

No. 25-6512

In the Supreme Court of the United States

AUBREY C. TRAIL,

Petitioner,

v.

NEBRASKA,

Respondent.

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

BRIEF IN OPPOSITION

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CAPITAL CASE
QUESTIONS PRESENTED

Petitioner Aubrey Trail received a sentence of death after a jury found him guilty of the gruesome murder of Ms. Sydney Loofe. Trail filed a postconviction motion that the district court denied as time barred. The Nebraska Supreme Court affirmed the district court. Trail's questions presented before this Court can be summarized as follows:

1. Whether the State violated Trail's right to due process by not equitably tolling or extending his deadline to file a postconviction motion by the amount of time he was without conflict-free counsel after conviction.

2. Whether the Due Process Clause required the State to equitably toll Trail's postconviction motion deadline under the attorney-abandonment doctrine when Trail demanded that his counsel withdraw.

3. Whether the State violated Trail's right to due process by requiring him to reconfirm his indigency status before appointing him postconviction counsel.

PROCEEDINGS DIRECTLY RELATED TO THIS CASE

In addition to the proceedings identified in Trail's petition, the State of Nebraska is also aware of the following proceeding:

State v. Trail, No. S-21-557, Nebraska Supreme Court. Judgment entered November 10, 2022.

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STATUTES OR OTHER PROVISIONS INVOLVED

In addition to the statutes and other provisions identified in Trail's petition, this case also involves Neb. Rev. Stat. § 29-3004. That statute provides:

The district court may appoint not to exceed two attorneys to represent the prisoners in all proceedings [for postconviction relief]. The district court, upon hearing the application, shall fix reasonable expenses and fees, and the county board shall allow payment to the attorney or attorneys in the full amount determined by the court. The attorney or attorneys shall be competent and shall provide effective counsel.

BRIEF IN OPPOSITION

A Nebraska jury convicted Aubrey Trail for the murder of Ms. Sydney Loofe and sentenced him to death. After the Nebraska Supreme Court affirmed the conviction and sentence, Trail asked the district court to appoint him postconviction counsel (to file a motion for postconviction relief for ineffective assistance of counsel). The district court required him to submit evidence of his indigency before appointing counsel. The district court appointed new counsel, and Trail had over 200 days with conflict-free counsel to file his postconviction motion. Trail filed his postconviction motion after the deadline, and the district court denied the motion as time barred. The Nebraska Supreme Court affirmed, holding that Trail failed to preserve his timeliness arguments and, in the alternative, that the motion was untimely.

Trail now argues that the State violated his due process rights by requiring him to prove his indigency before appointing counsel and by not extending his postconviction motion deadline by the amount of time he did not have conflict-free postconviction counsel. But this Court does not have jurisdiction to hear those arguments because the Nebraska Supreme Court held, as a matter of *state* law, that Trail failed to preserve those arguments. In any event, this Court has held that prisoners do not have a constitutional right to postconviction counsel. And this case presents a poor vehicle for this Court to revisit that precedent because the State appointed Trail counsel in plenty of time to file his postconviction motion.

The Court should deny the petition.

STATEMENT OF THE CASE

I. In late 2017, 24-year-old Sydney Loofe disappeared. *State v. Trail*, 981 N.W.2d 269, 282–83 (Neb. 2022). After opening an investigation, the State identified Aubrey Trail as a suspect. His cellphone location history led police officers to a roadside ditch where they discovered portions of Ms. Loofe’s body separated into 14 parts and placed into garbage bags. *Id.* at 283. Her autopsy revealed the manner of death was “homicidal violence that included an element of strangulation.” *Ibid.*

The remainder of Ms. Loofe’s body—including most of her internal organs, which the autopsy revealed were likely removed postmortem by a sharp blade—were never found. *Ibid.* Police discovered that Trail had purchased dropcloths, a hacksaw, blades, and tin snips the day Ms. Loofe was last seen alive. *Id.* at 282. Trail’s cellphone data showed that he was at Ms. Loofe’s apartment that night, and one of Ms. Loofe’s neighbors testified that the smell of bleach was so strong the following day that another resident became ill. *Id.* at 282–83. After police arrested Trail, he “spoke of draining [Ms. Loofe’s] blood from her body and being ‘very thirsty that day.’” *Id.* at 283. Ms. Loofe’s body also showed signs that she was restrained and suffered severe blunt force trauma before her death. *Ibid.*

II. The State charged Trail with one count of first-degree murder, one count of improper disposal of human skeletal remains, and one count of criminal conspiracy. Pet.App.3a. Trail pleaded no contest to the improper disposal of human skeletal remains, and a Nebraska jury convicted him on the counts of first-degree murder and criminal conspiracy. *Ibid.* A three-judge panel sentenced Trail to death. *Ibid.* Trail filed a direct appeal, and the Nebraska Supreme Court affirmed the conviction and

sentence. *Ibid.* Trail did not file a motion for rehearing or a petition for writ of certiorari from direct appeal. Pet.App.3a, 4a. The Nebraska Supreme Court issued its mandate on December 16, 2022. Pet.App.4a.

III. Over a year later, on February 14, 2024, Trail filed a motion for postconviction relief. Pet.App.5a. Trail's motion alleged ineffective assistance of counsel and other constitutional claims. *Ibid.* The State opposed the motion, arguing it was untimely. *Ibid.* The State asserted that under Neb. Rev. Stat. § 29-3001(4)(a), Trail's deadline to file was one year from "[t]he date the judgment of conviction became final by the conclusion of a direct appeal," which was December 16, 2023 (one year from the Nebraska Supreme Court's mandate). Pet.App.8a.

Trail did not file a response or request a hearing. Pet.App.10a. And his postconviction motion failed to offer any suggestion that his motion was timely. *Ibid.* The district court thus denied his motion as time barred. Pet.App.5a. Trail did not file a motion for reconsideration. *Ibid.*

IV. Trail appealed the denial of his postconviction motion. On the same day, he filed an "offer of proof" that, for the first time, responded to the State's timeliness arguments. Pet.App.6a, 7a.

Trail contended that he did not have an opportunity to argue that his motion was timely. Pet.App.7a. He also asserted that the district court failed to apply the later-in-time deadline for when "state action" creates an "impediment ... in violation of the Constitution" that "prevent[s] [a prisoner] from filing a verified motion." Pet.App.8a (quoting Neb. Rev. Stat. § 29-3001(4)(c)). He argued that the district court placed an unconstitutional impediment on him by delaying in appointing him conflict-

free counsel. *Ibid.* He also argued that his counsel abandoned him and that his deadline thus should have been equitably tolled by the number of days he lacked conflict-free counsel. Pet.App.9a.

The Nebraska Supreme Court affirmed the district court. The court first held that Trail failed to preserve his arguments on timeliness by not raising them in the 23 days after the State filed its response to his motion and before the district court denied the motion. Pet.App.10a–11a. The court also held that “[e]ven if” Trail had preserved his arguments, they would have failed. Pet.App.11a. The court concluded that the district court applied the correct subsection of Neb. Rev. Stat. § 29-3001(4) and that equitable tolling did not apply. Pet.App.11a–14a. The court reasoned that the attorney-abandonment doctrine did not apply because it was Trail who abandoned his attorney by demanding he withdraw. Pet.App.14a. The court also explained that Trail had “well over 200 days” with conflict-free counsel to file a motion. Pet.App.13a.

Trail now seeks a writ of certiorari, arguing that the Nebraska state courts deprived him of due process by denying his postconviction motion for untimeliness after he spent about 100 days of his year-long filing period without counsel.

REASONS FOR DENYING THE PETITION

For three reasons, the Court should deny Trail’s petition. *First*, the Court lacks jurisdiction to review the Nebraska Supreme Court’s judgment because it was based on the independent state-law ground that Trail failed to preserve his arguments. *Second*, this Court’s precedent makes clear that Trail was not entitled to postconviction counsel. *A fortiori*, he was not entitled to automatic appointment of

counsel or tolling of his filing deadline for the time he lacked conflict-free counsel. *Finally*, this case is a poor vehicle to revisit the Court's precedent on the lack of a right to postconviction counsel because Trail had conflict-free counsel for most of the postconviction filing period.

The Court should deny the petition.

I. Trail's Arguments Are Foreclosed on Independent State-Law Grounds—He Failed to Preserve His Arguments in District Court.

The Court should deny review because the Nebraska Supreme Court held, as a matter of state law, that Trail failed to properly preserve the arguments he now raises in his petition.

This Court does not have jurisdiction to “review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment.” *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). This includes a prisoner's federal claims where the prisoner “failed to meet a state procedural requirement” in raising them. *Id.* at 730. Here, this Court does not have jurisdiction to review the Nebraska Supreme Court's judgment because it independently rests on Trail's failure to comply with a state procedural requirement—he failed to properly preserve his arguments in Nebraska district court.

After Trail filed his postconviction motion, the State argued the motion should be denied because it was untimely. Pet.App.5a. Trail had the opportunity to raise all of the arguments he raises now—that his motion was timely under Neb. Rev. Stat. § 29-3001(4)(c), that the court failed to appoint him conflict-free counsel in time to file

his motion, and that the Due Process Clause required the court to extend his deadline because his attorney abandoned him. But, as the Nebraska Supreme Court noted, Trail “did not file any reply.” Pet.App.10a. “Nor did he ask for leave to amend his postconviction motion.” *Ibid.* “Nor did he request a hearing.” *Ibid.* In short, he made no attempt to assert any argument for timeliness. *Ibid.*

The district court then entered its order denying Trail’s motion as time barred. *Ibid.* Again, he had an opportunity to object. But he failed to do so. He did not file a motion to alter or amend. *Ibid.* He did not ask the district court to reconsider. *Ibid.* As the Nebraska Supreme Court explained, he simply “took no prompt action to apprise the court of his timeliness arguments.” *Ibid.*

It was not until after Trail filed his notice of appeal that he first attempted to set out his positions regarding the timeliness of his motion. *Ibid.* But by then, it was too late. The Nebraska Supreme Court affirmed the district court on the ground that it would “not consider as an assignment of error a question not presented to the district court.” *Ibid.*

This holding was plainly premised on state law. It did “not depend on a federal holding.” *Glossip v. Oklahoma*, 604 U.S. 226, 242 (2025). Indeed, Trail admits that the Nebraska Supreme Court “never assessed the federal constitutional questions.” Pet. 11. The court cited only Nebraska case law and applied its own rule that it does not review arguments not made in the district court. See Pet.App.9a–10a.

This holding was also “adequate to support the judgment.” *Coleman*, 501 U.S. at 729. The court could have ended its analysis with Trail’s failure to preserve his timeliness arguments. Indeed, he did not make even one of those arguments in

district court. While the Nebraska Supreme Court went on to analyze Trail's timeliness arguments, it did so in an alternative posture. It explained that "[e]ven if" Trail had raised his timeliness arguments before the district court, those arguments would fail. Pet.App.11a. The court's state-law preservation holding was thus an independent and sufficient basis for its decision. This Court's review of Trail's questions presented "could not affect the judgment and would therefore be advisory." *Coleman*, 501 U.S. at 729.

One final note on preservation: Trail may assert that his second question presented—which accuses the Nebraska Supreme Court of adopting a novel theory of "client abandonment"—could not have been raised before the district court because it challenges a theory adopted later by the Nebraska Supreme Court. Not true.

The Nebraska Supreme Court did not apply a new doctrine of "client abandonment" that independently time barred Trail's claims. Instead, the court's comment about Trail's abandoning his attorney was in response to Trail's argument that the court should excuse his procedural default under *Maples v. Thomas*, 565 U.S. 266 (2012), because his attorney abandoned him. Pet.App.13a–14a. And, like all the other arguments he now raises, he could have raised his attorney-abandonment theory before the district court. He failed to do so. Thus, every argument he now raises is independently disposed of by the Nebraska Supreme Court's state-law holding that he failed to properly preserve his timeliness arguments.

II. The State Afforded Trail Due Process.

Nebraska's postconviction statute gives district courts discretion to appoint counsel. See Neb. Rev. Stat. § 29-3004; *State v. Craig*, 146 N.W.2d 744, 746 (Neb.

1966). Yet Trail suggests he had a constitutional right to conflict-free postconviction counsel that the district court violated by requiring him to confirm his indigency and by not tolling his postconviction deadline. Trail’s argument suffers a fatal flaw: He did not have a constitutional right to postconviction counsel *at all*.

“[T]he Due Process Clause does not *require* that the state supply a lawyer” for postconviction proceedings. *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987) (emphasis added). Trail does not cite *Finley* in his petition. Instead, he points to *Murray v. Giarratano*, 492 U.S. 1 (1989), arguing that the State “ignores” that precedent. Pet. 16. But *Murray* extended *Finley* to capital cases—that is, it held that a prisoner on death row does *not* have a right to counsel in postconviction proceedings. *Murray*, 492 U.S. at 10.

Trail cruises right past *Murray*’s holding and relies on a couple of lines from a concurring opinion. Those lines note that all the prisoners on Virginia’s death row had been able to obtain counsel in postconviction proceedings. Pet. 16 (citing *Murray*, 492 U.S. at 14–15 (Kennedy, J., concurring)). From those lines, Trail constructs a conclusion that would overrule *Finley*—that Due Process required “institutional lawyers [be] available” to Trail. Pet. 17. Thus, while accusing the State of ignoring this Court’s precedent, Trail creates a rule directly contradicting this Court’s precedent (without even citing it).

But *Finley* and *Murray* make clear that Due Process does not require the State to appoint postconviction counsel. If that is true, Due Process certainly does not prohibit the State from requiring a prisoner to prove his indigency before the court appoints him postconviction counsel. See generally *Dist. Att’y’s Off. for Third Jud.*

Dist. v. Osborne, 557 U.S. 52, 69 (2009) (explaining that states have “more flexibility in deciding what procedures are needed in the context of postconviction relief” than at trial and on direct appeal). Nor does it require the State to toll his filing deadline for the time he was without counsel. See *ibid.* The State did not violate Due Process.

III. This Case is a Poor Vehicle to Reconsider *Finley* and *Murray*.

Finley and *Murray* make clear that Due Process does not entitle prisoners to postconviction counsel. Trail does not expressly ask this Court to overrule those cases (though his theory requires it). But, in any event, this case is a poor vehicle for reconsidering those cases because the State appointed Trail conflict-free counsel.

Trail had one year from when the Nebraska Supreme Court’s judgment on direct appeal became final to file a postconviction motion. See Neb. Rev. Stat. § 29-3001(4). Only 67 days passed from when the judgment was finalized (December 16, 2022) to when the Court appointed conflict-free counsel (February 21, 2023). See Pet.App.4a. A period of **164 days** then passed where Trail could have filed his motion. His counsel then took a new job that conflicted him from representing Trail (August 4, 2023). See Pet.App.4a, 6a. The district court appointed Trail new counsel 35 days later (September 8, 2023). See Pet.App.6a. Trail was then left with another **101 days** with conflict-free counsel to file his motion (he had until December 18, 2023, because December 16 was a Saturday). See Pet.App.8a. He failed to do so.¹

¹ Trail complains that the Nebraska courts erred by not applying the postconviction motion deadline that applies when “state action” creates an unconstitutional “impediment” that “prevent[s] [a petitioner] from filing a verified motion.” Neb. Rev. Stat. § 29-3001(4)(e). The Nebraska Supreme Court held that that subsection applies only where the impediment eats up the entire (or nearly the entire) period a prisoner could otherwise file—which was not the case here. See Pet.App.12a–

So, of his 367-day period to file a motion, Trail lacked conflict-free counsel for only 102 days. Trail had 265 days with conflict-free counsel to file his motion. This left him plenty of time to file a postconviction motion. Thus, even if Trail were asking this Court to revisit *Finley* and *Murray*, this petition presents a poor vehicle to do so because Trail was appointed counsel in time to file his motion.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: March 9, 2026

Respectfully submitted.

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13a. That holding is a matter of state law left to the Nebraska Supreme Court. See *Int'l Longshoremen's Ass'n, AFL-CIO v. Davis*, 476 U.S. 380, 387 (1986) (“[W]e have no authority to review state determinations of purely state law.”).