No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

RAYMOND MATA, JR.,

Petitioner,

-------v.------

STATE OF NEBRASKA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF NEBRASKA

PETITION FOR A WRIT OF CERTIORARI

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****CAPITAL CASE****

QUESTION PRESENTED

Petitioner Raymond Mata, Jr. has been on Nebraska's death row since June, 2000, except for periods following remand. In 2015, the Nebraska Unicameral (Legislature) repealed the Nebraska Death Penalty, but the legislative bill (LB 268) was vetoed by the Governor. The veto was promptly overridden by the Unicameral. During the summer of 2015, death penalty supporters mounted a statewide drive among voters to invoke the power of referendum, to repeal the Unicameral's repeal of the death penalty. Sufficient petition signatures were obtained, and the voters sustained repealing the repeal of the death penalty at the 2016 general election. In affirming dismissal of Petitioner's petition for postconviction relief in 2019, the Nebraska Supreme Court did not address its own case law defining an "act" subject to referendum attack as being an act passed by the Legislature and either signed by the Governor or not vetoed within five days. The act here was not signed by the Governor. He vetoed it within five days.

The question presented is:

Whether the citizens of Nebraska through improper use of their referendum power, or the trial court or Nebraska Supreme Court through erroneous approval of the referendum process in this case, deprived Petitioner of his federal right to due process under the Fourteenth Amendment to the U.S. Constitution.

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PETITION FOR A WRIT OF CERTIORARI

Raymond Mata, Jr. respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Nebraska in this case.

OPINIONS BELOW

The decision of the Nebraska Supreme Court affirming dismissal of Defendant's (Petitioner's) 2nd Amended Verified Motion for Post-Conviction Relief, *State v. Mata,* 934

N.W.2d 475, 304 Neb. 326 (Neb. 2019), is reprinted in Appendix A, pages A1 to A20. The trial court's Journal Entry dismissing Petitioner's Second Amended Verified Motion for Post-Conviction Relief is not reported, but is printed in Appendix B, pages B1 to B5.

JURISDICTION

The Supreme Court of Nebraska entered judgment on October 25, 2019. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

The Sixth Amendment, U.S. Const. amend. VI:

"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 defense."

The Fourteenth Amendment, U.S. Const. amend. XIV (in pertinent part):

"[N]or shall any State deprive any person of life, liberty or property, without due process of law."

Nebraska Constitution

Neb.Const. art. III, § 1:

"The legislative authority of the state shall be vested in a Legislature consisting of one chamber. The people reserve for themselves the power to propose laws and amendments to the Constitution and to enact or reject the same at the polls, independent of the Legislature, which power shall be called the power of initiative. The people also reserve power at their own option to approve or reject at the polls any act, item, section or part of any act passed by the Legislature, which power shall be called the power of referendum."

Neb.Const. art. III, § 2:

"The first power reserved by the people is the initiative whereby laws may be enacted and constitutional amendments adopted by the people independently of the Legislature. This power may be invoked by petition wherein the proposed measure shall be set forth at length. If the petition be for the enactment of a law, it shall be signed by seven percent of the registered voters of the state, and if the petition be for the amendment of the Constitution, the petition therefor shall be signed by ten percent of such registered voters. In all cases the registered voters signing such petition shall be so distributed as to include five percent of the registered voters of each of two-fifths of the counties of the state, and when thus signed, the petition shall be filed with the Secretary of State who shall submit the measure thus proposed to the electors of the state at the first general election held not less than four months after such petition shall have been filed. The same measure, either in form or in essential substance, shall not be submitted to the people by initiative petition, either affirmatively or negatively, more often than once in three years. If conflicting measures submitted to the people at the same election be approved, the one receiving the highest number of affirmative votes shall thereby become law as to all conflicting provisions. The constitutional limitations as to the scope and subject matter of statutes enacted by the Legislature shall apply to those enacted by the initiative. Initiative measures shall contain only one subject. The Legislature shall not amend, repeal, modify, or impair a law enacted by the people by initiative, contemporaneously with the adoption of this initiative measure or at any time thereafter, except upon a vote of at least two-thirds of all the members of the Legislature."

Neb.Const. art. III, § 3:

"The second power reserved is the referendum which may be invoked, by petition, against any act or part of an act of the Legislature, except those making appropriations for the expense of the state government or a state institution existing at the time of the passage of such act. Petitions invoking the referendum shall be signed by not less than five percent of the registered voters of the state, distributed as required for initiative petitions, and filed in the office of the Secretary of State within ninety days after the Legislature at which the act sought to be referred was passed shall have adjourned sine die or for more than ninety days. Each such petition shall set out the title of the act against which the referendum is invoked and, in addition thereto, when only a portion of the act is sought to be referred, the number of the section or sections or portion of sections of the act designating such portion. No more than one act or portion of an act of the Legislature shall be the subject of each referendum petition. When the referendum is thus invoked, the Secretary of State shall refer the same to the electors for approval or rejection at the first general election to be held not less than thirty days after the filing of such petition."

"When the referendum is invoked as to any act or part of act, other than emergency acts or those for the immediate preservation of the public peace, health, or safety, by petition signed by not less than ten percent of the registered voters of the state distributed as aforesaid, it shall suspend the taking effect of such act or part of act until the same has been approved by the electors of the state."

STATEMENT OF THE CASE

This is a capital case wherein Petitioner was convicted by a jury of killing his estranged girlfriend's three-year old son. Eventually, he was found to be eligible for the death penalty by a different jury, and was sentenced to death by a three-judge panel. The facts of the case and its procedural history over the course of 20 years are accurately recited in the Nebraska Supreme Court's most recent opinion in the case, *State v. Mata,* 934 N.W.2d 475, 304 Neb. 326 (Neb. 2019). *See* Appendix A, A3 through A7, "Background". Solely in the interests of brevity, and not as an admission of anything against his interests, Petitioner adopts the Nebraska Supreme Court's summary.

The postconviction court below denied Petitioner an evidentiary hearing on his petition for postconviction relief, and dismissed the petition on June 28, 2018. *See* Appendix B. The Nebraska Supreme Court affirmed the postconviction court's order on October 25, 2019. *See* Appendix A.

WHY THE WRIT SHOULD BE ALLOWED

Both the postconviction court below, and the Nebraska Supreme Court, found no flaw in the referendum process by which the people "rejected" the Legislature's repeal of Nebraska's Death Penalty. *See* Appendix C, Referendum 426. What both courts overlooked was that LB 268, the death penalty repeal bill, was not an "act of the Legislature" subject to repeal by referendum. In *Klosterman v. Marsh,* 143 N.W.2d 744, 180 Neb. 506 (Neb. 1966), the Nebraska

Supreme Court, in a detailed analysis of the language of Article III, section 3 (provision for referendum in the Nebraska Constitution) stated "... [A]n 'act of the Legislature' under Article III, section 3, means a particular legislative bill which has been passed by the Legislature and becomes law, either by the necessary passage of time for veto, or by the signature of the Governor. At that point it is an enactment and becomes an 'act of the Legislature.'" *Id.*, 180 Neb. at 512. Neither of the required events happened. The Governor vetoed LB 268, and the Legislature overrode the veto. The "referendum" was simply a nullity.

Nebraska has not had a death penalty since August 30, 2015, the effective date of non-emergency legislation for that year's Legislature. As an inmate of Nebraska's Death Row, Petitioner certainly has a liberty interest in the implementation of LB 268. He has been deprived of that interest without due process of law, in violation of his rights under the Fourteenth Amendment to the U.S. Constitution. *Hicks v. Oklahoma,* 447 U.S. 343, 100 S.Ct. 2227, 65 L.Ed.2d 175 (1980).

It appears to current counsel (different from previous counsel below) that the U.S. Constitutional violations raised herein were not presented to or ruled upon by either the postconviction court or the Nebraska Supreme Court (although neither court had jurisdiction to "recognize" the death penalty). Previous counsel's failure to address and preserve these issues has deprived Petitioner of his right to constitutionally effective counsel under the Sixth and Fourteenth Amendments to the U.S. Constitution. If not corrected, an egregious miscarriage of justice will be allowed to persist.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

STATE OF NEBRASKA, APPELLEE, V. RAYMOND MATA, JR., APPELLANT.

___ N.W.2d ___

Filed October 25, 2019. No. S-18-740.

1. **Postconviction: Constitutional Law: Appeal and Error.** In appeals from postconviction proceedings, an appellate court reviews de novo a determination that the defendant failed to allege sufficient facts to demonstrate a violation of his or her constitutional rights or that the record and files affirmatively show that the defendant is entitled to no relief.
2. **Postconviction: Judgments: Appeal and Error.** Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law which is reviewed independently of the lower court's ruling.
3. **Constitutional Law: Trial.** Inherently prejudicial practices, like shackling, are constitutionally forbidden during the guilt phase of a trial unless the use is justified by an essential state interest specific to each trial.
4. **Postconviction: Appeal and Error.** A motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal.
5. **Limitations of Actions.** The doctrine of equitable tolling permits a court to excuse a party's failure to comply with the statute of limitations where, because of disability, irremediable lack of information, or other circumstances beyond his or her control, the plaintiff cannot be expected to file suit on time.
6. **Statutes: Initiative and Referendum.** Upon the filing of a referendum petition appearing to have a sufficient number of signatures, operation of the legislative act is suspended so long as the verification and certification process ultimately determines that the petition had the required number of valid signatures.
7. **Postconviction: Proof.** In a postconviction proceeding, an evidentiary hearing is not required when the motion does not contain factual

allegations which, if proved, constitute an infringement of the movant's constitutional rights.

Appeal from the District Court for Scotts Bluff County: LEO P. DOBROVOLNY, Judge. Affirmed.

Bernard J. Straetker, Scotts Bluff County Public Defender, for appellant.

Douglas J. Peterson, Attorney General, and James D. Smith, Solicitor General, for appellee.

Brian William Stull, of American Civil Liberties Union Foundation, and Amy A. Miller, of American Civil Liberties Union of Nebraska Foundation, for amici curiae American Civil Liberties Union of Nebraska and American Civil Liberties Union Foundation.

Tracy Hightower-Henne, of Hightower Reff Law, G. Michael Fenner, of Creighton University School of Law, and Kevin Barry, of Quinnipiac University School of Law Legal Clinic, for amici curiae Legal Scholars.

Robert F. Bartle, of Bartle & Geier, and Anne C. Reddy, Keith Hammeran, and Tom Lemon, of Greenberg Traurig, L.L.P., for amici curiae former Nebraska Justices and Judges.

HEAVICAN, C.J., MILLER-LERMAN, CASSEL, STACY, FUNKE, and PAPIK, JJ., and PIRTLE, Judge.

FUNKE, J.

Raymond Mata, Jr., appeals the district court's denial of his second amended motion for postconviction relief without an evidentiary hearing. This postconviction action follows our decisions on direct appeal (*Mata I*),[1] after remand (*Mata II*),[2]

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[1] *State v. Mata*, 266 Neb. 668, 668 N.W.2d 448 (2003), *abrogated on other grounds, State v. Rogers*, 277 Neb. 37, 760 N.W.2d 35 (2009).

[2] *State v. Mata*, 275 Neb. 1, 745 N.W.2d 229 (2008).

and after denial of an initial motion for postconviction relief (*Mata III*).[3] Mata argues the district court erred in denying his constitutional claims that he was made to wear shackles in front of the jury during jury selection, overruling and finding untimely his claims that the sentencing scheme requiring a judge to make factual findings to impose the death penalty was unconstitutional, and overruling and finding untimely his claims that his constitutional rights were violated by the Legislature's passing a bill repealing the death penalty but a public referendum reimposing it. For the reasons stated herein, we affirm.

BACKGROUND

Mata was found guilty of first degree premeditated murder, first degree felony murder, and kidnapping in association with the death of 3-year-old Adam Gomez. In *Mata I*,[4] we explained the evidence adduced at trial showed Adam was the son of Patricia Gomez and Robert Billie. Patricia, Billie, and Adam lived together until September 1998, when Patricia and Billie ended their relationship and Billie moved out. Shortly thereafter, Mata and Patricia began dating, and Mata moved in with Patricia and Adam in October or November. Patricia later told police that although Mata did not treat Adam badly, Mata consistently expressed resentment of Adam.

Mata moved out on February 10, 1999, and moved in with his sister. That night, Patricia and Billie had sexual relations. On February 11, Patricia obtained a restraining order against Mata. However, Patricia continued to see Mata and they had sexual relations on February 14.

Later in February 1999, Patricia found out she was pregnant. Mata became aware of Patricia and Billie's sexual encounter and heard that the child had been conceived between February

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[3] *State v. Mata*, 280 Neb. 849, 790 N.W.2d 716 (2010), *disapproved, State v. Robertson*, 294 Neb. 29, 881 N.W.2d 864 (2016).

[4] *Mata I*, *supra* note 1.

7 and 10. Mata had separate confrontations with both Patricia and Billie about their relationship.

On March 11, 1999, Mata discovered that Patricia, Billie, and Adam attended a doctor's appointment for Adam together. That day, Mata unsuccessfully attempted to have Patricia come to his sister's house to visit him. When Patricia would not come to him, Mata went to Patricia. At her residence, Adam was watching television and Mata sent him to bed. Patricia testified she fell asleep while Mata watched television. Patricia said that when she woke up, Mata and Adam were gone, as was the sleeping bag that Adam had been using as a blanket. Mata denied knowing where Adam was when Patricia called at 3:37 a.m. Mata came back to Patricia's house and told Patricia that Adam was likely with her mother or Billie.

In subsequent searches of Mata's sister's residence, police found Adam's sleeping bag and clothing Adam had been wearing in a bag in the dumpster behind the residence. The bag also contained trash identified as being from the residence, including a towel and a boning knife that Mata's sister denied throwing away. In the residence, police found human remains in the basement room occupied by Mata. Hidden in the ceiling was a package wrapped in plastic and duct tape which contained a crushed human skull. The skull was fractured in several places by blunt force trauma that had occurred at or near the time of death. The head had been severed from the body by a sharp object at or near the time of death. In the kitchen refrigerator, police found a foil-wrapped package of human flesh. Mata's fingerprint was found on the foil. Human remains were also found on a toilet plunger and were found to be clogging the sewer line from the residence. Human flesh, both cooked and raw, was found in a bowl of dog food and in a bag of dog food. Human bone fragments were recovered from the digestive tract of Mata's sister's dog. All of the recovered remains were later identified by DNA analysis as those of Adam. Adam's blood was also found on Mata's boots.

After Mata was convicted, he was sentenced to life imprisonment for kidnapping and a three-judge panel sentenced him to death for first degree premeditated murder, finding the existence of an aggravating circumstance under Neb. Rev. Stat. § 29-2523(1)(d) (Cum. Supp. 2002). In *Mata I*, we affirmed these convictions and the life imprisonment sentence for kidnapping. Based upon *Ring v. Arizona*,[5] which was decided after the sentencing, we vacated the death sentence and remanded the cause with directions for a new penalty phase hearing and resentencing on the first degree premeditated murder conviction, requiring the jury to determine the existence of aggravating circumstances.[6]

On remand, the jury unanimously found the existence of the aggravating circumstance of exceptional depravity. A three-judge panel then heard evidence on mitigating circumstances and sentencing disproportionality. The panel found no statutory mitigating circumstances, considered five nonstatutory mitigating circumstances, and concluded the mitigating factors did not approach or exceed the weight of the exceptional depravity finding. The panel determined the penalty was not excessive or disproportionate to the penalty imposed in similar cases and again sentenced Mata to death on the first degree premeditated murder conviction.

In *Mata II*, issued February 8, 2008, we affirmed the imposition of Mata's death sentence. However, we determined that electrocution, as a means of carrying out that sentence, was cruel and unusual punishment in violation of Neb. Const. art. I, § 9, and issued an indefinite stay of Mata's execution.[7] Mata filed a petition for certiorari with the U.S. Supreme Court. On October 6, the Supreme Court denied Mata's petition.

On July 2, 2009, Mata filed a pro se motion for postconviction relief. At a preliminary hearing in October to consider

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[5] *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002).

[6] *Mata I*, *supra* note 1.

[7] *Mata II*, *supra* note 2.

whether to grant a request of counsel and an evidentiary hearing, Mata argued that he believed an evidentiary hearing would be premature because he was not "'ready'" and wished for the court to first consider the appointment of counsel who he hoped could assist him in evaluating the record and amending the motion before the merits would be determined.[8] Mata explained that he filed the motion for postconviction relief without first fully reviewing the record, because he needed to toll the 1-year statute of limitations for filing an application for a writ of habeas corpus in federal court. He claimed that our indefinite stay of his execution had placed him in a legal "'limbo'" which prevented him from filing a habeas action within a year from the final judgment.[9] Mata stated he would like an opportunity to amend his motion, with or without counsel.

In a single final order, the district court denied both an evidentiary hearing and Mata's request for appointment of counsel. The court did not specifically determine whether the motion for postconviction relief presented any justiciable issue which would entitle Mata to appointment of counsel. Instead, the court found that the files and records affirmatively showed that Mata was entitled to no relief based on the allegations in his motion.

In *Mata III*, we found it was an abuse of the district court's discretion to deny Mata leave to amend his motion for postconviction relief, reversed the district court's judgment, and remanded the cause with directions to appoint Mata counsel and grant him leave to amend his motion. The mandate in *Mata III* was issued on March 8, 2011, and Mata was appointed postconviction counsel on March 15.

In May 2015, the Nebraska Legislature passed 2015 Neb. Laws, L.B. 268, which abolished the death penalty in Nebraska, and then overrode the Governor's veto of the bill. Within L.B.

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[8] *Mata III*, *supra* note 3, 280 Neb. at 851, 790 N.W.2d at 717.

[9] *Id.* at 851, 790 N.W.2d at 718.

268, the Legislature provided that "in any criminal proceeding in which the death penalty has been imposed but not carried out prior to the effective date of this act, such penalty shall be changed to life imprisonment." The Legislature adjourned sine die on May 29. Because L.B. 268 did not contain an emergency clause, it was to take effect on August 30.[10]

Following the passage of L.B. 268, opponents of the bill sponsored a referendum petition to repeal it. On August 26, 2015, the opponents filed with the Nebraska Secretary of State signatures of approximately 166,000 Nebraskans in support of the referendum. On October 16, the Secretary of State certified the validity of sufficient signatures. Enough signatures were verified to suspend the operation of L.B. 268 until the referendum was approved or rejected by the electors at the upcoming election. During the November 2016 election, the referendum passed and L.B. 268 was repealed, that is, in the language of the Constitution, the act of the Legislature was "'reject[ed].'"[11]

On December 4, 2017, Mata filed his first amended motion for postconviction relief, and on March 16, 2018, he filed a second amended motion. The district court denied Mata's second amended motion for postconviction relief without an evidentiary hearing. Mata timely appealed.

ASSIGNMENTS OF ERROR

On appeal, Mata assigns, consolidated and restated, that the district court erred in (1) denying the claim that his constitutional rights were violated by being shackled during jury selection, because it could have been, and was, brought and decided on direct appeal; (2) denying and finding untimely Mata's claims that his Sixth Amendment rights were violated by having a panel of judges find mitigating circumstances and weigh those circumstances against the jury's finding of aggravating

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[10] See *State v. Jenkins*, 303 Neb. 676, 931 N.W.2d 851 (2019).

[11] See *id.* at 706, 931 N.W.2d at 877. See, also, Neb. Const. art. III, § 3.

circumstances; (3) denying and finding untimely Mata's claims that the referendum process and result amounted to an impermissible bill of attainder, cruel and unusual punishment, and violations of his due process rights by imposing a death sentence on Mata after it was changed to life imprisonment by L.B. 268; and (4) denying and finding untimely Mata's claims that the process of the referendum and its supporting campaign were an improper exercise violating constitutionally recognized separation of powers.

STANDARD OF REVIEW

[1] In appeals from postconviction proceedings, an appellate court reviews de novo a determination that the defendant failed to allege sufficient facts to demonstrate a violation of his or her constitutional rights or that the record and files affirmatively show that the defendant is entitled to no relief.[12]

[2] Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law which is reviewed independently of the lower court's ruling.[13]

ANALYSIS

USE OF SHACKLES DURING JURY SELECTION

Mata first assigns that the district court erred in denying the claim that his constitutional rights were violated by being shackled during jury selection. On this assignment, Mata alleges he was required to walk with shackles into the courtroom, in front of the jury to be selected, before being seated. Mata argues the district court incorrectly determined this issue could have been, and was, brought and decided on direct appeal, because *Deck v. Missouri*[14] was not decided until after Mata's first appeal.

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[12] *State v. Allen*, 301 Neb. 560, 919 N.W.2d 500 (2018).

[13] *State v. Tyler*, 301 Neb. 365, 918 N.W.2d 306 (2018).

[14] *Deck v. Missouri*, 544 U.S. 622, 125 S. Ct. 2007, 161 L. Ed. 2d 953 (2005).

[3] This argument is without merit. *Deck* did not establish a new rule for the use of shackles throughout a trial. *Deck* extended the existing holding detailed in *Holbrook v. Flynn*[15] that inherently prejudicial practices, like shackling, are constitutionally forbidden during the guilt phase of a trial unless the use is "justified by an essential state interest specific to each trial." *Deck* clarified that this requirement also applies to the penalty phase.[16]

[4] In *Mata I*, we addressed Mata's claim of a constitutional violation of his rights due to his being shackled during jury selection and specifically analyzed it under the requirement detailed in *Holbrook*.[17] In his current appeal, Mata makes no new arguments based upon *Deck*'s extension of that requirement. Instead, Mata seeks to relitigate his claims which were rejected on direct appeal, because *Deck* was decided after *Mata I* and restated *Holbrook*'s holding. A motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal.[18] Accordingly, this assignment is procedurally barred.

USE OF PANEL OF JUDGES IN MATA'S SENTENCING

Mata next assigns the district court erred in denying and finding untimely his claims challenging the use of the panel of judges to consider mitigating circumstances and weigh those circumstances against the jury's finding of aggravating circumstances. In considering this constitutional challenge to Nebraska's capital sentencing scheme, we must first determine whether these claims are time barred under Neb. Rev. Stat. § 29-3001(4) (Reissue 2016).

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[15] *Holbrook v. Flynn*, 475 U.S. 560, 569, 106 S. Ct. 1340, 89 L. Ed. 2d 525 (1986).

[16] *Deck*, *supra* note 14.

[17] *Mata I*, *supra* note 1.

[18] *Allen*, *supra* note 12.

The Nebraska Postconviction Act contains a 1-year time limit for filing a verified motion for postconviction relief, which runs from one of four triggering events or August 27, 2011, whichever is later.[19] The triggering events are:

> (a) The date the judgment of conviction became final by the conclusion of a direct appeal or the expiration of the time for filing a direct appeal;
>
> (b) The date on which the factual predicate of the constitutional claim or claims alleged could have been discovered through the exercise of due diligence;
>
> (c) The date on which an impediment created by state action, in violation of the Constitution of the United States or the Constitution of Nebraska or any law of this state, is removed, if the prisoner was prevented from filing a verified motion by such state action;
>
> (d) The date on which a constitutional claim asserted was initially recognized by the Supreme Court of the United States or the Nebraska Supreme Court, if the newly recognized right has been made applicable retroactively to cases on postconviction collateral review[.][20]

Mata first made his postconviction claims challenging the use of a panel of judges to find and consider mitigating circumstances in his initial amended postconviction motion filed December 2017. Mata argues his claims are not time barred, because the U.S. Supreme Court in *Hurst v. Florida*[21] provided newly recognized constitutional requirements for capital sentencing schemes. Although *Hurst* was decided in January 2016,[22] Mata and amici curiae argue that equitable tolling should apply because the passage of L.B. 268 and its repeal through public referendum created uncertainty as to Mata's sentence.

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[19] *State v. Harrison*, 293 Neb. 1000, 881 N.W.2d 860 (2016).

[20] § 29-3001(4).

[21] *Hurst v. Florida*, ___ U.S. ___, 136 S. Ct. 616, 193 L. Ed. 2d 504 (2016).

[22] *Id.*

[5] The doctrine of equitable tolling permits a court to excuse a party's failure to comply with the statute of limitations where, because of disability, irremediable lack of information, or other circumstances beyond his or her control, the plaintiff cannot be expected to file suit on time.[23] However, to date, we have not determined whether the doctrine of equitable tolling applies to postconviction actions brought under § 29-3001.[24] In this matter, we again need not make the determination as to whether equitable tolling applies to postconviction actions. In order for *Hurst* to be pertinent, the holding must have recognized a constitutional claim and that the newly recognized right is applicable retroactively to cases on postconviction collateral review.

In *State v. Lotter*,[25] we considered the question of whether *Hurst* was a triggering event under § 29-3001(4) to challenges to Nebraska's capital sentencing scheme. In *Lotter*, the defendant filed a motion for postconviction relief alleging Nebraska's capital sentencing scheme was unconstitutional in light of *Hurst* and within a year of the *Hurst* decision. In finding this claim time barred, we determined that the *Hurst* decision did not initially recognize a constitutional claim and set forth a new rule of law for sentencing. We explained *Hurst* merely applied the constitutional requirement recognized in *Ring*[26] that "capital defendants are entitled to a jury determination of any fact that would increase the possible maximum punishment," which was a holding that utilized a rule from *Apprendi v. New Jersey*[27] that "'"[i]t is unconstitutional for a legislature to remove from the jury the assessment of facts that

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[23] *State v. Conn*, 300 Neb. 391, 914 N.W.2d 440 (2018).

[24] See, *id.*; *State v. Huggins*, 291 Neb. 443, 866 N.W.2d 80 (2015).

[25] *State v. Lotter*, 301 Neb. 125, 917 N.W.2d 850 (2018), *cert. denied* ___ U.S. ___, 139 S. Ct. 2716, ___ L. Ed. 2d ___ (2019).

[26] *Ring*, *supra* note 5.

[27] *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

increase the prescribed range of penalties to which a criminal defendant is exposed."'"[28]

In *Lotter*, we specifically addressed the argument Mata now raises that *Hurst* expanded on *Ring* and *Apprendi* and announced a new requirement that a jury must find and consider mitigating circumstances instead of a panel of judges. We stated:

> Most federal and state courts agree that *Hurst* did not hold a jury must find beyond a reasonable doubt that the aggravating factors outweigh the mitigating circumstances. The 10th Circuit aptly observed: "[T]he Supreme Court's holding in *Hurst* only referenced the [finding of aggravating circumstances] . . . . The Court thus did not address whether the second of the required findings—that mitigating circumstances do not outweigh the aggravating circumstances—is also subject to *Apprendi*'s rule." . . . The plain language of *Hurst* reveals no holding that a jury must find beyond a reasonable doubt that the aggravating factors outweigh the mitigating circumstances. And this court has previously concluded that neither *Apprendi* nor *Ring* require[s] that the determination of mitigating circumstances, the balancing function, or the proportionality review be undertaken by a jury.[29]

We find no reason to depart from our determination in *Lotter* that the *Hurst* opinion merely applied previously recognized constitutional requirements to Florida's sentencing statute and that it did not extend the holding in *Ring* and *Apprendi* to finding and considering mitigating circumstances in capital sentencing schemes. As such, *Hurst* did not create a triggering event under § 29-3001(4) and Mata's claims concerning Nebraska's sentencing scheme are untimely and procedurally barred.

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[28] *Lotter, supra* note 25, 301 Neb. at 129, 917 N.W.2d at 855.

[29] *Id.* at 144-45, 917 N.W.2d at 863-64.

L.B. 268 AND PUBLIC REFERENDUM

Mata assigns that his constitutional rights against cruel and unusual punishment were violated and that he was deprived due process of law by L.B. 268 and its repeal by public referendum, which constituted an impermissible bill of attainder. Central to all three constitutional claims is the proposition that L.B. 268 changed his sentence to life imprisonment and the public referendum changed it back to death.

Contrary to this proposition, however, L.B. 268 never went into effect. L.B. 268 was passed in May 2015 and was set to take effect on August 30.[30] On August 26, opponents filed with the Nebraska Secretary of State approximately 166,000 signatures in support of a referendum.[31] Under the Nebraska Constitution, when a referendum is invoked as to any act "by petition signed by not less than ten percent of the registered voters . . . , it shall suspend the taking effect of such act" until a vote on the referendum.[32] Therefore, L.B. 268 was suspended 4 days before the effective date.

Mata and amici curiae argue a suspension under article III, § 3, of the Nebraska Constitution applies only once the Secretary of State determines the validity, sufficiency, and count of the petition's signatures and determines whether constitutional and statutory requirements have been met. In the instant case, the Secretary of State did not certify the validity of sufficient signatures until October 16, 2015. Under Mata and amici curiae's view, L.B. 268 was not suspended until the October 16 certification and was in effect from its August 30 effective date until this certification.

We addressed this argument in *State v. Jenkins*.[33] In that case, Nikko Jenkins, who was convicted but not sentenced to death prior to the passage of L.B. 268, argued L.B. 268 and its

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[30] See *Jenkins*, *supra* note 10.

[31] See *id.*

[32] Neb. Const. art. III, § 3.

[33] *Jenkins*, *supra* note 10.

subsequent repeal amounted to a violation of the Ex Post Facto Clauses of the U.S. and Nebraska Constitutions. In denying this claim, we rejected the notion that signatures must be verified and certified before an act's operation will be suspended. We reasoned:

> Jenkins' notion conflicts with several fundamental principles. The power of referendum must be liberally construed to promote the democratic process. The power is one which the courts are zealous to preserve to the fullest tenable measure of spirit as well as letter. The constitutional provisions with respect to the right of referendum reserved to the people should be construed to make effective the powers reserved. Stated another way, the provisions authorizing the referendum should be construed in such a manner that the legislative power reserved in the people is effectual. The right of referendum should not be circumscribed by narrow and strict interpretation of the statutes pertaining to its exercise.
>
> Jenkins' contention—that suspension cannot occur until a sufficient number of signatures are certified—would make ineffectual the people's power to suspend an act's operation. Whether an act went into effect, and for how long, would depend upon how quickly the Secretary of State and election officials counted and verified signatures. Jenkins' argument demonstrates the absurdity of such a view. Because the Secretary of State was unable to confirm that a sufficient number of voters signed the petitions until October 16, 2015, Jenkins contends that L.B. 268 went into effect on August 30, thereby changing all death sentences to life imprisonment and changing the status of any defendant facing a potential death sentence to a defendant facing a maximum sentence of life imprisonment. Such an interpretation would defeat the purpose of this referendum—to preserve the death penalty. Our constitution demands that the power of referendum not be impaired by ministerial tasks appurtenant to the process.

> Having produced the signatures necessary to suspend the act's operation, the people were entitled to implementation of their will.[34]

[6] As in *Jenkins*, we conclude that upon the filing of a referendum petition appearing to have a sufficient number of signatures, operation of the legislative act is suspended so long as the verification and certification process ultimately determines that the petition had the required number of valid signatures.[35] Accordingly, L.B. 268 was suspended on August 26, 2015, 4 days prior to the effective date by the filing of the referendum petition and necessary signatures. Mata's cruel and unusual punishment, due process, and bill of attainder claims which assert that L.B. 268 changed his sentence to life imprisonment and that the repeal of L.B. 268 resentenced him to death fail, because L.B. 268 was suspended and no such changes in his sentence occurred.

It appears Mata may also be claiming he was subjected to cruel and unusual punishment by the political debate on the death penalty, the possibility that his sentence would be changed by L.B. 268 regardless of whether it went into effect, and the threat of his sentence of death remaining through the repeal of L.B. 268. However, the entirety of Mata's analysis and supporting authority presumes his sentence was changed by L.B. 268, which, as determined above, did not occur, because it was suspended prior to its effective date. Mata provides no argument or authority for the proposition that a cruel and unusual punishment violation could occur from a stated possibility of a change in a defendant's sentence and the public debate on that issue, and we find none.

Additionally, Mata's assertion that public debate and the potential effect of a suspended bill is enough to warrant a cruel and unusual punishment finding is flawed. Assuming without deciding that emotional or psychological harm alone

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[34] *Id.* at 709-10, 931 N.W.2d at 878-79.

[35] *Jenkins*, *supra* note 10.

is to be considered pain in an Eighth Amendment analysis, the U.S. Supreme Court has repeatedly held that because some risk of pain is inherent in any method of execution, the Constitution does not require the avoidance of all risk of pain.[36] "'The Eighth Amendment's prohibition of "cruel and unusual" punishments necessarily excludes from constitutional recognition *de minimis* uses of physical force, provided that the use of force is not of a sort repugnant to the conscience of mankind.'"[37]

If the potential for a modification in a defendant's conviction or sentence were sufficient, any defendant convicted and sentenced for violating a law would be eligible for relief every time a change in that law were contemplated by the Legislature, contemplated by a public referendum, vetoed by the Governor, or subjected to public debate. Moreover, it would open the door to a cruel and unusual challenge following every case where an appeal of a conviction or sentence is granted, whether successful or unsuccessful, in that the appeal process would also provide a possibility for a change in the party's conviction or sentence. While we acknowledge the potential for modification of a defendant's conviction or sentence is likely to affect that defendant, this potential does not rise to the level of unnecessary and wanton infliction of pain necessary for a determination of cruel and unusual punishment.[38] Instead, they are necessary aspects of our democratic system which demands the examination and reexamination of its laws and participation of the electorate through political

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[36] *Bucklew v. Precythe*, ___ U.S. ___, 139 S. Ct. 1112, 203 L. Ed. 2d 521 (2019); *Glossip v. Gross*, ___ U.S. ___, 135 S. Ct. 2726, 192 L. Ed. 2d 761 (2015); *Baze v. Rees*, 553 U.S. 35, 128 S. Ct. 1520, 170 L. Ed. 2d 420 (2008).

[37] *Wilkins v. Gaddy*, 559 U.S. 34, 37-38, 130 S. Ct. 1175, 175 L. Ed. 2d 995 (2010), quoting *Hudson v. McMillian*, 503 U.S. 1, 112 S. Ct. 995, 117 L. Ed. 2d 156 (1992).

[38] See, U.S. Const. amend. VIII; Neb. Const. art. I, § 9. See, also, *Mata II*, *supra* note 2.

debate. Accordingly, Mata was not subjected to cruel and unusual punishment by the political debate on the death penalty, the possibility that his sentence would be changed by L.B. 268, and the threat of his sentence of death remaining through the repeal of L.B. 268.

SEPARATION OF POWERS

Mata next challenges the process involved in the repeal of L.B. 268 through the public referendum. To the extent Mata's claims under this assignment require that L.B. 268 went into effect prior to being suspended by the referendum process, those claims are without merit as described in the previous section.[39]

On Mata's remaining claims under this assignment, Mata asserts the Governor and State Treasurer impermissibly organized and contributed to a group which opposed L.B. 268 and worked toward its repeal through the public referendum, solicited money for the opposition group, and took on leadership within the opposition group. Mata seems to make claims of due process and cruel and unusual punishment violations derived from separation of powers requirements under the Nebraska Constitution. However, while Mata states that the participation of the Governor and State Treasurer in the process of the referendum violated his due process rights and rights against cruel and unusual punishment, it is unclear on what basis Mata is alleging such violations occurred. Instead, Mata's argument exclusively centers on how the Governor's and State Treasurer's actions supporting and participating in the referendum violated the constitutional separation of powers requirements and that such violations invalidated the referendum.

Mata relies on two provisions under the Nebraska Constitution: Neb. Const. art. III, § 1, and Neb. Const. art. II, § 1. Article III, § 1, provides:

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[39] See *Jenkins*, *supra* note 10.

> The legislative authority of the state shall be vested in a Legislature consisting of one chamber. The people reserve for themselves the power to propose laws and amendments to the Constitution and to enact or reject the same at the polls, independent of the Legislature, which power shall be called the power of initiative. The people also reserve power at their own option to approve or reject at the polls any act, item, section, or part of any act passed by the Legislature, which power shall be called the power of referendum.

Article II, § 1, provides:

> The powers of the government of this state are divided into three distinct departments, the legislative, executive, and judicial, and no person or collection of persons being one of these departments shall exercise any power properly belonging to either of the others except as expressly directed or permitted in this Constitution.

Mata contends these provisions establish that legislative authority is vested solely within the Legislature and the people through the referendum process unless expressly directed or permitted under the Constitution. Mata argues that this means members of the executive branch, such as the Governor and State Treasurer, are prohibited from initiating, participating, instructing, and actively supporting legislative initiatives through a referendum or organizing, participating, instructing, and actively supporting groups to do the same.

Without determining the constitutional appropriateness of the Governor's and State Treasurer's participation in the referendum process, Mata's separation of powers claims fail because the result of the referendum is not invalidated even if such actions were constitutionally improper as alleged. Such a determination is in line with cases where we have previously found dual-service violations.[40] In those cases, the remedy

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[40] See, *State ex rel. Stenberg v. Murphy*, 247 Neb. 358, 527 N.W.2d 185 (1995); *State ex rel. Spire v. Conway*, 238 Neb. 766, 472 N.W.2d 403 (1991).

was not abandonment of any action in which the violating party participated but was to remove the party from the violating position.[41]

In addition, Mata asserts the Governor and State Treasurer acted improperly but does not allege that the Governor's and State Treasurer's participation influenced the referendum, that the referendum would have been frustrated if they had not participated, that votes were changed due to their participation, or how the referendum and its results are impossibly linked to the alleged inappropriate participation. At oral argument, Mata's counsel admitted that he was unsure what impact the Governor or the State Treasurer had on the referendum process.

In contrast, the facts which Mata did allege demonstrate the repeal of L.B. 268 did not occur solely at the Governor's and State Treasurer's direction. The referendum process was a public process which required a petition with the signatures of more than 10 percent of the registered voters for its initiation, it required public debate and deliberation, and it required a public vote.

[7] In a postconviction proceeding, an evidentiary hearing is not required when the motion does not contain factual allegations which, if proved, constitute an infringement of the movant's constitutional rights.[42]

Mata did not allege facts sufficient to invalidate the repeal of L.B. 268 due to separation of powers violations, and therefore, Mata's claims under this assignment fail to establish a denial or infringement on his rights so as to render his sentence void or voidable. Accordingly, Mata's separation of powers claims fail.

CONCLUSION

For the reasons stated above, Mata is not entitled to postconviction relief for his constitutional claims involving being

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[41] See *id.*

[42] *Allen, supra* note 12.

shackled during jury selection, his having a panel of judges find and weigh mitigating circumstances, the effect of L.B. 268 and the referendum rejecting it, and the Governor's and State Treasurer's participation in the referendum process. Accordingly, the district court did not err in denying Mata's motion for postconviction relief without an evidentiary hearing.

AFFIRMED.

FREUDENBERG, J., not participating.

APPENDIX B

IN THE DISTRICT COURT FOR SCOTTS BLUFF COUNTY, NEBRASKA

THE STATE OF NEBRASKA,
Plaintiff,

vs.

RAYMOND MATA, JR.,
Defendant.

Case No. CR 99-37

JOURNAL ENTRY

In March of 2018, a records hearing was held on the defendant's Second Amended Verified Motion for Post-Conviction Relief. The issues presented were taken under advisement. The ruling on the issues follows.

First, a comment on the form of the the Motion itself. Although post-conviction proceedings have developed their own body of legal precedent, they are civil in nature, and the pleading rules have been applied in such cases, and previously in this case. Those rules provide that the document which sets forth the party's claims be "a short and plain statement of the claim showing that the pleader is entitled to relief..." This motion is 96 pages long. It reads much like an appellate court brief, and packs in many, many case citations. While post-conviction law does require a defendant to set forth *facts,* which if true, would amount to a constitutional violation, this motion goes far beyond that, and borders on being unwieldy.

APPLICABLE LAW

An evidentiary hearing is not required when, notwithstanding proper pleading of facts in a motion for postconviction relief, the files and records in a movant's case do not show a denial or violation of the movant's constitutional rights causing the judgment against the movant to be void or voidable.

A postconviction motion must include specific factual allegations to support the claim. *State v. McGhee*, 280 Neb. 558 (2010).

A defendant requesting post-conviction relief must establish the basis for such relief. *State v. Duncan,* 278 Neb. 1006 (2009).

The Nebraska Postconviction Act, Neb. Rev. Stat. § 29-3001 et seq. provides that postconviction relief is available to a prisoner in custody under sentence who seeks to be released on the ground that there was a denial or infringement of his or her constitutional rights such that the judgment was void or voidable. *State v. Crawford*, 291 Neb. 362, (2015). Thus, in a motion for postconviction relief, the defendant must allege facts which, if proved, constitute a

denial or violation of his or her rights under the U.S. or Nebraska Constitution, causing the judgment against the defendant to be void or voidable. *State v. Crawford, supra.*

A court must grant an evidentiary hearing to resolve the claims in a postconviction motion when the motion contains factual allegations which, if proved, constitute an infringement of the defendant's rights under the Nebraska or federal Constitution. *State v. Huston,* 291 Neb. 708 (2015). If a postconviction motion alleges only conclusions of fact or law, or if the records and files in the case affirmatively show that the defendant is entitled to no relief, the court is not required to grant an evidentiary hearing. *Id.*

A proper ineffective assistance of counsel claim alleges a violation of the fundamental constitutional right to a fair trial. *State v. Crawford, supra.* To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense. *State v. Crawford, supra.*

To show prejudice under the prejudice component of the *Strickland* test, the defendant must demonstrate a reasonable probability that but for his or her counsel's deficient performance, the result of the proceeding would have been different. *State v. Huston, supra.* A reasonable probability does not require that it be more likely than not that the deficient performance altered the outcome of the case; rather, the defendant must show a probability sufficient to undermine confidence in the outcome. *Id.* A court may address the two prongs of this test, deficient performance and prejudice, in either order. *Id.*

In addressing the "prejudice" component of the *Strickland* test, appellate courts focus on whether counsel's allegedly deficient performance rendered the result of the trial unreliable or the proceeding fundamentally unfair. *State v. Iromaunya,* 282 Neb. 798 (2011).

Prejudice in an ineffective assistance of counsel case is shown when there is a reasonable probability, or a probability sufficient to undermine confidence in the outcome, that but for counsel's deficient performance, the result of the proceeding would have been different. *State v. Poe,* 284 Neb. 750 (2012).

In order to show ineffective assistance of counsel under *Strickland v. Washington*, a defendant must show, first, that counsel was deficient and, second, that the deficient performance actually caused prejudice to the defendant's case. The two prongs of this test may be addressed in either order, and the entire ineffectiveness analysis should be viewed with a strong presumption that counsel's actions were reasonable. *State v. Buckman,* 259 Neb. 924 (2000).

Furthermore, trial counsel is afforded due deference to formulate trial strategy and tactics. When reviewing a claim of ineffective assistance of counsel, an appellate court will not second-guess reasonable strategic decisions by counsel. *State v. Jim,* 278 Neb. 238 (2009).

A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged

conduct, and to evaluate the conduct from counsel's perspective at the time. *State v. Billups*, 263 Neb. 511 (2002).

The defendant must make a showing of how he was prejudiced in the defense of his case as a result of his attorney's actions or inactions and that, but for the ineffective assistance of counsel, there is a reasonable probability that the result would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. In determining whether a trial counsel's performance was deficient, there is a strong presumption that such counsel acted reasonably. When reviewing a claim of ineffective assistance of counsel, an appellate court will not second-guess reasonable strategic decisions by counsel. *State v. McHenry*, 268 Neb. 219 (2004).

ANALYSIS

Timeliness of the motion as a whole

In this case, the Nebraska Supreme Court directed the trial court to allow the defendant to file an amended motion. No time within which that had to be done was stated in the appellate opinion, and no time limit was set in the remand order filed by the trial court.

Post-conviction law was amended in 2011 to limit the time within which claims for this relief can be made. Claims made on or after August 27, 2011 must be filed within one year following the later of:

The final judgment;

Diligent discovery of the factual predicate of the claim;

Removal of some state-action impediment to filing;

The pronouncement of a new constitutional ground made retroactive;

August 27, 2011.

In this case, leave was granted to amend an earlier-filed motion, which was timely filed. The defendant had requested amendment apparently to more fully review the record. The pleading rules allowing amendment by leave of court do not set a time limit within which amendments must be made.

So, in general, the amended motion, and the second amended motion, though filed years after the Supreme Court opinion and the trial court's order, are not considered untimely, although some parts are, as will be explained below.

Ground One – shackles

This is a ground that could be, and was, the topic of direct appeal. The same issue was squarely dealt with in the direct appeal, and found to be without merit. So this cannot be a ground for relief.

Grounds Two, Three, and Four

These all center around the *Dixon* opinion of the Nebraska Supreme Court (259 Neb. 976) regarding re-viewing evidence by the jury. Two is jury misconduct; Three is trial counsel's failure to object; and Four is appellate counsel's failure to make it an appeal issue.

As the State points out in its response to the motion, *Dixon* was decided after the trial in this case, so there was no *Dixon* to form the basis for an objection by trial counsel. Since trial counsel did not object, there was no issue preserved for appeal for appellate counsel to raise. *Dixon* itself is not a case about constitutional issues as regards the re-viewing discussed in that case.

Dixon was a case about *testimonial* evidence. Here, the defendant states that his "recorded audio and video statements" were allowed to be replayed by the jury. *Dixon* has been disapproved in this respect by *State v. Vandever*, 287 Neb. 807 (2014). *Vandever* clarified that *Dixon* only applied to testimonial evidence, and defined it: "testimony refers to trial evidence, including live oral examinations, affidavits and depositions in lieu of live testimony, and tapes of examinations conducted prior to the time of trial for use at trial in accordance with procedures provided by law."

The *Vandever* court found that the defendant's recorded interview was not testimonial in nature, and therefore heightened procedures for re-viewing such evidence were not necessary.

The alleged facts in the motion show the evidence the jury may have reviewed was not testimonial in nature, and the *Dixon* rule cited (if such a rule ever actually existed) does not apply. Even testimonial evidence can be reviewed with judicial discretion and supervision.

Grounds Five and Six

Five and Six discuss the *Hurst* case with regard to the requirement that a jury make findings of fact that are used to enhance a sentence. The Nebraska death penalty law does have such a requirement for the finding of aggravating circumstances, and that law was applied in this case, after the decision in *Ring v. Arizona*, 536 U.S. 583 (2002).

If *Hurst* does in fact set forth a new constitutional ground for post-conviction relief, this portion of the motion is untimely, as it was not filed within one year after *Hurst*, which was a 2016 opinion.

Ground 7

This ground regarding death qualification of jurors could have been raised on direct appeal and is therefore procedurally barred.

Grounds 8, 9, and 10

These three grounds relate to the actions taken by the Nebraska Legislature, the Governor, and the voters in a referendum. None of these grounds are constitution-based; they all deal with procedures and actions taken external to the court proceedings which led to the defendant's conviction and sentence, and occurred many years after.

The 8th amendment prohibits cruel and unusual punishment; the actions of the Legislature, Governor, and people did not impose any punishment upon the defendant.

Bills of Attainder are prohibited by Article I, section 8 of the United States Constitution. A bill of attainder is a legislative act, directed against a designated person, pronouncing him guilty of an alleged crime without trial or conviction according to the recognized rules of procedure, and passing sentence of death and attainder upon him. Black's Law Dictionary Revised Fourth Edition. There is no legislative act which found the defendant guilty, or imposed a sentence upon him. He was tried, convicted, and sentenced in a court of law.

Assuming without finding that these grounds are able to be considered at all, they are not timely filed within one year of the actions complained of.

FINDINGS AND ORDER

The defendant has not alleged facts which, if proved, constitute a denial or violation of his rights under the U.S. or Nebraska Constitution, causing the judgment against the defendant to be void or voidable. The motion alleges only conclusions of fact or law, and the records and files in the case affirmatively show that the defendant is entitled to no relief. Some of the claims are time-barred.

The court is therefore not required to grant an evidentiary hearing, and the Second Amended Motion for Post-Conviction Relief is overruled and dismissed.

BY THE COURT

Leo Dobrovolny

District Judge

Copy to: Doug Warner
Bernie Straetker

APPENDIX C

Nonpartisan Ticket
General Election
November 8, 2016

Referendum ordered by Petition of the People

Referendum No. 426

A vote to "Retain" will eliminate the death penalty and change the maximum penalty for the crime of murder in the first degree to life imprisonment by retaining Legislative Bill 268, passed in 2015 by the First Session of the 104th Nebraska Legislature.

A vote to "Repeal" will keep the death penalty as a possible penalty for the crime of murder in the first degree by repealing Legislative Bill 268, passed in 2015 by the First Session of the 104th Nebraska Legislature.

The purpose of Legislative Bill 268, passed by the First Session of the 104th Nebraska Legislature in 2015, is to eliminate the death penalty and change the maximum penalty for the crime of murder in the first degree to life imprisonment. Shall Legislative Bill 268 be repealed?

◯ Retain

◯ Repeal