the Constitution of the United States.

This fundamental right is protected under the Fourteenth Amendment from violation in proceedings in state courts.

The conditions whereby the petitioner was convicted and sentenced to the Nebraska Department of Corrections, presents circumstances so contrary to natural, inherent, and fundamental principles and fairness as to amount to a violation of due process of law under the Fourteenth Amendment.

Petitioner Brandon J. Weathers argues that he is entitled to an evidentiary hearing in the Lancaster County District Court on his Petition for Writ of Habeas Corpus which alleged that he was denied counsel in the proceedings leading to his convictions and sentences and did not waive his right to counsel in violation of the due process clause of the Fourteenth Amendment.

## ARGUMENT

The Petitioner is deprived of his liberty without due process of law, contrary to the provisions of the Fourteenth Amendment in that he was denied counsel in the proceedings leading to his convictions and sentences.

The Petitioner is deprived of his liberty without due process of law, contrary to the provisions of the Fourteenth Amendment, in that he did not waive his right to the assistance of counsel by words or actions.

In his application for writ of habeas corpus, the allegations of which remain uncontradicted in the record, the application for the writ alleged as follows:

Per state Habeas Corpus Statute, 29-2801 et seq., Petitioner challenges the jurisdiction of the Douglas County District Court to render a lawful and valid judgment of conviction and subsequently sentence the petitioner to a term of imprisonment, where the petitioner was denied counsel in the proceedings leading to his convictions and did not waive his right to counsel in violation of the due process clause of the Fourteenth Amendment.

Other circumstances with reference to the conviction and incarceration of the petitioner which are alleged in his application for the writ of habeas corpus are set forth in greater detail below, in connection with the discussion of the cases and the law with respect to the right of an accused to be provided with the assistance of counsel.

The petitioner respectfully urges that his conviction without the assistance of counsel deprived him due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, particularly in view of the circumstances existing in this case.

The Sixth Amendment to the United States Constitution provides:

in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The fundamental character of the right to assistance of counsel in a criminal proceeding in a state court, as a right included in the conception of the due process clause of the Fourteenth Amendment was carefully analyzed in *Powell v. Alabama*, 287 U.S. 45, 77 L.Ed. 158, 84 A.L.R. 527, where this Court said, the opinion quoting in part from the opinion in *Twining v. New Jersey*, 211 U.S. 78, 99, 53 L.Ed. 97, 106:

"It is possible that some of the personal rights safeguarded by the first eight Amendments against national action may also be safeguarded against state action, because a denial of them would be a denial of due process of law." *Chicago B & O R. Co. v. Chicago*, 166 U.S. 226, 41 L.Ed. 979. If this is so, it is not because those rights are enumerated in the first eight Amendments, but because they are of such nature that they are included in the conception of due process of law.

This Court has in many cases held that certain of the rights protected against national action by the first eight Amendments to the Constitution are equally protected against state action under

the due process of law clause of the Fourteenth Amendment.

The more fundamental and the more deep rooted in the traditions and principles of justice and liberty is the right, the more certain it is to be a right safeguarded against state action by the due process of law clause of the Fourteenth Amendment.

IN *JOHNSON V. ZERBST*, 304 U.S. 458, 82 L.Ed. 1461, this Court, in a case involving the right to the assistance of counsel under the Sixth Amendment to the Constitution, in a case coming before this Court from the Northern District of Georgia which dismissed a petition for a writ of habeas corpus on behalf of a petitioner who had been convicted in a U.S. District Court, emphasized the fundamental character of the right of such assistance, in the following language:

It embodies a realistic recognition of the obvious truth that the average defendant does not have the professional skill to protect himself when brought before a tribunal with power to take his life or liberty,

wherein the prosecution is presented by experienced and learned Counsel. That which is simple, orderly and necessary to the lawyer to the untrained layman may appear intrinsic, complex and mysterious.

Consistently with the wise policy of the Sixth Amendment and other parts of our fundamental charter, this Court has pointed to '...the humane policy of the modern criminal law...' which now provides that a defendant '... if he be poor, ... may have counsel furnished him by the state ... Not infrequently ... more able than the attorney for the state.'"

The untrained layman is just as lacking in the professional skill and knowledge necessary to prepare his defense in a state court as in a federal court.

The procedure to such a layman certainly may appear to be as intricate, complex and mysterious, if not more so, in a state court as in a federal court.

The deprivation of life or liberty is just as inclusive and real to the accused whether the death penalty is imposed by a federal or state court, or whether the accused is restrained in a federal or a state penitentiary.

It is the protection of that life and liberty in accordance with the traditionally recognized fundamental principles of justice which is safeguarded by the requirements of the due process of law clause of the Fourteenth Amendment.

And it is because the right to assistance of counsel has been traditionally recognized as one of the most fundamental of such human rights that the freedom of a state establishing its policy is necessarily limited in this respect by the constitutional guarantees of the Fourteenth Amendment.

This Court, in *Johnson v. Zerbst*, *supra*, established the following rule:

Violation, prior to judgment or sentence, of the right of one accused of federal crime to assistance of counsel under the Sixth Amendment deprives the criminal court of further jurisdiction, so as to render the judgment or sentence void, and therefore, is ground for relief in habeas corpus, provided, that the accused did not subsequently waive the violation.



Johnson v. Zerbst, supra, was reaffirmed in Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799, where this Court stated that the "Sixth Amendment to Federal Constitution providing that in all criminal prosecutions, the accused shall enjoy the right to assistance of counsel for his defense is made obligatory on the states by the Fourteenth Amendment, and indigent defendant in criminal prosecution in state court has right to have counsel appointed for him."

The application for the writ of habeas corpus sets forth the following facts material to the consideration of the question presented:

1. The Petitioner contends that said judgment, sentence, and commitment are null and void, for the reason that the court lost jurisdiction to pronounce judgment and impose sentence and order him committed to prison because the Petitioner was denied counsel in the proceedings leading to his convictions and did not waive his right to counsel in violation of the due process clause of the Fourteenth Amendment.

2. The Petitioner was not represented by counsel at any time during the trial or imposition of the sentence.

3. The Petitioner was financially unable to employ counsel at the trial and sentencing hearing.

4. The Petitioner never made a knowing and intelligent waiver of his right to counsel.

The Constitution of Nebraska provides in Article I, Section 3:

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

The Constitution of Nebraska provides in Article I, Section 11:

"In all criminal prosecutions the accused shall have the right to appear and defend in person or by counsel, to demand the nature and cause of accusation, and to have a copy thereof, and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed."

Nebraska Revised Statute 29:3903 provides in part:

"If the court determines the defendant to be indigent, it shall formally appoint the public defender, or in counties not having a public defender, an attorney or attorneys licensed to practice law in this state, not exceeding two, to represent the indigent felony defendant at all future critical stages of the criminal proceedings against such defendant."

The Constitution of Nebraska provides in Article I, Section 8:

"The privilege of the writ of habeas corpus shall not be suspended, unless in case of rebellion or invasion, the public safety requires it, and then only in such manner as shall be prescribed by law."

The Supreme Court of Nebraska has held that the writ was properly invoked to obtain release from imprisonment resulting from deprivation of constitutional rights. *In re Resler*, 115 Neb. 335, 338-340, 212 N.W. 765

The Supreme Court of Nebraska has recognized that

"Only a void judgment may be collaterally attacked."  
Sanders v. Frakes, 295 Neb. 374 (2016)

The Supreme Court of Nebraska has consistently recognized the right of an accused to the appointment of counsel unless validly waived.

In *State v. Sack*, 239 Neb. 690 (1991), the defendant pled guilty to forgery and he appealed to the Supreme Court of Nebraska. The Supreme Court held:

"Burden is on the State to establish valid waiver of accused's Sixth Amendment right to counsel and every reasonable presumption against the waiver is indulged." U.S.C.A. Const. Amend. 6

"Waiver of right to counsel must appear affirmatively from the record before court may conclude that accused has waived a constitutional statutory right."

"Accused has the right to counsel, and he or she also has a right under the Sixth Amendment and Nebraska Constitution to conduct his or her own defense. U.S.C.A. Amend. 6; Const. Art. 1, 11

The Supreme Court of Nebraska determined that the defendant did not waive his constitutional right to counsel, and reversed and remanded for further proceedings.

In *State v. Stott*, 255 Neb. 438, 584 N.W. 2d 434 (1998), the question was presented in a case in which the accused was convicted without counsel at trial and sentenced to 24 hours in jail. The Supreme Court used the following language, clearly indicating that the right to assistance of counsel exists unless voluntarily waived:

"Because Stott was actually imprisoned for this conviction, it is clear that she had a right to the assistance of counsel at her trial. It is irrelevant that Stott would have had no such right at the same trial, for the same offense, had she not been imprisoned.

Stott's right to counsel was implicated with the closing of her cell door, and her conviction was therefore obtained in violation of the Sixth Amendment.

The remedy for this violation is equally clear. In *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938), the Court held that a conviction obtained in violation of a defendant's right to counsel at trial is void. That Court stated:

Since the Sixth Amendment constitutionally entitles one charged with crime to the assistance of counsel, compliance with this constitutional mandate is an essential jurisdictional prerequisite to a federal court's authority to deprive an accused of his life or liberty. When this right is properly waived, the assistance of counsel is no longer a necessary element of the court's jurisdiction to proceed to conviction and sentence. If the accused, however, is not represented by counsel and has not competently and intelligently waived his constitutional right, the Sixth Amendment stands as a jurisdictional bar to a valid conviction and sentence depriving him of his life or his liberty. A court's jurisdiction at the beginning of trial may be lost "in the course of the proceedings" due to failure to complete the court-as the Sixth Amendment requires-by providing counsel for an accused who is unable to obtain counsel, who has not intelligently waived this constitutional guaranty, and whose life or liberty is at stake. If this requirement of the Sixth Amendment is not complied with, the court no longer

has jurisdiction to proceed.

304 U.S. at 467-68, 58 S.Ct. 1019. The Court concluded that depriving a defendant of the right to counsel at trial renders the trial "absolutely void." 304 U.S. at 468, 58 S.Ct. 1019.

The Supreme Court of Nebraska found that Stott's Sixth Amendment right to counsel was violated, and her conviction was reversed and the cause dismissed.

Again in *State v. Warlick*, 308 Neb. 656 (2021), six years after the petitioner's conviction, the Supreme Court of Nebraska affirmed a conviction for marijuana possession offenses and weapon offenses and stated:

"An accused has a state and federal constitutional right to be represented by an attorney in all critical stages of a criminal prosecution which can lead to a sentence of confinement."

"In determining whether there has been a knowing and voluntary waiver of the right to counsel, the key inquiry is whether the defendant was sufficiently

aware of the right to have counsel and of the possible consequences of a decision to forgo the aid of counsel."

IN view of the opinions from the above Nebraska cases, it is difficult to understand how the petitioner in the instant case can be said to have been accorded due process of law in accordance with fundamental principles of fairness and justice as commonly understood in the system of law under which justice is administered under Nebraska law.

The bill of exceptions in the trial proceedings fail to show where any waiver of counsel exists. The petitioner did not waive his constitutional right to counsel by words or actions.

Neither the Lancaster County District Court, the Nebraska Court of Appeals or the Supreme Court addressed the issue as to whether the petitioner waived his right to counsel. The petitioner's claim remains uncontravened.

The petitioner argued that he did not waive his right to counsel in his postconviction motion.



In the order denying postconviction relief dated April 19, 2018 on page 4 states, "appellate counsel was also not ineffective for failing to allege Defendant did not voluntarily waive his right to counsel, as the record supports Defendant waived this right knowing the consequences of the decision. BOE 70:16-18 (Writ of Certiorari, Appendix F)

At BOE 70:16-18, the trial court asks the petitioner, "Okay. All right. Now, are--mr. Weathers, are you still wanting to proceed self-represented?" The petitioner responds "Yes." (Writ of Certiorari, Appendix G)

This is not a constitutional waiver of the petitioner's right to counsel.

Regarding a constitutional waiver, this Court has held that: "to be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter.

Von Moltke v. Gillies, 332 U.S. 708, 724, 68 S.Ct. 316, 323, 92 L.Ed. 309, 321 (1948)

The petitioner has proved by a preponderance of evidence that he did not knowingly or intelligently waive his constitutional right to counsel in his habeas corpus petition and in this writ of certiorari.

On writ of certiorari to the Supreme Court of Nebraska to review a judgment affirming a denial of an application for a writ of habeas corpus without giving a state prisoner an opportunity to prove his allegations therein, this Court held in *Smith v. O'Grady*, 161 S.Ct. 572 (1941), that if the prisoner could prove his allegation that, inter alia, he had been adjudged guilty of a felony by a state court without benefit of counsel, the judgment upon which his imprisonment rested was a violation of the due process clause of the Fourteenth Amendment and could not stand, and this Court remanded the case to the state court to determine whether the allegations were true.

More than 80 years after *Smith v. O'Grady*, supra, the procedures in Nebraska still does not conform with the pronouncement of the Supreme Court of the United States that was made clear in the language in *Boyd v. O'Grady*, 121 Fed. 2d 146:

"We think it must be inferred from the decisions of the Supreme Court of Nebraska in *Alexander v. O'Grady*, 137 Neb. 645, 290 N.W. 718, and *Davis v. O'Grady*, 137 Neb. 708, 291 N.W. 82, and from the action of the Supreme Court of the State in *Smith v. O'Grady*, *supra*, and from the state court's summary denial of the petition for habeas corpus in this case, that at least up to the time of the decision in *Smith v. O'Grady* in February of this year, the Nebraska courts when considering petitions for habeas corpus did not give to the Nebraska statute requiring assignment of counsel to one accused of a penitentiary offense the same effect as the federal courts are required to give to the assistance of counsel clause of the Sixth Amendment in habeas corpus cases before them."

"It is at best doubtful whether the Nebraska courts would, before *Smith v. O'Grady*, *supra*, have granted habeas corpus to a person sentenced on a plea of guilty but without counsel upon proof aliunde that the waiver of counsel, implied by the plea, had not been intelligently and competently made, and it is made clear in *Smith v. O'Grady*, *supra*, that the procedural guarantee of the Sixth Amendment to the federal constitution is protected against state invasion through the Fourteenth Amendment."

"It follows that this petition for habeas corpus presented to the federal judge the rare case and peculiar urgency where the petitioner had no fair prospect of securing full and complete protection of the rights guaranteed by the federal constitution through habeas corpus proceedings in the state courts, even by appeal to the court of last resort in the state. He had been confined in the jail and penitentiary more than twenty months upon a sentence of twenty-nine months (allowing for good time) and could not hope for relief by the process of appeal through the state Supreme Court to the United States Supreme Court within the period of the sentence.

Although the Nebraska procedure in habeas corpus will doubtless be conformed to the pronouncement of the Supreme Court in *Smith v. O'Grady*, *supra*, it had not been at the time this petition for the writ was presented, and we think the federal judge ought not to have declined to consider it. It states a cause of action and the evidence should be heard."

The Nebraska procedures still do not conform to the pronouncements of the United States Supreme Court in *Smith v. O'Grady*, *supra*.

In the petitioner's case it must be remembered that no pleading was filed on behalf of the Attorney General, and that the conclusions reached by both the Lancaster County District Court, the Nebraska Court of Appeals and the Supreme Court of Nebraska were based upon the allegations of the petitioner's petition as uncontraversted.

The Supreme Court of Nebraska affirmed the decision of the Nebraska Court of Appeals that stated:

"the regularity of the proceedings leading up to the sentence in a criminal case cannot be inquired into on an application for writ of habeas corpus, for that matter is available only in a direct proceeding."

This holding was rejected more than eighty years ago by this very Court in *Johnson v. Zerbst*, *supra*.

The uncontraversted allegations in the petitioner's duly sworn application for writ of habeas corpus are as follows:

1. The Petitioner was not represented by counsel at any time during the trial or imposition of the sentence.  
(Writ of Certiorari, Appendix E)

2. The Petitioner was financially unable to employ counsel at the trial and sentencing hearing.

3. The Petitioner never made a knowing and intelligent waiver of his right to counsel. (Writ of Certiorari, Appendixes F and G)

The Supreme Court of Nebraska has stated, "in the case of a prisoner held pursuant to a judgment of conviction, habeas corpus is available as a remedy only upon a showing that the judgment, sentence, and commitment are void." *Sanders v. Frakes*, *supra*. A judgment is void, and not merely voidable, if the court rendering it lacked personal or subject matter jurisdiction or otherwise lacked a legal basis for the judgment. *Id.*

Nebraska law clearly allows habeas corpus to attack a conviction which is void or where the convicting court lacked jurisdiction.

Habeas corpus in Nebraska is appropriate for holding an evidentiary hearing and adjudicating petitioner's asserted denial of right to counsel. Under *Johnson v. Zerbst*, 372 U.S. 385, a court lacks jurisdiction to

enter judgment, and its proceedings are void, unless the constitutional guaranty of counsel is met.

### CONCLUSION

For the reasons stated above, the petitioner requests that the United States Supreme Court reverse the decision of the Supreme Court of Nebraska and remand this matter to the Lancaster County District Court for an evidentiary hearing in this matter.

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

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Date: February 23, 2022.