

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

No. 25-6512

**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

**REPLY IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI**

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CAPITAL CASE

QUESTIONS PRESENTED FOR REVIEW

Mr. Trail was an indigent, death sentenced individual who diligently pursued the appointment of conflict-free counsel to raise credible claims related to the ineffective assistance of trial counsel, who had remained on as his direct appeal counsel. A postconviction court imposed indigency hurdle after indigency hurdle not required by Nebraska law or procedure—and then bootstrapped that lost time as a basis to decline to even consider the verified postconviction petition once non-conflicted counsel was appointed. Nebraska’s deprivation of the entirety of the postconviction remedy when an individual pursues the appointment of conflict-free counsel presents the following questions:

1. Does a state violate this Court’s precedent and the Due Process clause when it penalizes the request for the appointment of conflict-free counsel?
2. Does the Due Process clause endorse a theory of a client’s abandonment of an attorney?
3. Is the timely and unencumbered appointment of conflict-free counsel a requirement of an adequate and corrective process where the statute requires effective and meaningful counsel?

A. **Introductory Statement.**

Distilled to its essence, Mr. Trail alleges it is inappropriate for state courts to penalize the request for the appointment of conflict-free counsel with the deprivation of an entire remedy. Indeed, the State acknowledges that Petitioner has been subject to judicial modification of the will of Nebraska’s legislature. Instead of the year to which he was entitled under the postconviction statute, the State recognizes that the Nebraska Supreme Court shortened the statute of limitations in Mr. Trail’s case to “over 200 days.” BIO p. 2; p. 6 (“had conflict-free counsel for most of the postconviction filing period.”); p. 11 (Mr. Trail only lost 102 days due to conflicts).¹ Courts should not legislate – and to do so here violated Due Process.

The Nebraska Legislature provided for a year-long statute of limitations, which begins *once the impediment is removed*. Neb. Rev. Stat. § 29-3001(4)(c). The State in its BIO recognizes that a conflict existed that deprived Mr. Trail of more than 100 days of conflict free representation. Under the statute, only after the conflict impediment was removed should the clock have started. Yet the State argues that Mr. Trail had “plenty of time” to file a postconviction motion once counsel was appointed—and the Nebraska Supreme Court’s decision rested on that same premise, judicially overriding the legislature in such a way as to deprive Mr. Trail of any postconviction process whatsoever.

¹ Mr. Trail did not ask for all 100 days – instead he desired credit for approximately 62 days.

B. Mr. Trail's direct appeal counsel possessed an actual conflict, and Mr. Trail acted with diligence in seeking the appointment of conflict-free counsel.

Mr. Trail was represented by the same attorneys at trial and on direct appeal. Thus, the only place to raise trial counsel's ineffectiveness was in a post-conviction proceeding. Trial counsel assured the Nebraska Supreme Court that Mr. Trail would not be prejudiced by their withdrawal. But they failed to file a motion for rehearing, a motion to stay the mandate, or a petition for writ of certiorari to this Court. All three of these failures impacted either or both the state and federal statutes of limitations. The Nebraska Supreme Court permitted direct appeal counsel to abandon Mr. Trail before the mandate issued and while the clock was running on the time to file a petition for certiorari to this Court. As a result, conflicted counsel acted in a manner that successfully prevented judicial review of their representation.

Two days after abandonment by the conflicted counsel, Mr. Trail mailed a motion requesting conflict-free counsel in the Nebraska Supreme Court. App. 21a. The court denied Mr. Trail's too early request as being filed in the wrong court.

Then Mr. Trail promptly mailed for filing his appointment request with the trial court. App. 23a. Wherein, he indicated he needed counsel and apprised the court of his previously found pauper status:

I have already been ruled indigent
by the trial court. I ask that you

Id. (highlight added).

Despite Mr. Trail's diligence and the fact that he had publicly funded appointed counsel at every prior stage due to his indigency, the district court² required him to jump through hoops to again prove his indigency—including submitting account statements that were already in the possession of a State agency and which Mr. Trail could not obtain through the normal process—before it would appoint counsel. Those additional requests went beyond what is required under Nebraska law. Because of the trial court's expansive requirement, counsel was not appointed until sixty-seven days after the issuance of the mandate and sixty-two days after Mr. Trail filed his request. The trial court's imposition of increased requirements for proof of indigency, which exceeded what is required by Nebraska law, left Mr. Trail without counsel at a critical time.

The state misconstrues Mr. Trail's argument (BIO p. 2). Mr. Trail does not contend that it was the requirement that he prove his indigency in itself that deprived him of due process. Rather, the State deprived Mr. Trail of due process and any meaningful postconviction procedure by putting up roadblocks without reason. The Nebraska district court ordered Mr. Trail to obtain and submit a certified copy of his institutional account statement reflecting the six months before he filed his motion for appointment of counsel. Not only did this order impermissibly place a financial burden on a defendant whom had *already been found indigent*, but it also was far in excess of the single *in forma pauperis* requirement provided for by Nebraska law: that the defendant submit an affidavit attesting to his indigency—

² The same court that found Mr. Trail to be indigent and appointed counsel at trial.

something Mr. Trail had done eight days before the court issued its order. These roadblocks deprived Mr. Trail of conflict-free counsel, which in turn deprived him of over sixty days of the one-year statute of limitations—and he was not given credit for those days once the impediment was removed. He was further deprived of due process by the Nebraska Supreme Court’s gutting of Neb. Rev. Stat. § 29-3001(4)(c), ignoring its clear meaning to determine that Mr. Trail had no recourse for the district court’s delay and subsequent preclusion of the postconviction process altogether.

C. Mr. Trail’s Due Process claim was addressed but never analyzed by the Nebraska Supreme Court.

The State simply glosses over the fact that the Nebraska Supreme Court in a separate area of its opinion noted that the Due Process arguments were properly before them.

This Court has consistently recognized the application of Due Process protections when a state provides a postconviction procedure. While a state is not required to provide a postconviction process, should a state choose to do so, it must comply with due process. *Evitts v. Lucey*, 469 U.S. 387, 401 (1985); *see also Case v. Nebraska*, 381 U.S. 336 (1965) (Nebraska mooted the federal question of whether providing a postconviction process is mandatory by enacting a postconviction statute that afforded the statutory right to counsel).

In the 1960s, the Nebraska Legislature responded to the grant of certiorari by ensuring access to a remedy, an adequate corrective process. *Case*, 381 U.S. at 337. The new postconviction provision included a statutory right to effective

counsel. As noted by Justice Brennan in his concurring opinion, this Court properly dismissed *Case* because the Nebraska statute’s “[p]rovision for counsel to represent prisoners, as in § 4 of the Nebraska Act, would enhance the probability of effective presentation and a proper disposition of prisoners’ claims.” *Case*, at 347 (Brennan, J., concurring); *see also Murray v. Giarratano*, 492 U.S. 1, 14-15 (1989) (Kennedy, J., concurring) (“[N]o prisoner on death row in Virginia has been unable to obtain counsel to represent him in postconviction proceedings, and Virginia’s prison system is staffed with institutional lawyers to assist in preparing petitions for postconviction relief.”).

Contrary to the State’s contentions, Mr. Trail is not suggesting that this Court has announced a constitutional right to postconviction counsel, nor does Mr. Trail ask this Court to overrule prior precedent. Rather, Mr. Trail asks that this Court *enforce* its own existing precedent by requiring Nebraska to follow it.

In *Murray* and in *Pennsylvania v. Finley*, this Court declined to hold that there is a constitutional right to counsel in collateral proceedings. 492 U.S. at 7; 481 U.S. 551, 559 (1987). But in neither case did this Court foreclose the constitutional right to due process in postconviction proceedings. Rather, the Court pointed out in *Finley* that Pennsylvania was permitted to offer the assistance of counsel in postconviction “without requiring the full panoply” of protections provided at trial and on direct appeal. 481 U.S. at 559. The Court explained that “the Constitution does not put the State to the difficult choice between affording no counsel whatsoever or following the strict procedural guidelines enunciated in *Anders*.” *Id.*

In *Murray*, the Court upheld that same principle in capital cases as well as non-capital ones. 492 U.S. at 12. Justice Kennedy, who provided the fifth vote by concurring in the judgment of the Court and who was joined by Justice O'Connor, noted that “meaningful access can be satisfied in various ways,” and the fact that “no prisoner on death row in Virginia has been unable to obtain counsel to represent him in postconviction proceedings” was instructive in determining that Virginia’s scheme complied with the Constitution. *Id.*

In other words, while this Court declined to prescribe precisely how postconviction proceedings must be offered, or whether they are offered at all, the Court still acknowledged that due process applies to petitioners in postconviction proceedings. And the Court did not overrule its precedent in *Evitts*, in which it made clear that “when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution—and, in particular, in accord with the Due Process Clause.” 469 U.S. at 401.

Here, Nebraska chose to include a provision of counsel in its postconviction statute, at the discretion of the district court. Neb. Rev. Stat. § 29-3004. In Mr. Trail’s case, the district court determined that the appointment of counsel was warranted for postconviction proceedings. In those proceedings, Mr. Trail was entitled to due process. Had Mr. Trail not been indigent, he would not have been at the mercy of the court’s 62-day delay in appointing his counsel. But because he was indigent and relied on the court to provide counsel, the delay cost him precious time

from the statute of limitations, ultimately depriving him of the postconviction remedy altogether. This does not comply with due process.

The Nebraska Supreme Court avoided altogether the federal constitutional questions altogether. While the court recognized that a state need not provide a postconviction process, it **never assessed** the federal constitutional questions implicated when a state elects to do so. *State v. Trail*, 319 Neb. 84, 92 (2025). Nebraska has chosen to implement a postconviction process, which inherently affords defendants the right to Due Process as they navigate the system. Violation of this Due Process right raised a federal question that the Nebraska Supreme Court should have addressed, and it places this case squarely within this Court's jurisdiction.

The State conflates the Nebraska Supreme Court's rejection of the equitable tolling arguments with the Due Process arguments. This conflation is a distraction this Court should not follow: regardless of whether the Nebraska Supreme Court recognizes the doctrine of equitable tolling in postconviction, the postconviction process must comply with due process under the Constitution. The way Mr. Trail's postconviction case was treated, both by the district court and by the Nebraska Supreme Court, demonstrates that Nebraska's postconviction process does not comply with due process. Even setting that aside, the State could not cite a single rule Mr. Trail violated in support of its claim of an independent and adequate state law ground for the Nebraska Supreme Court's decision, nor one that put him on notice that his arguments would be deemed waived.

D. Mr. Trail's right to Due Process was violated.

This Court's authority is clear: "[W]hen a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution - and, in particular, in accord with the Due Process Clause." *Evitts*, 469 U.S. at 401. Saddling a capital defendant with conflicted counsel for over 100 days "transgresses any recognized principle of fundamental fairness in operation." *Dist. Atty's Off. for Third Jud. Dist. v. Osborne*, 557 U.S. 52, 69 (2009).

The State fails to address how the trial court's imposition of a financial hurdle can stand in light of the principles of *Smith v. Bennett*, 365 U.S. 708, 713 (1961) ("When an equivalent right is granted by a State, financial hurdles must not be permitted to condition its exercise."), and *Long v. Dist. Ct. of Iowa*, 385 U.S. 192, 194 (1966) ("having established a postconviction procedure, a State cannot condition its availability to an indigent upon any financial consideration.").

The State fails to mention that *Murray*, is a plurality opinion. Therefore, the genuine ruling of the Court is found in the concurring opinion of Justice Kennedy (joined by Justice O'Connor), finding the decisive factor was, "[w]hile Virginia has not adopted procedures for securing representation that are as far reaching and effective as those available in other States, no prisoner on death row in Virginia has been unable to obtain counsel to represent him in postconviction proceedings, and Virginia's prison system is staffed with institutional lawyers to assist in preparing petitions for postconviction relief." *Id.* at 14-15 (Kennedy, J., concurring). Without

recognizing the actual vote in *Murray*, the State's analysis fails to address *Murray's* actual ruling. While this Court did not require the appointment of counsel in postconviction proceedings, it acknowledged that the provision of counsel was consistent with, and demonstrated compliance with, due process in postconviction proceedings.

E. No such legal theory of “client abandonment of an attorney” exists.

The State does not contest that the Nebraska Supreme Court manufactured a previously unheard-of legal doctrine of client abandonment of an attorney. It is not a real doctrine. It has no legal basis and disregards an attorney's ethical and legal obligations to a client. The Nebraska Supreme Court improperly morphed Mr. Trail's request for new postconviction counsel when he believed his direct appeal to be over into an accusation that he abandoned his counsel rather than interpreting it in the most straightforward manner: a desire to have conflict-free counsel's purposeful consideration of his trial and direct appeal representation and the proper means to avail himself of his first opportunity to raise ineffective assistance of counsel claims as required by Nebraska law.

Core features of simple fairness are implicated here. Access to the guiding hand of counsel, as opposed to being abandoned or forced to accept conflicted representation, is a fundamental feature of due process. Rather than supporting the above, the State seeks to penalize Mr. Trail for asking for counsel in order to avail himself of an available remedy. Bootstrapping that request into the basis for

denying him access to the remedy he sought to pursue is a fundamental denial of due process.

F. Nebraska does not provide an adequate corrective process.

When states implement corrective processes such as postconviction relief, they should be “swift and simple and easily invoked,” “eschew rigid and technical doctrines of forfeiture, waiver, or default,” and “provide for full fact hearings to resolve disputed factual issues.” *Case*, 381 U.S. at 346-47 (1965) (Brennan, J., concurring). Nebraska completely fails in this regard, and Mr. Trail’s case is a clear example of this failure.

The court’s ruling will lead to absurd results if this Court does not intervene. Nebraska’s Legislature provided a full year to file a postconviction motion once a state-imposed impediment is removed. Now, the Nebraska Supreme Court has judicially modified the statute and held that an impediment counts only if it consumes the entire year. Consequently, a postconviction court could have appointed counsel on day 364 and the defendant would have a single day to file or be out of time. This does not comply with the Constitution’s or this Court’s notions of due process.

Not only did Nebraska effectuate the denial of timely appointed conflict-free counsel, but it also effected a deprivation of the postconviction process altogether. The State ignores this Court’s recent precedent that postconviction procedures must permit petitioners to “actually seek . . . relief.” *A.A.R.P. v. Trump*, 605 U.S. 91, 95 (2025); *Trump v. J.G.G.*, 604 U.S. 670, 673 (2025). To effectuate this deprivation,

the Nebraska Supreme Court judicially struck from existence portions of Neb. Rev. Stat. § 29-3001(4), effectively eliminating the following language: "The one-year limitation period shall run from the later of . . ." (emphasis added).

CONCLUSION

The petition for writ of certiorari should be granted and the Nebraska Supreme Court's decision summarily reversed and remanded for further proceedings, or, in the alternative, the Court should set the case for plenary review.

Respectfully submitted,

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