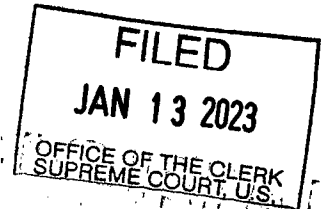


22-6650

No. _____



IN THE
SUPREME COURT OF THE UNITED STATES

State of Nebraska ex rel.,
ANTONIO ROOKS-BYRD,

Petitioner,

v.

NEBRASKA COURT OF APPEALS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE NEBRASKA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

ANTONIO ROOKS-BYRD, #73537
Nebraska State Penitentiary
P.O. Box 22500
Lincoln, Nebraska 68542-2500
(402) 471-3161

PRO SE PETITIONER

QUESTION PRESENTED

1. Whether the Fourteenth Amendment to the United States Constitution prohibits a state appellate court from adjudicating an application or motion in complete absence of all jurisdiction?

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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 Nebraska Supreme Court.

OPINIONS BELOW

The opinion and order from the Nebraska Supreme Court appears at Appendix A to the petition and is unpublished. The application for original action and petition for writ of mandamus appears at Appendix B to the petition.

JURISDICTION

The judgment of the Nebraska Supreme Court was entered on October 19, 2022. There was no extension of time to file this petition and it is timely filed by not later than January 17, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

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."

STATEMENT OF THE CASE

On May 6, 2013, Petitioner's appeal from the denial of his motion for

postconviction relief was lost due to negligence by prison officials at the Nebraska State Penitentiary who delayed the processing and mailing out of his notice of appeal, poverty affidavit, praecipe for bill of exceptions, and praecipe for transcript ("legal documents"). Petitioner's attorney at the time, William D. Gilner ("Gilner"), filed in the Nebraska Court of Appeals on June 8, 2018, a "MOTION FOR ORDER NUNC PRO TUNC MOTION TO REINSTATE APPEAL." On July 16, 2018, the Nebraska Court of Appeals entered an Order denying Petitioner's motion to reinstate appeal in *State v. Rooks-Byrd*, No. A-13-335 (Neb.App. 2018), unpublished.

On March 1, 2022, Petitioner filed in the district court of Sarpy County, Nebraska ("trial court"), a pro se "VERIFIED MOTION TO VACATE AND MODIFY JUDGMENT" or, when liberally construed, a motion to reinstate appeal (A-22-165/T1-41). The trial court entered its "OPINION AND ORDER" on March 22, 2022, denying Petitioner's motion to reinstate appeal (id./T52-53). Petitioner timely appealed, however, the trial court denied him leave to appeal in forma pauperis and the Nebraska Court of Appeals affirmed the trial court's denial of in forma pauperis on August 30, 2022, in *State v. Rooks-Byrd*, No. A-22-217 (Neb.App. 2022), unpublished (A-22-217/T1-2). Petitioner's family thereafter timely paid the docket fee for Appeal No. A-22-165.

On August 17, 2022, Petitioner filed in the Nebraska Court of Appeals a "MOTION TO VACATE" asserting that the appellate court lacked jurisdiction over his motion to reinstate appeal filed by Gilner because it lacked jurisdiction over the initial appeal and that it also lacked subject matter jurisdiction over this motion to reinstate appeal due to it being filed in the wrong court. The Nebraska Court of Appeals entered an Order on August 17, 2022, overruling

Petitioner's motion to vacate in *State v. Rooks-Byrd*, No. A-13-335 (Neb.App. 2018)', unpublished.

On October 6, 2022, Petitioner filed an "APPLICATION FOR ORIGINAL ACTION AND PETITION FOR WRIT OF MANDAMUS" in the Nebraska Supreme Court (Appendix B). Petitioner requested the Nebraska Supreme Court to issue a peremptory writ of mandamus directing the Nebraska Court of Appeals to vacate its July 16, 2018, entered Order in *State v. Rooks-Byrd*, No. A-13-335 (Neb.App. 2018), for lack of jurisdiction (*id.*). The Nebraska Supreme Court entered its Order on October 19, 2022, denying Petitioner's application for original action and petition for writ of mandamus (Appendix A). The present petition for writ of certiorari is now before this Court for its consideration.

REASONS FOR GRANTING WRIT

I. CERTIORARI SHOULD BE GRANTED TO ADDRESS WHETHER THE FOURTEENTH AMENDMENT PROHIBITS A STATE APPELLATE COURT FROM ADJUDICATING AN APPLICATION OR MOTION IN COMPLETE ABSCENCE OF ALL JURISDICTION.

The facts of this case present this Court with an ideal opportunity to resolve the unanswered question regarding whether the due process and equal protection clauses of the Fourteenth Amendment prohibits a state appellate court from adjudicating an application or motion in complete absence of all jurisdiction. "Subject matter jurisdiction" is a court's statutory or constitutional power to adjudicate a case. *United States v. Cotton*, 535 U.S. 625, 630 (2002). Defects in subject matter jurisdiction can never be forfeited or waived, and require correction, regardless of whether error was raised in district court. *Id.* In this case, Petitioner's appeal from the denial of his motion for postconviction relief was lost due to negligence by the prison officials at the Nebraska State Penitentiary who delayed the processing and

mailing out of Petitioner's legal documents. Petitioner asserts that the Nebraska Court of Appeals lacked jurisdiction to adjudicate the motion to reinstate appeal in that the notice of appeal was not filed within 30 days in Appeal No. A-13-335 which prompted the appellate court to dismiss the initially filed postconviction relief appeal for lack of jurisdiction.

The appropriate procedure when an appeal is lost due to official negligence is for the party seeking relief to file a motion in the lower court, seeking the ability to establish the basis for obtaining relief. (emphasis added). **State v. Parnell, 301 Neb. 774, 776 (2018)**. Here, Gilner filed Petitioner's motion to reinstate appeal in the Nebraska Court of Appeals on June 8, 2018. Petitioner contends that the Nebraska Court of Appeals also lacked subject matter jurisdiction over the motion to reinstate appeal because it was filed in the wrong court. This motion to reinstate appeal should have been filed in first instance in the trial court.

Petitioner asserts that there is no other plain and adequate remedy available in the ordinary course of law in that the trial court will not afford him an evidentiary hearing to rebut presumptions that the prison officials faithfully performed official duties. See Parnell, 301 Neb. at 777. The trial court erroneously based its "OPINION AND ORDER" upon res judicata from the Nebraska Court of Appeals July 16, 2018, entered Order (A-13-335) in complete absence of all jurisdiction (A-22-165/T52-53). Furthermore, the trial court also erroneously found that Petitioner raised the same issue on Appeal Nos. A-19-997, A-19-1028, A-19-1029, A-19-1060, A-19-1075, A-20-372, and A-21-543. (id.). The aforementioned appeals were from the denial of collateral attacks on Petitioner's convictions and sentences. None of the

mentioned appeals involved any motions to reinstate the postconviction relief appeal or the same subject matter.

Moreover, there is also no other plain and adequate remedy available in the ordinary course of law in that the Nebraska Court of Appeals did not grant Petitioner in forma pauperis status for his appeal from the trial court's denial of his motion to reinstate appeal. The Nebraska Court of Appeals also affirmed the trial court's denial of Petitioner's motion to reinstate appeal in *State v. Rooks-Byrd*, No. A-22-165 (Neb.App. 2023), unpublished. Petitioner only wants the opportunity to have his day in court in the form of an evidentiary hearing to rebut presumptions that the Nebraska State Penitentiary prison officials faithfully performed official duties. The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

Petitioner and Parnell are both similarly situated Nebraska prisoners. The equal protection clause of the Fourteenth Amendment imposes upon a state the requirement that all similarly situated persons should be treated alike. *Plyler v. Doe*, 457 U.S. 202, 216 (1982). Generally, legislation or a court decision will be presumed to be valid if the disparate treatment of a class of citizens is rationally related to a legitimate state interest. See *Vance v. Bradley*, 440 U.S. 93, 97 (1979). However, strict scrutiny of state laws is required if a suspect class is involved or "when state laws impinge on personal rights protected by the Constitution." *Cleburne v. Cleburne Living, Inc.*, 473 U.S. 432, 440 (1985). The Nebraska Supreme Court's decision in this case clearly violates Petitioner's federal constitutional rights to due process of

law and to equal protection of the laws.

The Nebraska courts have sanctioned such a high degree of departure from clearly established federal law as determined by this Court and Nebraska law as to call for an exercise of this Court's discretionary and supervisory powers. A writ of certiorari should issue on this basis.

CONCLUSION

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

Respectfully submitted

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PRO SE PETITIONER

January 13, 2023