

****THIS IS A CAPITAL CASE****

No. _____

**IN THE
SUPREME COURT OF THE UNITED STATES**

AUBREY TRAIL, Petitioner,

v.

STATE OF NEBRASKA, Respondent.

On Petition for Writ of Certiorari
to the Supreme Court of Nebraska

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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Cite as 319 Neb. 84STATE OF NEBRASKA, APPELLEE, V.
AUBREY C. TRAIL, APPELLANT.

___ N.W.3d ___

Filed May 30, 2025. No. S-24-484.

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: Limitations of Actions: Pleadings.** If the facts in a case are undisputed, the issue as to when the 1-year time limit for filing a verified motion for postconviction relief begins to run is a question of law.
3. **Constitutional Law: Due Process.** The determination of whether the procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law.
4. **Postconviction: Limitations of Actions: Pleadings.** The Nebraska Postconviction Act contains a 1-year time limit for filing verified motions.
5. **Postconviction: Limitations of Actions: Sentences: Death Penalty.** The 1-year limitation period set out in Neb. Rev. Stat. § 29-3001(4) (Cum. Supp. 2024) governs all postconviction motions, including successive motions and those challenging a death sentence.
6. **Postconviction: Limitations of Actions: Records: Appeal and Error.** An appellate court looks to the allegations of the verified postconviction motion and the files and records of the case to determine which of the triggering events applies to a determination of timeliness under Neb. Rev. Stat. § 29-3001(4) (Cum. Supp. 2024).
7. **Postconviction.** States are not obligated to provide a postconviction relief procedure.
8. _____. Under the Nebraska Postconviction Act, the district court has discretion to adopt reasonable procedures for determining what the motion

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and the files and records show, and whether any substantial issues are raised, before granting a full evidentiary hearing.

9. **Postconviction: Limitations of Actions: Dismissal and Nonsuit: Appeal and Error.** District courts have discretion to provide the parties an opportunity to present their positions before acting sua sponte to dismiss a postconviction motion as time barred, and an appellate court will examine such procedures for an abuse of discretion.
10. **Judges: Words and Phrases.** An abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition.
11. **Postconviction: Appeal and Error.** An appellate court will not consider as an assignment of error a question not presented to the district court for disposition through a defendant's motion for postconviction relief.
12. **Postconviction: Limitations of Actions: Proof.** To satisfy the tolling provision of Neb. Rev. Stat. § 29-3001(4)(c) (Cum. Supp. 2024), a prisoner must show there was (1) an impediment created by state action, (2) which amounted to a violation of the federal or state Constitution or a state law, and (3) as a result, the prisoner was prevented from filing a verified motion. If all these factors are satisfied, the 1-year limitation period will begin to run on the date the impediment was removed.

Appeal from the District Court for Saline County: DAVID J. A. BARGEN, Judge. Affirmed.

Laurence E. Komp, Chief Federal Public Defender for the Western District of Missouri, and Megan R. Kielty for appellant.

Michael T. Hilgers, Attorney General, and Stacy M. Foust for appellee.

FUNKE, C.J., MILLER-LERMAN, CASSEL, STACY, PAPIK, and FREUDENBERG, JJ., and VOLKMER, District Judge.

CASSEL, J.

INTRODUCTION

Aubrey C. Trail moved for postconviction relief nearly 14 months after the conclusion of his direct appeal, and the district court denied the motion without a hearing as untimely

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under Neb. Rev. Stat. § 29-3001(4)(a) (Cum. Supp. 2024). Trail now argues it was timely under § 29-3001(4)(c). But because Trail failed to raise his timeliness arguments to the district court even after the State made timeliness an issue and because those arguments would lack merit even if properly raised, we affirm.

BACKGROUND

TRIAL AND DIRECT APPEAL

Prior to trial, Trail pled no contest to improper disposal of human skeletal remains. A jury subsequently found Trail guilty of murder in the first degree and criminal conspiracy to commit first degree murder. A three-judge panel sentenced Trail to death for first degree murder.

Through trial counsel, Trail filed a direct appeal. We reaffirmed the constitutionality of Nebraska’s death penalty statutes, found Trail’s sentence of death was not excessive or disproportionate, and found no merit to Trail’s other assignments of error.¹

If a party intends to prosecute proceedings to the U.S. Supreme Court and desires an order staying the mandate, the party must apply for a stay within 7 days from the release of the opinion or other dispositive entry or file the application with a motion for rehearing.² Trail did not apply for a stay. Nor did Trail file a motion for rehearing within 10 days after the release of the opinion.³

POSTAPPELLATE DECISION FILINGS

Nineteen days after release of our decision, Trail’s counsel and that counsel’s law firm filed a motion to withdraw. According to the motion, Trail called and wrote counsel to request that withdrawal. The motion further stated, “Because

¹ *State v. Trail*, 312 Neb. 843, 981 N.W.2d 269 (2022).

² Neb. Ct. R. App. P. § 2-114(A)(2) (rev. 2022).

³ See Neb. Ct. R. App. P. § 2-113(A) (rev. 2022).

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the undersigned counsels’ representation has effectively ended with the decision of the Nebraska Supreme Court and in light of [Trail’s] request, withdrawal can be accomplished without material adverse effect on the interests of [Trail].” We sustained the motion.

Days later, Trail sent a letter to the clerk of this court requesting appointment of postconviction counsel. We overruled the motion without prejudice to a filing in the trial court.

On December 16, 2022, our mandate issued.

In a letter filed in the district court for Saline County on January 3, 2023, Trail requested the appointment of counsel for postconviction proceedings. In a January 19 order, the court directed Trail to file, within 21 days, a certified copy of his institutional account statement for the past 6 months. Because a prison official informed Trail that he would need to communicate with “central office accounting in Lincoln” for a 6-month report, Trail requested and received from the court additional time to provide the information.

The deadline to file a petition for a writ of certiorari with the U.S. Supreme Court was February 8, 2023.⁴ Trail did not do so.

On February 21, 2023, the district court appointed postconviction counsel. Six months later, on August 24, counsel moved to withdraw because his new employment created an actual conflict of interest. On September 8, the court sustained the motion to withdraw and appointed replacement counsel.

On November 2 and 8, 2023, Trail filed *ex parte* motions seeking authorization of funds for a mitigation specialist. The State objected to the request and asked for a hearing. Trail moved to overrule the State’s objection. The court held a hearing on these filings on November 30. Trail’s counsel stated that a mitigation specialist was needed to investigate claims and collect evidence in anticipation of an evidentiary hearing. The State pointed out that Trail had not yet filed a motion for

⁴ See Sup. Ct. R. 13(1).

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postconviction relief. The court asked counsel for briefing on the matter, and in the context of determining a due date, Trail’s counsel asserted that “the deadline for the postconviction motion is actually December 19th.”

On December 15, 2023, the court overruled Trail’s requests and sustained the State’s objection. It did so because “no post-conviction relief proceeding ha[d] been initiated.”

POSTCONVICTION PROCEEDINGS

On February 14, 2024, Trail filed a 78-page verified motion for postconviction relief. It contained no specific allegations of timeliness. In a section entitled “Procedural History,” it set forth numerous dates from the filing of the information in July 2018 to the overruling in December 2023 of his request for mitigation specialist funding. Among the dates were those concerning appellate counsel’s motion to withdraw, Trail’s requests for postconviction counsel, postconviction counsel’s subsequent motion to withdraw, and the appointment of replacement postconviction counsel. Trail alleged that when this court allowed his appellate counsel to withdraw, on December 2, 2022, it left him without counsel “at a critical moment.”

Trail’s motion primarily contained allegations of ineffective assistance of counsel. It also alleged that his death sentence constituted cruel and unusual punishment and that the State failed to disclose material and exculpatory evidence.

On May 6, 2024, the State filed a response to the post-conviction motion. The State asserted that the motion should be denied without an evidentiary hearing for numerous reasons, including that it was time barred because “[n]one of the subsections of . . . § 29-3001(4) apply to make [the motion] timely.”

On May 29, 2024, the court entered an order denying Trail’s motion as time barred. As to timeliness and referring to the court’s entire record, the court stated that there was no evidence that any subsection other than § 29-3001(4)(a) applied.

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The court found Trail’s failure to file his motion within the time limitation of § 29-3001(4) to be dispositive. Subsequently, no motion to alter or amend or motion seeking reconsideration was filed.

Instead, on June 27, 2024, Trail filed an “offer of proof to make a record of [his] response to the State’s . . . reply.” He first set forth a timeline of filings from November 10, 2022, to May 29, 2024. Then he asserted reasons to support his belief that his motion was timely: (1) This court allowed Trail to be abandoned by counsel before the mandate issued and before the time to file a petition for a writ of certiorari had expired; (2) Trail promptly filed two requests for the assistance of counsel on further appeal and postconviction proceedings but no such request was granted until February 21, 2023; (3) Trail was left without counsel from August 4 to September 8 due to his attorney’s conflict of interest; and (4) Trail’s current counsel, appointed September 8, had a voluminous record to review without the assistance of a mitigation specialist.

Trail suggested that the court should “exclude” certain time periods from the calculation of the 1-year limitation period. He asserted that 65 days between this court’s mandate and the order appointing counsel should be excluded, making the deadline to file February 21, 2024, at the earliest. Trail proposed an exclusion of 20 days from August 4, when prior counsel became burdened with an actual conflict of interest, to August 24, when counsel moved to withdraw. And Trail contended that 15 days between August 24, when prior counsel moved to withdraw, and September 8, when the court appointed different counsel, should be excluded. Trail asserted that his motion for postconviction relief was timely filed under § 29-3001(4)(c) “[i]n light of the abandonment of counsel at a critical stage of [his] direct appeal and the 100 days during which he was left effectively without counsel, despite his repeated pleas that counsel be appointed for purposes of postconviction proceedings.”

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Seventy minutes after Trail filed the offer of proof, he filed the instant appeal.

ASSIGNMENTS OF ERROR

Trail assigns that the district court erred by (1) denying his motion for postconviction relief as time barred and (2) denying the motion in violation of his due process rights.

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.⁵

[2] If the facts in a case are undisputed, the issue as to when the 1-year time limit for filing a verified motion for postconviction relief begins to run is a question of law.⁶

[3] The determination of whether the procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law.⁷

ANALYSIS

Trail's two assignments of error are related. He contends that the district court erred in denying his motion as time barred and in doing so without giving him an opportunity to be heard. We start with a discussion of the time limitation for filing a motion for postconviction relief. Then, we consider whether Trail raised any of his tolling arguments to the district court and whether the district court abused its discretion when it reviewed and dismissed Trail's motion without seeking a reply to the State's response.

⁵ *State v. Torres*, 300 Neb. 694, 915 N.W.2d 596 (2018).

⁶ See *id.*

⁷ *State v. Lotter*, 278 Neb. 466, 771 N.W.2d 551 (2009).

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TIME LIMITATION

[4,5] The Nebraska Postconviction Act contains a 1-year time limit for filing verified motions.⁸ The 1-year limitation period set out in § 29-3001(4) governs all postconviction motions, including successive motions and those challenging a death sentence.⁹ The period runs from one of five triggering events, whichever is later.¹⁰

[6] An appellate court looks to the allegations of the verified postconviction motion and the files and records of the case to determine which of the triggering events applies to a determination of timeliness under § 29-3001(4).¹¹ We see nothing implicating the triggering events described in § 29-3001(4)(b), (d), or (e). Of the two other triggering events, each party relies upon a different one.

The State asserted, and the district court agreed, that § 29-3001(4)(a) applied. The triggering event there is “[t]he 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.”¹² Pursuant to § 29-3001(4)(a), the last day for Trail to file his motion was December 16, 2023.

But Trail contends that his motion was timely because § 29-3001(4)(c) extended the time for filing. Under § 29-3001(4)(c), the 1-year period begins running on “[t]he 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.”

We turn to the State’s contention that tolling was not raised to the district court and Trail’s argument that he was not afforded an opportunity to be heard.

⁸ *State v. Torres*, *supra* note 5.

⁹ *State v. Lotter*, 311 Neb. 878, 976 N.W.2d 721 (2022).

¹⁰ § 29-3001(4).

¹¹ *State v. Torres*, *supra* note 5.

¹² § 29-3001(4)(a).

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PRESERVATION OF AND OPPORTUNITY TO
PRESENT TIMELINESS ARGUMENT

[7,8] States are not obligated to provide a postconviction relief procedure.¹³ Under the Nebraska Postconviction Act, the district court has discretion to adopt reasonable procedures for determining what the motion and the files and records show, and whether any substantial issues are raised, before granting a full evidentiary hearing.¹⁴

Trail argues that his postconviction motion was timely under § 29-3001(4)(c) because he was abandoned by counsel and because equitable tolling applies to capital cases. The State counters that Trail failed to preserve his timeliness arguments by not raising them to the district court. But Trail contends that he had no opportunity to present such arguments and that the district court violated his right to due process when it denied his motion as time barred without giving him an opportunity to be heard.

[9,10] We have previously rejected a similar due process argument. In *State v. Torres*,¹⁵ a prisoner sentenced to death filed a successive motion for postconviction relief and the district court denied it after determining that it was time barred. On appeal, the prisoner primarily challenged the procedure followed by the district court when it reviewed the motion and dismissed it sua sponte without giving him notice and an opportunity to be heard. We stated that district courts have discretion to provide the parties an opportunity to present their positions before acting sua sponte to dismiss a post-conviction motion as time barred and that an appellate court will examine such procedures for an abuse of discretion.¹⁶ An abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant

¹³ *State v. Lotter*, *supra* note 7.

¹⁴ *State v. Dean*, 264 Neb. 42, 645 N.W.2d 528 (2002).

¹⁵ *State v. Torres*, *supra* note 5.

¹⁶ See *id.*

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of a substantial right and denying a just result in matters submitted for disposition.¹⁷

We found no abuse of discretion in *Torres*. We noted that the prisoner did not argue that his motion was timely under any subsection of § 29-3001(4). Further, he did not point to anything he might have argued or offered, if provided such an opportunity, that would have changed the court's conclusion his claim was time barred.

Here, in considering the parties' respective positions, we start with Trail's verified motion for postconviction relief. It contained no assertions of timeliness. This absence is particularly glaring in light of the declaration by Trail's counsel during the November 2023 hearing that the deadline for filing a postconviction motion was December 19. Counsel's having so advised the court, one would reasonably expect the motion to explain why it was not filed by that date.

After the State asserted that Trail's motion was time barred under § 29-3001(4)(a), Trail had incentive to inform the court of his timeliness arguments. But over the ensuing 3 weeks, Trail did not file any reply. Nor did he ask for leave to amend his postconviction motion. Nor did he request a hearing.

Twenty-three days after the State's response, the court entered its order denying Trail's motion as time barred. Even after the order's entry, Trail took no prompt action to apprise the court of his timeliness arguments. He did not file a motion to alter or amend. He did not ask the court to reconsider. Instead, 52 days after the State's response, 29 days after the court's order, and approximately 70 minutes before depriving the district court of jurisdiction by filing a notice of appeal, Trail filed a document setting out his position regarding timeliness. His action came too late to be considered by the district court.

[11] An appellate court will not consider as an assignment of error a question not presented to the district court

¹⁷ See *id.*

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for disposition through a defendant’s motion for postconviction relief.¹⁸ We cannot read Trail’s postconviction motion as asserting timeliness under § 29-3001(4)(c). His motion did not mention that subsection, nor did it use any of its language. The mere recitation of dates concerning counsels’ motions to withdraw and the appointments of counsel, along with an allegation that Trail was left without counsel “at a critical moment,” are simply insufficient to put the court on notice that Trail was claiming “an impediment created by state action”¹⁹ prevented him from filing his motion. We find no abuse of discretion by the court in denying Trail’s motion as time barred without first inviting Trail to respond.

Even if Trail’s motion had alleged equitable tolling or tolling under § 29-3001(4)(c), neither would apply. We explain why next.

TOLLING OF LIMITATIONS PERIOD

We read Trail’s appellate brief as asserting three tolling-related arguments. Those arguments are based on equitable tolling, statutory tolling under § 29-3001(4)(c), and abandonment by counsel.

Where it applies, 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.²⁰ In a case decided last year, after observing that we were being asked for the fifth time to consider whether equitable tolling may be applied to the 1-year limitation period in § 29-3001(4), we stated: “[E]ven if [the prisoner] is correct and he would be entitled to equitable tolling based on his circumstances, in order to equitably toll his limitation period, the 1-year

¹⁸ *Id.*

¹⁹ § 29-3001(4)(c).

²⁰ See *State v. Boeggeman*, 316 Neb. 581, 5 N.W.3d 735 (2024), *disapproved on other grounds*, *State v. Goynes*, 318 Neb. 413, 16 N.W.3d 373 (2025).

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limitation period provided by § 29-3001(4) must be subject to equitable tolling. It is not.”²¹ We explained that the 1-year limitation period served the goals of the Nebraska Postconviction Act and that “we ha[d] previously declined to recognize common-law remedies for the purpose of asserting time-barred postconviction claims, as doing so would undermine the purpose of the Legislature in enacting § 29-3001(4).”²² For those same reasons, even in capital cases, § 29-3001(4) is not subject to equitable tolling.

A principle similar to equitable tolling is already found in the statutory tolling language of § 29-3001(4)(c).²³ And we have stated that “it is difficult to conceive of a circumstance outside § 29-3001(4)(c) that would support application of the equitable tolling doctrine in a postconviction motion.”²⁴ We turn to the statutory tolling language.

[12] To satisfy the tolling provision of § 29-3001(4)(c), a prisoner must show there was (1) an impediment created by state action, (2) which amounted to a violation of the federal or state Constitution or a state law, and (3) as a result, the prisoner was prevented from filing a verified motion. If all these factors are satisfied, the 1-year limitation period will begin to run on the date the impediment was removed.²⁵ These requirements are driven by the statutory language, which we are not empowered to embellish or supplement. Taking the last requirement first, we find that it has not been satisfied.

The plain language of § 29-3001(4)(c) requires a showing that an impediment prevented the prisoner from filing the verified motion.²⁶ We have stated that even if equitable tolling applied, the circumstances of a case would not support

²¹ *Id.* at 595, 5 N.W.3d at 745.

²² *Id.* at 598, 5 N.W.3d at 746.

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

²⁴ *Id.* at 399, 914 N.W.2d at 446.

²⁵ *State v. Amaya*, 298 Neb. 70, 902 N.W.2d 675 (2017).

²⁶ See *State v. Shannon*, 293 Neb. 303, 876 N.W.2d 907 (2016).

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the principle if the period in which the prisoner was claiming equitable tolling did not encompass the entire 1-year limitation period of § 29-3001(4).²⁷ For example, in *State v. Huggins*,²⁸ the prisoner argued that the limitation period should be tolled during the time he was in federal custody, but we stated that “no tolling occurs where, as in this case, the prisoner has time to file a motion for postconviction relief within the statutory 1-year period.”

That is the situation here. In Trail’s brief, he highlights the trial court’s 62-day delay in appointing postconviction counsel after he made the request and the 15-day delay in appointing replacement counsel after his postconviction counsel withdrew. In Trail’s last-minute filing, he asserted that he was without counsel for 100 days.

But at least two flaws doom Trail’s argument. First, even excluding those delays would still leave Trail with well over 200 days in which to file his motion. Trail has not shown that an impediment created by state action left him with no time to file his motion. But more fundamentally, the time limit for postconviction motions does not operate like Nebraska’s speedy trial statutes.²⁹

Finally, we reject Trail’s argument that his motion should be considered timely because he was abandoned by counsel. His reliance on *Maples v. Thomas*³⁰ is misplaced. There, a prisoner’s attorneys did not inform him that they left their law firm and could not serve as his counsel, nor did they seek leave from the court to withdraw. During the 42 days that the state court allowed for noticing an appeal from a trial court’s denial of postconviction relief, the prisoner was abandoned

²⁷ See, *State v. Conn*, *supra* note 23; *State v. Huggins*, 291 Neb. 443, 866 N.W.2d 80 (2015).

²⁸ *State v. Huggins*, *supra* note 27, 291 Neb. at 450, 866 N.W.2d at 86.

²⁹ See Neb. Rev. Stat. §§ 29-1205 to 29-1209 (Reissue 2016).

³⁰ *Maples v. Thomas*, 565 U.S. 266, 132 S. Ct. 912, 181 L. Ed. 2d 807 (2012).

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by counsel and was unaware that he needed to act pro se to protect himself. The U.S. Supreme Court found that due to the “extraordinary circumstances quite beyond his control,”³¹ the prisoner showed cause to excuse a procedural default.

In contrast, Trail was not abandoned by counsel—he abandoned his counsel. His appellate counsel sought leave to withdraw at Trail’s request. Trail knew that the motion was thereafter sustained and that he needed to act pro se until the court later appointed counsel for him. While the Legislature is free to amend the time limitation under § 29-3001(4) to extend the filing time in situations where a prisoner is truly abandoned by counsel, we are not.

CONCLUSION

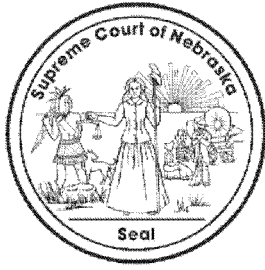
- For the reasons explained above, we conclude the following:
- Before dismissing a postconviction motion as time barred, it is within a district court’s discretion to provide the parties an opportunity to present their positions. The court did not abuse its discretion nor deprive Trail of due process when it denied Trail’s motion as time barred weeks after the State asserted it was untimely and Trail failed to take action.
 - Even in capital cases, § 29-3001(4) is not subject to equitable tolling.
 - Section 29-3001(4)(c) does not apply if the prisoner has time to file a motion for postconviction relief within the statutory 1-year period.

We affirm the district court’s order denying, as time barred, Trail’s motion for postconviction relief.

AFFIRMED.

BERGEVIN, J., not participating.

³¹ *Id.*, 565 U.S. at 289.



CLERK OF THE NEBRASKA SUPREME COURT
AND NEBRASKA COURT OF APPEALS
2413 State Capitol, P.O. Box 98910
Lincoln, Nebraska 68509-8910
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August 7, 2025

Laurence Komp
laurence_komp@fd.org

IN CASE OF: S-24-000484, State v. Aubrey C Trail
TRIAL COURT/ID: Saline County District Court CR18-37

The following filing: Motion Appellant for Rehearing & Brief
Filed on 06/09/25
Filed by appellant Aubrey C Trail #213318

Has been reviewed by the court and the following order entered:

Motion of Appellant for rehearing overruled.

Sincerely,
Joshua R. Shasserre
Clerk

**Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001**

Scott S. Harris
Clerk of the Court
(202) 479-3011

October 28, 2025

Mr. Laurence Edward Komp
CHU - Federal Public Defender - W.D. Mo.
1000 Walnut Street
Suite 600
Kansas City, MO 64106

Re: Aubrey C. Trail
v. Nebraska
Application No. 25A475

Dear Mr. Komp:


The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Kavanaugh, who on October 28, 2025, extended the time to and including January 4, 2026.

This letter has been sent to those designated on the attached notification list.

Sincerely,

Scott S. Harris, Clerk

by


Rashonda Garner
Case Analyst

**Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001**

Scott S. Harris
Clerk of the Court
(202) 479-3011

NOTIFICATION LIST

Mr. Laurence Edward Komp
CHU - Federal Public Defender - W.D. Mo.
1000 Walnut Street
Suite 600
Kansas City, MO 64106

Clerk
Supreme Court of Nebraska
2413 State Capitol Building
Lincoln, NE 68509

IN THE SUPREME COURT OF THE STATE OF NEBRASKA

STATE OF NEBRASKA,)	
	)	Case No. S 21-000557
Appellee,)	
)	
vs.	)	MOTION TO WITHDRAW
)	
AUBREY C. TRAIL,)	
)	
Appellant,)	

COME NOW Benjamin H. Murray and the law firm of Murray Law, P.C., L.L.O., and hereby move this Court for an order allowing them to withdraw as counsel for Aubrey C. Trail. In support of this motion, Benjamin H. Murray, attorney for Defendant, states:

1. Benjamin H. Murray and Joseph H. Murray were appointed to represent defendant herein on June 12, 2018.
2. Counsel have represented Defendant through trial and automatic appeal to the Nebraska Supreme Court.
3. On November 10, 2022, the Nebraska Supreme Court issued its opinion in this matter, affirming Defendant's conviction.
4. Following the Supreme Court's decision, Defendant contacted counsel by telephone and letter requesting the filing of this motion.
5. Because the undersigned counsels' representation has effectively ended with the decision of the Nebraska Supreme Court and in light of Defendant's request, withdrawal can be accomplished without material adverse effect on the interests of the defendant.

WHEREFORE, it is requested that this Court enter an order granting counsel leave to withdraw as attorneys of record herein.

Dated this 29th day of November, 2022.

MURRAY LAW, PC LLO

By */s/ Benjamin H. Murray*

Benjamin H. Murray
#24951
Attorney at Law
MURRAY LAW, PC LLO
147 North 4th Street
P.O. Box 87
Hebron, Nebraska 68370
(402) 768-7400
benmurray@murraylawpcullo.com

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above Motion to Withdraw was filed this date utilizing the JUSTICE E-File System, and that the undersigned counsel relies upon that system to make electronic services upon the attorneys of record for plaintiff herein, James D. Smith, Assistant Attorney General, electronically, and by mailing a properly addressed photocopy thereof to defendant, Aubrey C. Trail, Inmate #213318, Tecumseh State Correctional Institution, 2725 Highway 50, Tecumseh, Nebraska 68450 by United States Mail, postage prepaid, this 29th day of November, 2022.

/s/ Benjamin H. Murray

Benjamin H. Murray
#24951
Attorney at Law
MURRAY LAW, PC LLO
147 North 4th Street
P.O. Box 87
Hebron, Nebraska 68370
(402) 768-7400
benmurray@murraylawpcullo.com

Certificate of Service

I hereby certify that on Tuesday, November 29, 2022 I provided a true and correct copy of this *Motion Appt Counsel to Withdraw Murray* to the following:

Aubrey C Trail #213318 service method: **Other (Certified Mail N/A)**

State of Nebraska represented by James D Smith (15476) service method: Electronic Service to **james.smith@nebraska.gov**

Signature: /s/ Benjamin H. Murray (24951)

(1)

21-0557

TO: Clerk of the Nebraska Supreme Court 12-4-22

Dear Clerk,

Can you send me information as to how I go about getting an attorney appointed to me for the next part of the appeals process. Murray Law PC LHO were my attys during the trial phase and the mandatory appeal which was recently rejected by the Court and they have filed a motion to withdraw as their job and what they were appointed for is completed.

I have decided to pursue the next phase in the appeal process but do not have the knowledge or ability to do so myself. I was found to be indigent by the district Court of Saline County and my status has not changed as I am on death row.

I am making a request with this letter that I be appointed an attorney for the post conviction phase. If there are papers I need to fill out I ask that you send them to me or that you send me any information I need in how to go about getting an attorney for what comes next in the appeals process.

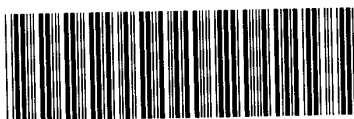
Thank you

Aubrey C. Trail

Aubrey C. Trail #213318

P.O. Box 900

Tecumseh NE 68450-0900



000102675NSC

FILED

DEC 07 2022

NEBRASKA SUPREME COURT
COURT APPEALS

CERTIFICATE OF SERVICE

On December 7, 2022 the preceding notice was sent to the following persons at the addresses given, by mailing by United States Mail, postage prepaid, or E-mail:

James D Smith
james.smith@nebraska.gov



Wendy A. Wussow

Wendy A. Wussow
Clerk

(1)

Dear Clerk,

12-21-22

I am requesting of the Court that an attorney be appointed to help me in the Post Conviction Phase of my appeal process. I do not have the knowledge nor the means to proceed myself pro se.

Murray Law has been granted leave to withdraw from my case by the Nebraska Supreme Court and can not represent me any further as one of my issues is Post Conviction Filing could possibly be ineffective assistance of Counsel.

I understand that I don't have an absolute right to have an attorney appointed but to not appoint one I believe would raise huge questions of fairness as well as prejudice as there is no other inmate currently under a sentence of death in Nebraska who was not appointed Counsel in the Post Conviction Phase.

I have already been ruled indigent by the trial court. I ask that you consider this letter as my motion for an attorney to be appointed to me. If there are papers I need to fill out please send those to me. Thank you.



000052471D22

Aubrey C. Trail #213318
P.O. Box 90
Tecumseh, NE.
68450-0090

FILED BY THE CLERK
023 JAN 06 PM 2:33
CLERK OF DISTRICT COURT
LINCOLN, NEBRASKA

IN THE DISTRICT COURT OF SALINE COUNTY, NEBRASKA

DISTRICT



STATE OF NEBRASKA

Case No. CR18-37

Plaintiff,

vs.

AUBREY C TRAIL

Defendant.

FINANCIAL AFFIDAVIT

OF DISTRICT COURT
SALINE COUNTY, NEBRASKA

2023 JAN 18 PM 2:36

FILED BY THE CLERK

I hereby swear that by reason of poverty:

☒ I am unable to pay the docket fee, cost bond, and other costs of appeal, and I believe I am entitled to redress.

☒ I am unable to afford counsel to represent me in this proceeding.

☐ I am unable to pay the judgment assessed against me;

I wish to apply for time in which to pay such judgment.

The nature of this action, defense or appeal is:

I hereby submit the following financial affidavit.

I. Employer: NONE - I am a Death Row inmate
Address: P.O. Box 900 Tecumseh NE 68450-0900
Length of employment: _____

If unemployed, state reason, physical or otherwise, why you cannot be employed: IN CARCERATED

II. Income (Monthly)

	Self	Spouse
A. Wages	\$ 0	\$ 0
B. Welfare	\$ 0	\$ 0
C. Unemployment	\$ 0	\$ 0
D. Parents	\$ 0	\$ 0
E. Other	\$ 0	\$ 0

III. Family Assets

A. Cash on Hand	\$ 0	F. Rentals	\$ 0
B. Bank Accounts	\$ 0	G. Tools	\$ 0
C. Automobiles	\$ 0	H. Equipment	\$ 0
D. Real Estate	\$ 0	I. Jewelry	\$ 0
E. Securities, Stocks, Bonds	\$ 0	J. Other	\$ 0



000052505D22

IV. Marital Status: ☒ Single ☐ Married ☐ Divorced ☐ Widowed

Name of Spouse: _____

Number of children you are supporting and their ages: _____

V. Debts

(continue on back, if needed)

A. US Government	\$	428,000.00 (Restitution)
B. _____	\$	
C. _____	\$	
D. _____	\$	
E. _____	\$	
F. _____	\$	
G. _____	\$	
H. _____	\$	
I. _____	\$	
J. _____	\$	
K. _____	\$	
L. _____	\$	

Monthly Expenses

(continue on back, if needed)

A. Necessities in	\$	
B. Prison,	\$	
C. Hygiene,	\$	
D. working supplies	\$	
E. ect.	\$	
F. _____	\$	
G. _____	\$	
H. _____	\$	
I. _____	\$	
J. _____	\$	
K. _____	\$	
L. _____	\$	

FILED BY THE CLERK
2023 JAN 18 PM 2:36
OF DISTRICT COURT
SALINE COUNTY NEBRASKA

VI. Education Completed: 12th Grade

I swear or affirm, under penalty of perjury, that the foregoing financial affidavit is true and hereby request the following:

- ☒ Waiver of payment of docket fee, cost bond and other costs of appeal.
- ☒ Appointment of counsel to represent me in this proceeding.
- ☐ Additional time in which to pay the judgment assessed against me.

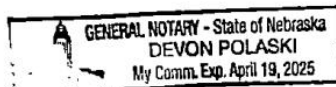
SIGN IN FRONT OF NOTARY PUBLIC

Signature [Signature] Date: 1-11-23
Name _____ Street Address/P.O. Box P.O. Box 900 Tecumseh NE 68451
Bar Number and Firm Name (attorneys only) _____ City/State/ZIP Code _____
Phone _____ Email Address _____

State of Nebraska)
County of Johnson) ss.

This document was acknowledged before me by Aubrey Trail
this 11th day of January, 20 23.
[Signature] Notary commission expires: 4/19/2025
Signature of Judge/Clerk of the Court/Notary Public
Title: _____ Serial Number (if any): _____

FILED BY THE CLERK
2023 JAN 18 PM 2:36
OF DISTRICT COURT
SALINE COUNTY NEBRASKA



	ORDER	Filed in Saline District Court *** EFILED *** Case Number: D22CR180000037 Transaction ID: 0019408637 Filing Date: 01/19/2023 10:45:35 AM CST
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IN THE DISTRICT COURT OF SALINE COUNTY, NEBRASKA

STATE V. AUBREY C TRAIL

Case ID: CR18-37

NOW on this 19th day of January, 2023, this matter comes before the Court. The Court, having reviewed the Defendant's request to proceed in forma pauperis and for appointed counsel and Defendant's Financial Affidavit, finds that the Defendant has failed to include all the necessary documentation to support the Financial Affidavit. Therefore, the Defendant is ordered to file a certified copy of his institutional account statement for the past 6 months within 21 days of the date of this Order.

IT IS SO ORDERED.

BY THE COURT:

David J.A. Bargaen

(1)

Dear Clerk,

1-30-23

Please find enclosed the inmate request form where I asked for my prison account sheet for the past 6 months.

I am told I have to contact Lincoln Central accounting for a print out that far back as the prison can only do 90 days.

I have written to Central accounting for the 6 month read out as the court has ordered but do not know if I will get it and be able to get it to the court within the 21 days the court gave me.

Because of these reasons I ask the court for a 30 day extension in getting the required information as I have no way of knowing how long Central accounting will take to get the print out to me.

Respectfully

Aubrey G. Trail

Aubrey G. Trail #213318

P.O. Box 900

Tecumseh, NE

68450-0900

FILED BY THE CLERK

2023 FEB -3 AM 11:51

CLERK OF DISTRICT COURT
SALINE COUNTY NEBRASKA



000052569D22

Page 11 of 186

NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES

INMATE INTERVIEW REQUEST

TO: D-Gallery CM McNair DATE: 1-26-23
 FROM: Aubrey Trail #213318 TSCJ SMU D-5
NAME / NUMBER FACILITY LOCATION

WORK LOCATION: _____ UNIT STAFF: _____

MESSAGE: The Saline County District Court wants
a print out of my account for the last
6 months. I can't seem to get a response
from inmate accounting.
Can you give me an account print out of
my account activity for the last 6 months.
This is for the financial affidavit I filed
with the court for an attorney.
If you need to see the letter from the
court, it will stop by my cell to (in)
show it to you.

Thank you

Aubrey Trail #213318
 Signature

ORIGINAL - DCS Employee
 YELLOW - Inmate
 Both copies need to be submitted for response.

REPLY: THE INSTITUTION CAN ONLY PRINT OFF
THE LAST 90 DAYS IF YOU'D LIKE A
6 MONTH REPORT YOU'LL NEED TO CONTACT
CENTRAL OFFICE ACCOUNTING IN LINCOLN.

1-27-23
 Date

cm McNair
 Signature

DCS-A-013 (rev. 1/2017)

FILED BY THE CLERK
 2023 FEB -3 AM 11:51
 OF DISTRICT COURT
 SALINE COUNTY NEBRASKA

	JOURNAL ENTRY/ORDER	Filed in Saline District Court *** EFILED *** Case Number: D22CR180000037 Transaction ID: 0019491609 Filing Date: 02/07/2023 02:48:34 PM CST
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IN THE DISTRICT COURT OF SALINE COUNTY, NEBRASKA

STATE V. AUBREY C TRAIL

Case ID: CR18-37

NOW on this 7th day of February, 2023, this matter comes before the Court. The Court, having reviewed the Defendant's request for additional time to provide a certified copy of his institutional account statement for the past six (6) months, grants the Defendant an extra 30 days from the date of this Order to provide the necessary documentation requested.

IT IS SO ORDERED.

BY THE COURT:

David J.A. Bargaen

	<p>ORDER FOR APPOINTMENT OF COUNSEL</p>	<p>Filed in Saline District Court *** EFILED *** Case Number: D22CR180000037 Transaction ID: 0019547891 Filing Date: 02/21/2023 10:56:40 AM CST</p>
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IN THE DISTRICT COURT OF SALINE COUNTY, NEBRASKA

STATE V. AUBREY C TRAIL

Case ID: CR18-37

NOW on this 21st day of February, 2023, this matter came before the Court on Defendant Aubrey Trail's Motion for Appointment of Counsel.

After reviewing the affidavit and attached institutional account transactions, the Motion for Appointment of Counsel is granted and Timothy S. Noerrlinger is appointed to represent the Defendant.

IT IS SO ORDERED.

BY THE COURT:



David J.A. Bargaen

IN THE DISTRICT COURT OF SALINE COUNTY, NEBRASKA

STATE OF NEBRASKA,	)	CR18-37
)	
PLAINTIFF,)	
)	
VS.	)	MOTION TO WITHDRAW
)	
AUBREY C. TRAIL,)	
)	
DEFENDANT.)	

COMES NOW Timothy S. Noerrlinger, Attorney at Law, and hereby moves this Court for an order allowing him to withdraw as counsel for Defendant in the above-entitled matter. Counsel has taken a position with Nebraska Commission on Public Advocacy and is no longer able to represent client.

s/Timothy S. Noerrlinger, #23222
Attorney at Law
446 S. 10th Street
Lincoln, NE 68508
(402) 474-5529
tim@rapplaw.com

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing motion was served upon Sandra J. Allen, Deputy Saline County Attorney, via electronic service this 24th day of August, 2023.

s/Timothy S. Noerrlinger, #23222

IN THE DISTRICT COURT OF SALINE COUNTY, NEBRASKA

STATE OF NEBRASKA,	)	Case No. CR18-37
)	
Plaintiff,)	
	)	OFFER OF PROOF
vs.)	
)	
AUBREY C. TRAIL,)	
)	
Defendant.)	

COMES NOW, Aubrey C. Trail, by and through his attorney of record and respectfully files an offer of proof to make a record of the undersigned's response to the State's May 6, 2024 reply to the defendant's Verified Motion for Postconviction Relief. Counsel shows as follows:

1. On November 10, 2022, the Nebraska Supreme Court released an opinion affirming Mr. Trail's conviction and sentence on direct appeal.
2. On November 29, 2022, before the Nebraska Supreme Court issued a mandate, trial counsel filed a motion to withdraw as counsel.
3. At the time trial counsel moved to withdraw, no motion for rehearing or motion to stay the mandate was filed.
4. On December 2, 2022, the Nebraska Supreme Court granted trial counsel's motion to withdraw even though Mr. Trail was still within the time to file a Petition for a Writ of Certiorari with the United States Supreme Court.
5. On December 4, 2022, Mr. Trail mailed for filing a motion requesting that new counsel be appointed to pursue further appeals or postconviction relief.
6. On December 14, 2022, the Nebraska Supreme Court denied Mr. Trail's request for the appointment of counsel while he was still within the time to file a Petition for a Writ of Certiorari with the United States Supreme Court.
7. The Nebraska Supreme Court filed the mandate on December 18, 2022 and this Court issued the mandate on December 19, 2022.
8. On December 21, 2022, Mr. Trail mailed for filing another motion for the appointment of counsel with the Saline County District Court.
9. Sixty-two days later, on February 21, 2023, this Court appointed Mr. Timothy Noerrlinger to represent Mr. Trail in his postconviction action. This

appointment only occurred after the expiration of the time for filing certiorari with the Supreme Court of the United States.

10. On August 4, 2023, Mr. Noerrlinger accepted a position with the Nebraska Commission on Public Advocacy.
11. At the time Mr. Noerrlinger accepted the position, the NCPA was representing Mr. Trail's co-defendant, Ms. Bailey Boswell. From that time onward, Mr. Noerrlinger could no longer represent Mr. Trail due to a conflict of interest. *See Noerrlinger Affidavit.*
12. Twenty days later, on August 24, 2023, Mr. Noerrlinger filed a motion to withdraw as counsel.
13. Fifteen days later, on September 8, 2023, this Court granted Mr. Noerrlinger's motion to withdraw and appointed current counsel.
14. On October 18, 2023, current counsel filed a motion to seal an affidavit to be used in support of a request for a mitigation specialist in order to conduct the necessary investigation in furtherance of Mr. Trail's postconviction motion.
15. On October 30, 2023, current counsel re-filed the motion to seal with additional information that was requested by this Court.
16. On November 2, 2023, this Court granted counsel's motion to seal and counsel promptly filed an Ex-Parte Motion for Mitigation Specialist.
17. On November 8, 2023, a second motion for mitigation specialist was filed at the request of this Court with service on the plaintiff.
18. On November 16, 2023, the State filed an objection to counsel's request for a mitigation specialist and counsel filed a response to the State's motion the next day, on November 17, 2023.
19. On November 22, 2023, this Court issued an order setting a hearing on counsel's motion for a mitigation specialist.
20. A hearing was held on November 30, 2023, and this Court took the issue under advisement to allow parties to submit briefs.
21. Both parties submitted their briefs to this court on December 7, 2023.
22. On December 15, 2023, this Court denied Mr. Trail's motion for mitigation specialist because Mr. Trail had not yet filed a postconviction motion.
23. On February 14, 2024, Mr. Trail filed his Verified Motion for Postconviction Relief.
24. With no response or action from this Court, the State filed a response on May 6, 2024, alleging that Mr. Trail's Verified Motion for Postconviction Relief is time-barred.

25. On May 29, 2024, this Court denied Mr. Trail's Verified Motion for Postconviction Relief on the grounds that the motion is time-barred without providing an opportunity for Mr. Trail to respond to the State's argument.
26. Mr. Trail's Verified Motion for Postconviction Relief is timely pursuant to Neb. Rev. Stat. § 29-3001(4)(c).
27. The Nebraska Supreme Court allowed Mr. Trail to be abandoned by counsel before the mandate issued and before the time to file a Petition for a Writ of Certiorari had expired.
28. Despite Mr. Trail promptly filing two requests for the assistance of counsel on further appeal and postconviction proceedings, this request was not granted until February 21, 2023.
29. Even after counsel was initially appointed, Mr. Trail was again left without representation from August 4, 2023, to September 8, 2023, an additional 35 days, because his attorney had a conflict of interest that precluded him from continuing to represent Mr. Trail. *See Noerrlinger Affidavit.*
30. Current counsel, appointed on September 8, 2023, was left with the task of reviewing a 4,503-page Bill of Exceptions, 922 exhibits, 9 banker boxes containing trial counsel's file, and approximately 1 terabyte of digital discovery while also following up on the numerous investigative leads that were ignored by trial counsel, as outlined in Mr. Trail's Verified Motion for Postconviction Relief, without the assistance of a qualified mitigation specialist.
31. The Court should exclude from the calculation of the one-year statute of limitations the 65 days between the Supreme Court's mandate and this Court's order appointing counsel, making the deadline to file a Verified Motion for Postconviction Relief February 21, 2024, at the earliest.
32. The Court should further exclude the 20 days from August 4, 2023, when Mr. Trail's previous counsel became burdened with an actual conflict of interest, and August 24, 2023, when conflicted counsel moved to withdraw. Counting these 20 days, during which Mr. Trail was left without non-conflicted representation, would make the deadline to file a Verified Motion for Postconviction Relief March 12, 2024.
33. The Court should further exclude the 15 days between August 4, 2023, when Mr. Trail's previous counsel moved to withdraw, and September 8, 2023, when the Court appointed the undersigned to represent Mr. Trail. Counting these 15 days, the deadline to file a Verified Motion for Postconviction Relief would be March 27, 2024.

34. Having filed a Verified Motion for Postconviction Relief prior to those dates, Mr. Trail had timely and properly filed with this Court.

In light of the abandonment of counsel at a critical stage of Mr. Trail's direct appeal and the 100 days during which he was left effectively without counsel, despite his repeated pleas that counsel be appointed for purposes of postconviction proceedings, Mr. Trail's Verified Motion for Postconviction Relief was timely filed pursuant to Neb. Rev. Stat. § 29-3001(4)(c). Mr. Trail offers the foregoing and the attached Exhibit A in response to the State's May 6, 2024, response to his Verified Motion for Postconviction Relief as an offer of proof of the information he would have presented to this Court had he been provided a meaningful opportunity to respond.

Dated this 27th date of June, 2024.

Respectfully submitted,
AUBREY C. TRAIL, Defendant

BY: /s/Megan R. Kielty, #26113
Attorney for Defendant
Berry Law Firm
6940 O Street, Ste. 400
Lincoln, NE 68510
(402)466-8444
megan.kielty@berrylaw.com

IN THE DISTRICT COURT OF SALINE COUNTY, NEBRASKA

STATE OF NEBRASKA,) Case No. CR18-37
)
Plaintiff,) AFFIDAVIT
)
vs.)
)
AUBREY C. TRAIL,)
)
Defendant.)

I, Timothy S. Noerrlinger, being duly sworn under oath, state:

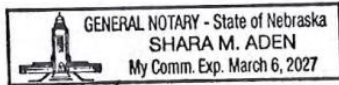
1. On February 21, 2023, I was appointed to represent the defendant, Aubrey Trail, to serve as postconviction counsel;
2. On August 4, 2023, I accepted a full-time position as an attorney with the Nebraska Commission on Public Advocacy;
3. At the time I accepted said position, the Nebraska Commission on Public Advocacy was representing the defendant's co-defendant, Bailey Boswell;
4. I moved to withdraw from defendant's case on August 24, 2023;
5. This court granted me leave to withdraw on September 8, 2023;
6. Due to the potential conflict created by accepting a position with the Nebraska Commission on Public Advocacy, I ceased my preparation of defendant's postconviction motion;
7. Between August 4, 2023 and September 8, 2023, I limited my actions in defendant's case to a brief review of some FBI reports and three phone calls with the defendant to keep him apprised of the status of his case and prepare him for the transition to a new attorney.

I hereby swear, or affirm, under penalty of perjury, that the above information is true.

Signature: Timothy A. Noerrlinger Date: 6/27/24
Printed Name: Timothy Noerrlinger
Address: 140 N. 8th, Suite 270, Lincoln, NE 68508
Telephone Number: 402-471-7778
Email: tnoerrlinger@ncpa-ne.gov

State of Nebraska)
) ss.
County of Lancaster)

SUBSCRIBED and SWORN to before me this 27th day of
June, 2024.



Shara M. Aden
Notary Public

IN THE DISTRICT COURT OF SALINE COUNTY, NEBRASKA

STATE OF NEBRASKA,	)	CR 18-37
)	
Plaintiff,)	
)	
vs.	)	ORDER
)	
AUBREY TRAIL,)	
)	
Defendant.)	

Now this 8th day of September, 2023, this matter came before the Court on defendant's counsel's request for leave to withdraw from the above captioned case due to a change in said counsel's employment. The Court, being fully advised in the premises, finds that said motion to withdraw should be sustained.

IT IS ORDERED that Mark Rappl and Megan Kielty of Naylor and Rappl Law, be appointed to represent defendant on the above captioned case.

IT IS FURTHER ORDERED that defendant's trial counsel, Timothy S. Noerrlinger is given leave to withdraw from the above captioned case due to the appointment of defendant's new court appointed attorney and for the reasons noted above.

BY THE COURT:


District Court Judge
David J. A. Barga

IN THE DISTRICT COURT OF SALINE COUNTY, NEBRASKA

STATE OF NEBRASKA,	)	Case No. CR 18-37
)	
Plaintiff,)	
)	
v.	)	ORDER
)	
AUBREY C. TRAIL,)	
)	
Defendant.)	

NOW ON THIS 29th day of May, 2024, this matter comes on for decision on Defendant's Motion for Post Conviction Relief.

BACKGROUND

On June 9, 2021, Defendant was sentenced on Count I, First Degree Murder, to death; on Count II, Improper Disposal of Human Skeletal Remains, to two years in prison; and on Count III, Criminal Conspiracy to Commit First Degree Murder, to 50 years in prison. On July 6, 2021, Defendant filed a Notice of Appeal. On November 10, 2022, the Nebraska Supreme Court issued its opinion affirming the District Court, and the Supreme Court issued its Mandate on December 16, 2022. The Mandate was filed by the Clerk of the District Court on December 19, 2022, and judgment on the Mandate was entered by the District Court on the same day.

On January 3, 2023, Defendant filed with the Clerk of the District Court a letter styled as a motion requesting appointment of counsel for the postconviction phase of his case, and on January 18, 2023, filed a financial affidavit in support of the motion. The affidavit failed to attach Defendant's institutional account statement from the Department of Corrections, and the District Court entered an Order on January 19, 2023, granting Defendant 21 days to so file the account statement. On February 3, 2023, Defendant requested an additional 30 days to file his account statement, and on February 7, 2023, the District Court granted Defendant's request. On February 21, 2023,

Defendant filed his account statement, and on the same day, after reviewing Defendant's financial affidavit and account statement, the District Court appointed counsel to represent Defendant in his postconviction proceedings. On August 24, 2023, Defendant's counsel moved to withdraw from representation, and on September 8, 2023, the District Court issued an Order granting counsel's request to withdraw and appointing new counsel for Defendant.

On November 2 and 8, 2023, Defendant filed an Ex Parte Motion for Mitigation Specialist requesting the Court authorize \$25,000.00 for Defendant to hire a mitigation specialist to "assist in the investigation of issues that are reasonably necessary to the identification and development of potential grounds for postconviction relief." The State filed an objection, and Defendant filed a Motion to Overrule Objection. Hearing was held on the Motions on November 30, 2023, and counsel submitted written closing arguments on December 7, 2023. On December 15, 2023, the District Court issued its Order denying Defendant's Motion because no postconviction proceeding had yet been initiated with the filing of a motion for postconviction relief. Nearly two months later, on February 14, 2023, Defendant filed his Verified Motion for Postconviction Relief. On May 6, 2024, while Defendant's Motion was pending, the State filed a Response to Defendant's Motion for Postconviction Relief.

LAW

Neb. Rev. Stat. § 29-3001(1) provides:

"A prisoner in custody under sentence and claiming a right to be released on the ground that there was such a denial or infringement of the rights of the prisoner as to render the judgment void or voidable under the Constitution of this state or the Constitution of the United States, may file a verified motion, in the court which imposed such sentence, stating the grounds relied upon and asking the court to vacate or set aside the sentence."

Section 29-3001(4) provides for a one year limitations period for the filing of a motion for postconviction relief:

“A one-year period of limitation shall apply to the filing of a verified motion for postconviction relief. The one-year limitation period shall run from the later of:

- (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; or
- (e) The date on which the Supreme Court of the United States denies a writ of certiorari or affirms a conviction appealed from the Nebraska Supreme Court. This subdivision only applies if, within thirty days after petitioning the Supreme Court of the United States for a writ of certiorari, the prisoner files a notice in the district court of conviction stating that the prisoner has filed such petition.”

ANALYSIS

Before proceeding to the merits of Defendant’s Motion, the Court must first consider whether it was timely filed under the statutory

requirements. *See State v. Koch*, 304 Neb. 133 (2019) (holding it is error for a district court to hold an evidentiary hearing on a motion for postconviction relief where the motion is time barred).

“[I]f, as part of its preliminary review, the trial court finds the postconviction motion affirmatively shows—either on its face or in combination with the files and records before the court—that it is time barred under § 29-3001(4), the court is permitted, but not obliged, to sua sponte consider and rule upon the timeliness of the motion. Whether to rule sua sponte on the timeliness of a postconviction motion is a matter left to the discretion of the district court.”

State v. Boeggeman, 316 Neb. 581, 592 (2024).

Regarding the timeliness of the filing of Defendant’s Motion, there is no evidence in this case that any subsection other than subsection (a) of Section 29-3001(4) applies. Indeed, at the hearing on Defendant’s Ex Parte Motion for Mitigation Specialist, counsel for Defendant stated to the Court “the deadline for the postconviction motion is actually December 19th,” which corresponds to the statutory requirement of Section 29-3001(4)(a) that the one-year limitation period shall run from “[t]he 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.”

“In *State v. Huggins*, we held the issuance of a mandate by a Nebraska appellate court is a definitive determination of the conclusion of a direct appeal, and the date the judgment of conviction became final, for purposes of § 29-3001(4)(a). *State v. Huggins* observed that when a criminal conviction is appealed, this court has often indicated the finality of the judgment is tied to the issuance of a final mandate, and that under Nebraska law and procedure, the issuance of a mandate by an appellate court is a clear signal that a direct appeal has been concluded. Since our decision in *Huggins*, both this

court and the Court of Appeals have applied the rule that for purposes of § 29-3001(4)(a), the conclusion of a direct appeal occurs when a Nebraska appellate court issues the mandate in the direct appeal.

Koch, 304 Neb. at 138 (emphasis added) (internal quotation marks and alterations omitted). In this case, the record shows the Nebraska Supreme Court issued its Mandate on December 16, 2022. Under prevailing case law, “that is the date on which [Defendant’s] judgment of conviction became final by the conclusion of his direct appeal for purposes of Section 29-3001(4)(a).” *Id.* at 139. Defendant filed his Motion for Postconviction Relief on February 14, 2024, well beyond one year after the date the mandate was issued by the Supreme Court. Even if counted from the date the Mandate was filed by the Clerk of the District Court and judgment entered on the Mandate by the District Court on December 19, 2023, the date referenced by counsel for Defendant at the November 30 hearing, but which would not comport with the direction in *Koch*, Defendant’s Motion was still filed nearly two months beyond the one-year limitation period. As such, Defendant’s Motion for Postconviction Relief is time barred under Section 29-3001(4)(a).


Because Defendant’s failure to file his Motion for Postconviction Relief within the time limitation of Section 29-3001(4) is dispositive, the Court need not, and does not, reach the issues raised in his Motion, and no hearing will be held on the Motion.

CONCLUSION

Because Defendant’s Motion for Postconviction Relief is time-barred pursuant to Neb. Rev. Stat. § 29-3001(4), the Motion is denied.

IT IS SO ORDERED.

BY THE COURT:


David J. A. Barga
District Judge

CERTIFICATE OF SERVICE

I, the undersigned, certify that on May 29, 2024 , I served a copy of the foregoing document upon the following persons at the addresses given, by mailing by United States Mail, postage prepaid, or via E-mail:

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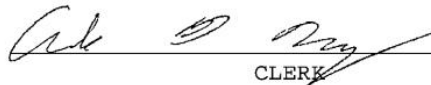
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BY THE COURT:


CLERK

