

**NO. A-25-656
NO. A-25-657**

**IN THE
NEBRASKA COURT OF APPEALS**

STATE OF NEBRASKA,

Appellee,

v.

EMANUAL CHAVEZ,

Appellant.

**APPEAL FROM THE DISTRICT COURT
OF LANCASTER COUNTY, NEBRASKA**

Honorable Susan I. Strong, District Judge

BRIEF OF APPELLANT

Respectfully submitted:

Matthew Kosmicki, #21875
140 N. 8th Street, Suite 250
Lincoln, NE 68508
531-500-0935
mattkosmickilaw@gmail.com
Attorney for Appellant

TABLE OF CONTENTS

STATEMENT OF THE BASIS OF JURISDICTION	4
STATEMENT OF THE CASE	4
1. Nature of the Case	4
2. Issues Tried in the Court Below	4
3. Trial Court’s Decision and Judgment	5
4. Scope of Appellate Review	5
ASSIGNMENTS OF ERRORS	5
PROPOSITIONS OF LAW	6
STATEMENT OF FACTS	8
SUMMARY OF ARGUMENT	9
ARGUMENT	10
I. The district court erred denying Chavez an evidentiary hearing on his verified motion for postconviction relief, despite the motion containing factual allegations that he wished to file an appeal which, if true, would establish a denial of his constitutional right to effective assistance of counsel	10
II. The district court erred, as a matter of law, in interpreting “directed by the client” to require personal, direct communication by the defendant, rather than recognizing that a request conveyed through an intermediary acting at the defendant’s direction satisfies counsel’s duty to file a notice of appeal.	13
III. The district court violated Chavez’s due process rights by resolving factual disputes on the written record and dismissing without holding an evidentiary hearing	16

CONCLUSION.....	18
-----------------	----

TABLE OF AUTHORITIES

CASES CITED

<i>Hass v. Neth</i> , 265 Neb. 321, (2003)	8, 17
<i>Johnson v. Avery</i> , 393 U.S. 483 (1969).....	8, 10, 15
<i>Mathews v. Eldridge</i> , 424 U.S. 319 (1976).....	8, 17
<i>Roe v. Flores-Ortega</i> , 528 U.S. 470 (2000)	7, 11, 14, 15
<i>State v. Britt</i> , 310 Neb. 69 (2021).....	5, 6, 11, 13, 16
<i>State v. Gonzalez-Faguaga</i> , 266 Neb. 72 (2003)	7, 13
<i>State v. Hess</i> , 261 Neb. 368 (2001).....	11
<i>State v. Jaeger</i> , 311 Neb. 69 (2022).....	5, 7, 9, 10, 11, 13, 14, 16
<i>State v. McCroy</i> , 259 Neb. 709 (2000).....	7, 12
<i>State v. Munoz</i> , 309 Neb. 285 (2021).....	6, 16
<i>State v. Russell</i> , 308 Neb. 499 (2021).....	7, 11
<i>State v. Thalken</i> , 299 Neb. 857 (2018)	8, 14
<i>State v. Trotter</i> , 259 Neb. 212 (2000).....	6, 7, 10, 11, 12, 13, 14, 15

STATUTES CITED

Nebraska Postconviction Act. Neb. Rev. Stat. §§ 29-3001 (Reissue 2016 & Cum. Supp. 2023).....	4, 7, 13
29-3002 (Reissue 2016 & Cum. Supp. 2023)	4
Neb. Rev. Stat. §§ 25-1911 (Reissue 2016).....	4

NEBRASKA COURT RULES CITED

Neb. Ct. R. § 2-101(F)(1).....	6, 7, 10, 11, 12, 14, 15, 16
Neb. Ct. R. Prof. Cond. § 3-501.4(a)(3)–(4).....	8, 12
Neb. Ct. R. Prof. Cond. § 3-501.4(b)	8, 12

STATEMENT OF THE BASIS OF JURISDICTION

This is an appeal under the Nebraska Postconviction Act. Neb. Rev. Stat. §§ 29-3001 et seq. (Cum. Supp. 2014). A hearing for the state's response and motion to deny the appellant's postconviction relief without an evidentiary hearing was held on June 16, 2025. The district court ultimately denied a postconviction evidentiary hearing to appellant, Emanuel Chavez on July 31, 2025. (T16-21). Appellant appeals the denial of his verified motion for postconviction relief pursuant to the authority of Neb.Rev.Stat. § 25-1912A. In CR22-404, Chavez pled no contest to Count I Attempted Possession of Child Pornography by an individual 19 years or older. He was sentenced to not less than two (2) years no more than three (3) years. (T16-17) In CR22-405, Chavez pled no contest and was convicted of Sexual Assault in the First Degree, count I, and Enticement by Electronic Communication Device, count II. (T16) He was sentenced to twenty-four (24) years to thirty-four (34) years on count I and one (1) to two (2) years for count II. (T16-17) Appellate jurisdiction is conferred with the filing of a notice of appeal within thirty days of the final order that is appealed. Neb. Rev. Stat. §§ 25-1911, 29-3002 (Reissue 2016) and Neb. Const. art. I, § 23. Notice of Appeal, Request for Bill of Exceptions and filing fee were timely filed on August 26, 2025. (T23, T25)

STATEMENT OF THE CASE

1. Nature of the Case

This is an appeal from the denial of a verified motion for postconviction relief in both CR22-404 and CR22-405. Chavez alleged that trial counsel was ineffective for failing to file a notice of appeal after being instructed to do so by him, in violation of his rights under the Nebraska Constitution, Article I, §§ 3, 11, and 23, and the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. (T1). For efficiency both cases were combined on appeal. (1:11-16)

2. Issues Tried in the Court Below

A progression hearing was held on June 16, 2025, to determine whether an evidentiary hearing was required on the verified postconviction motions. No evidence was offered. The district court

took judicial notice, without objection, of:

- the May 23, 2023, sentencing order;
- the June 24, 2024, motion for postconviction relief;
- the March 14, 2025, progression order; and
- the State's May 14, 2025, motion to deny postconviction relief without hearing. (1:19-2:3).
- the district took judicial notice of its file, noting a notice of appeal was not filed in either case. (4:23-5:12).

The issue before the court was whether the verified allegations, if true, required an evidentiary hearing under Nebraska postconviction standards.

3. Trial Court's Decision and Judgment

After taking the matter under advisement (9:17-19), the district court entered an order on July 31, 2025, denying Chavez's request for an evidentiary hearing and dismissing the postconviction motion. (T16-21 respectively). The court found that Chavez's mother acted independently in contacting trial counsel and that Chavez did not personally direct trial counsel to file a notice of appeal. (T19-20)

4. Scope of Appellate Review

In an appeal from the denial of postconviction relief, findings of fact are reviewed for clear error. Questions of law, and the determination whether the allegations, if true, would entitle the defendant to relief, are reviewed de novo. *State v. Jaeger*, 311 Neb. 69 (2022); *State v. Britt*, 310 Neb. 69 (2021).

ASSIGNMENTS OF ERRORS

1. THE DISTRICT COURT ERRED DENYING CHAVEZ AN EVIDENTIARY HEARING ON HIS VERIFIED MOTION FOR POSTCONVICTION RELIEF, DESPITE THE MOTION CONTAINING FACTUAL ALLEGATIONS THAT HE WISHED TO FILE AN APPEAL WHICH, IF TRUE, WOULD ESTABLISH A DENIAL OF HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

Issue: Whether the verified motion alleged facts which, if true, would constitute a denial of constitutional rights requiring an evidentiary hearing under Nebraska law.

2. THE DISTRICT COURT ERRED, AS A MATTER OF LAW, IN INTERPRETING “DIRECTED BY THE CLIENT” TO REQUIRE PERSONAL, DIRECT COMMUNICATION BY THE DEFENDANT, RATHER THAN RECOGNIZING THAT A REQUEST CONVEYED THROUGH AN INTERMEDIARY ACTING AT THE DEFENDANT’S DIRECTION SATISFIES COUNSEL’S DUTY TO FILE A NOTICE OF APPEAL.

Issue: Whether Nebraska law, including Neb. Ct. R. § 2-101(F)(1) and *State v. Trotter*, requires personal, direct communication from a defendant, or whether a directive may be communicated through an intermediary.

3. THE DISTRICT COURT VIOLATED CHAVEZ’S DUE PROCESS RIGHTS BY RESOLVING FACTUAL DISPUTES ON THE WRITTEN RECORD AND DISMISSING WITHOUT HOLDING AN EVIDENTIARY HEARING.

Issue: Whether the district court improperly weighed credibility and resolved factual disputes on the pleadings, in violation of the Due Process Clause and Nebraska postconviction procedure.

PROPOSITIONS OF LAW

1. A district court must grant an evidentiary hearing on a postconviction motion when the motion contains factual allegations which, if true, constitute a violation of the defendant’s constitutional rights. *State v. Britt*, 310 Neb. 69 (2021).

2. Summary dismissal of a postconviction motion is proper only when the existing record affirmatively refutes the factual allegations asserted. *State v. Britt*, 310 Neb. 69 (2021); *State v. Munoz*, 309 Neb. 285 (2021).

3. Whether the allegations in a postconviction motion, if proved, would entitle the defendant to relief is a question of law, which an appellate court reviews de novo. *State v. Jaeger*, 311 Neb. 69 (2022).
4. Whether the district court resolved factual issues without an evidentiary hearing presents a mixed question of law and fact; factual findings are reviewed for clear error, and legal conclusions are reviewed de novo. *State v. Jaeger*, 311 Neb. 69 (2022).
5. When a verified postconviction motion alleges specific facts not affirmatively refuted by the record, the district court may not resolve factual disputes or make credibility determinations without an evidentiary hearing. *State v. Gonzalez-Faguaga*, 266 Neb. 72 (2003).
6. A prisoner is entitled to an evidentiary hearing on postconviction claims unless the files and records affirmatively show that he is not entitled to relief. Neb. Rev. Stat. § 29-3001.
7. Counsel appointed to represent a criminal defendant shall, upon request by the defendant after judgment, file a notice of appeal unless permitted to withdraw. Neb. Ct. R. § 2-101(F)(1).
8. Trial counsel has a duty to perfect an appeal after being directed by the defendant, and failure to file a requested appeal constitutes deficient performance. *State v. Trotter*, 259 Neb. 212, 609 N.W.2d 33 (2000).
9. Failure of counsel to file or perfect a requested appeal is presumptively prejudicial and constitutes ineffective assistance of counsel. *State v. Russell*, 308 Neb. 499, 954 N.W.2d 920 (2021); *State v. Trotter*, 259 Neb. 212 (2000).
10. Failure to file a notice of appeal can never be considered a strategic decision; filing a notice of appeal is a ministerial task. *State v. McCroy*, 259 Neb. 709, 613 N.W.2d 1 (2000); *Roe v. Flores-Ortega*, 528 U.S. 470 (2000).
11. An attorney acts unreasonably when he disregards a client's specific instruction to file a notice of appeal. *Roe v. Flores-Ortega*, 528 U.S. 470 (2000).

12. The right to appeal in criminal cases may be exercised only by the party to whom it is given, and generally only a person aggrieved or injured by the judgment may appeal. *State v. Thalken*, 299 Neb. 857 (2018).
13. Prisoners have a fundamental right of access to the courts and may rely on third-party intermediaries to communicate legal requests when institutional restrictions impede direct communication. *Johnson v. Avery*, 393 U.S. 483 (1969).
14. A lawyer must keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information. Neb. Ct. R. Prof. Cond. § 3-501.4(a)(3)–(4).
15. A lawyer must explain matters to the extent reasonably necessary to permit a client to make informed decisions regarding the representation. Neb. Ct. R. Prof. Cond. § 3-501.4(b).
16. Due process guarantees the right to be heard at a meaningful time and in a meaningful manner. *Mathews v. Eldridge*, 424 U.S. 319 (1976).
17. The fundamental requirements of due process include notice, identification of the accuser, the factual basis for the accusation, reasonable time and opportunity to present evidence, and a hearing before an impartial tribunal. *Hass v. Neth*, 265 Neb. 321, 657 N.W.2d 11 (2003).

STATEMENT OF FACTS

Chavez filed verified motions for postconviction relief in each respective case alleging that his trial counsel, Carlos Monzon, was ineffective for failing to file a notice of appeal after being instructed to do so. (T1-7)

Following sentencing, Chavez was immediately transported to the Reception and Treatment Center. (T3) Due to institutional intake restrictions, he did not have direct access to counsel in the days following sentencing. (T3) Chavez alleged in his verified motion that he directed his mother to communicate his desire to appeal to trial counsel, and that she did so through repeated attempts to contact counsel within the thirty-day appeal period. (T3-4) The verified motion

further alleged that counsel refused to file the appeal and did not attempt to verify Chavez's wishes. (T3-4)

On June 16, 2025, the district court held a progression hearing to determine whether an evidentiary hearing was warranted. (1:11-16) The State argued that there was "zero allegation" Chavez personally contacted or attempted to contact trial counsel to file a notice of appeal. (T12) Defense counsel clarified that Chavez was incarcerated at the Reception and Treatment Center during the thirty-day period for filing a notice of appeal and was unable to communicate with counsel directly and instead relied on his mother to communicate his instruction to appeal. (6:14-8:11;T1-4) He further argued that because trial counsel was on notice that Chavez wished to file an appeal, counsel had an ethical duty to file the appeal, or at a minimum, investigate further into Chavez's wishes to appeal by contacting Chavez to try to ascertain his wishes. (7:7-11)

The district court took the matters under advisement and, on July 31, 2025, issued a written order finding that Chavez's mother acted independently and that Chavez did not personally direct counsel to file a notice of appeal. (T16-21) The court denied an evidentiary hearing and dismissed the postconviction motions. (T16-21). This appeal follows.

SUMMARY OF ARGUMENT

The district court erred in denying the petitioner an evidentiary hearing on his claim that he timely instructed his attorney to file an appeal. The petitioner was incarcerated and unable to communicate directly with counsel within the 30 days allowed to file a notice of appeal in each respective case. (T-3) To ensure an appeal was filed, Chavez directed his mother to contact his attorney and convey that instruction. Trial counsel responded to Mrs. Cortez, without ever contacting Chavez his client, by saying that filing an appeal was "not worth it" and that to file an appeal "may lead to more charges." (T3-4)

The trial court mischaracterized these events, concluding that the request to appeal was made solely by Chavez's mother rather than as a relayed instruction from Chavez himself. (T20) That finding was premature and is unsupported by the limited record. The petitioner's allegations, if true, establish that the appeal instruction was made at his direction and on his behalf, not as an unsolicited request from a

third party, namely his mother. This mischaracterization established a denial of Chavez's constitutional right to effective assistance of counsel. *State V. Jaeger*, 311 Neb. 69, 80 (2022).

It is uncontested by the district court, the state and the petitioner that if counsel denies their client an appeal when they are so instructed, the denial constitutes per se ineffective assistance of counsel under Ct. R. § 2-101(F)(1) and *State v. Trotter*, 259 Neb. 212, 222, 609 N.W.2d 33 (2000). When an inmate instructs another person to relay his request to counsel, that instruction remains his own act. Whether the intermediary was a family member, interpreter, or staff member, the constitutional analysis does not change: if counsel was instructed to appeal and failed to do so, that omission constitutes per se ineffective assistance.

Chavez alleged sufficient facts in his verified motions for postconviction relief to warrant an evidentiary hearing, and the district court erred by overruling his motions and dismissing each motion and therefore denying Chavez the opportunity to prove his factual allegations. To deny an evidentiary hearing under these circumstances disregards the inherent communication barriers faced by incarcerated individuals, which the courts themselves recognize as significant and unavoidable. See *Johnson v. Avery*, 393 U.S. 483 (1969). By resolving these factual disputes without giving Chavez an opportunity to be heard, the trial court denied him his due process rights by not allowing Chavez to prove his factual assertions.

ARGUMENT

I. THE DISTRICT COURT ERRED DENYING CHAVEZ AN EVIDENTIARY HEARING ON HIS VERIFIED MOTION FOR POSTCONVICTION RELIEF, DESPITE THE MOTION CONTAINING FACTUAL ALLEGATIONS THAT HE WISHED TO FILE AN APPEAL WHICH, IF TRUE, WOULD ESTABLISH A DENIAL OF HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

A district court must grant an evidentiary hearing on a postconviction motion when the motion contains factual allegations which, if true, would constitute a denial or violation of the movant's

constitutional rights. *State v. Jaeger*, 311 Neb. 69 (2022); *State v. Britt*, 310 Neb. 69, 76 (2021). Whether the allegations, if proven, would entitle the movant to relief is a question of law, reviewed de novo.

It is undisputed that Nebraska law imposes a statutory duty to file a notice of appeal when directed by the injured party. Nebraska's appellate rules make counsel's duty clear. Neb. Ct. R. § 2-101(F)(1) provides:

"Counsel appointed in a trial court to represent a defendant in a criminal case ... shall, upon request by the defendant after judgment, file a notice of appeal and continue to represent the defendant unless permitted to withdraw by the appellate court." This rule codifies a statutory, nondiscretionary obligation: once a defendant expresses a desire to appeal, trial counsel must file the notice or obtain leave to withdraw.

Nebraska case law mirrors that requirement. In *State v. Trotter*, 259 Neb. 212, 222 (2000), as the district court acknowledged, the Supreme Court held that "following conviction, it is the trial counsel's duty to perfect an appeal after being so directed by the criminal defendant," and that failing to do so constitutes deficient performance and is presumptively prejudicial. See also *State v. Hess*, 261 Neb. 368 (2001). Furthermore, the Nebraska Supreme Court has held, that after a trial, conviction, and sentencing, if counsel deficiently fails to file or perfect an appeal after being so directed by the criminal defendant, prejudice will be presumed and counsel will be deemed ineffective, thus entitling the defendant to postconviction relief. *State v. Russell*, 308 Neb. 499, 507 (2021)

Additionally, as the district court in its order points out, Federal law is the same as Nebraska law. In *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000), the U.S. Supreme Court held, "A lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable."

Here, Chavez's verified motions alleged facts that triggered trial counsel's duty to file an appeal. Chavez's verified motion each alleged that, immediately after sentencing, he was transported to the Reception and Treatment Center and that his ability to communicate directly with trial counsel was nearly impossible because of prison designed limitations. (T3) Limitations which included phone numbers being approved by prison officials and being unable to write out of the prison for a while. (6:17-7:1) He requested assistance from his mother,

Mona Castro, to communicate his desire to appeal in each case. (6:17-7:1) Castro then emailed, phoned, and eventually spoke with trial counsel within the 30-day appeal period, expressly stating that “Chavez wanted to file an appeal.” (T3) and (7:15-16) Trial counsel, being reasonably informed of Chavez’s intent to appeal each case, refused to file an appeal and instead telling Castro it was “not worth it” because an appeal could lead to new charges or more time. (T3) Those allegations, if true, demonstrate that counsel was informed of the client’s wish to appeal and despite being informed by his client, Chavez, consciously refused to file, violating § 2-101(F)(1) and *Trotter, supra*.

Even if trial counsel believed that filing an appeal might prompt additional charges or otherwise be disadvantageous to Chavez, such considerations cannot justify failing to file a notice of appeal. Nebraska law is clear that counsel’s failure to perfect an appeal can never be treated as a strategic decision. *State v. McCroy*, 259 Neb. 709, 718, (2000). A lawyer cannot substitute his judgment for the client’s decision to file an appeal. It is not the lawyer’s province to make the decision whether to appeal or not to appeal. Filing a notice of appeal is a ministerial act, not a matter of trial strategy. Thus, even if trial counsel believed that an appeal in each case “might turn out poorly” for Chavez, such a belief did not excuse him from filing the appeal once instructed to do so by Chavez.

Because trial counsel was put on notice through Cortez that Chavez wished to pursue an appeal in both cases, his obligation to act was triggered not only as a matter of law, but as a matter of professional and ethical duty. Under the Nebraska Rules of Professional Conduct, a lawyer must “keep the client reasonably informed about the status of a matter” and “promptly comply with reasonable requests for information.” Neb. Ct. R. Prof. Cond. § 3-501.4(a)(3)–(4). In addition, § 3-501.4(b) requires counsel to “explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”

At a minimum, the rules of professional conduct required trial counsel to follow up on the communication conveyed by Cortez, contact Chavez, and ascertain his wishes regarding an appeal in both cases. They further required counsel to explain the implications, advantages, and disadvantages of filing a notice of appeal so that Chavez could

make an informed decision. By failing to make even this minimal effort, counsel did not satisfy his ethical duties to his client.

The district court misapplied the standard for granting a hearing. The trial court concluded that Chavez “does not allege that he directed his mother to take these actions” and therefore failed to state a claim. (T19) That finding is contrary to the plain and express language of the verified motion, which specifically alleged that Chavez requested his mother’s help in communicating his wish to appeal. (T3 respectively) Each motion was verified, and included non-conclusory allegations with dates and events, and alleged conduct that — if true — establishes per se ineffective assistance. Under *Britt and Jaeger*, *supra* such detailed factual allegations required an evidentiary hearing. The record does not affirmatively refute these allegations; it merely reflects competing interpretations. Whether Castro acted independently or at her son’s request is a factual dispute, not a legal deficiency, a dispute that raises the very issue evidentiary hearings are intended resolve.

The district court erred by overruling Chavez’s Motions for Postconviction Relief and denying him an evidentiary hearing. By deciding that Chavez’s allegations were insufficient as a matter of law, the district court improperly weighed credibility and resolved factual disputes on the pleadings. When a verified motion alleges facts which, if true, constitute a violation of the right to effective counsel, and those facts are not refuted by the record, the court must conduct an evidentiary hearing. *State v. Gonzalez-Faguaga*, 266 Neb. 72 (2003). Because Chavez’s verified motions met that standard, the district court’s refusal to hold a hearing violated both § 29-3001 and the framework established by *Britt* and *Trotter*, *supra*.

II. THE DISTRICT COURT ERRED, AS A MATTER OF LAW, IN INTERPRETING “DIRECTED BY THE CLIENT” TO REQUIRE PERSONAL, DIRECT COMMUNICATION BY THE DEFENDANT, RATHER THAN RECOGNIZING THAT A REQUEST CONVEYED THROUGH AN INTERMEDIARY ACTING AT THE DEFENDANT’S DIRECTION SATISFIES COUNSEL’S DUTY TO FILE A NOTICE OF APPEAL.

Whether the district court applied the correct legal standard in interpreting the phrase “directed by the client” is a question of law.

When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *State v. Jaeger*, 311 Neb. 69, 80 (2022)

Nebraska's appellate rules expressly impose a non-discretionary duty to file a notice of appeal once a defendant requests it. *See Neb. Ct. R. § 2-101(F)(1)*. Nothing in the rule requires the request to be in-person, in writing, or directly from the defendant's mouth to counsel's ear. The rule focuses on the simple fact of the request, not the vehicle of the request. The Nebraska Supreme Court has consistently reinforced the duty imposed upon trial counsel, that when a defendant directs counsel to file an appeal, counsel has a duty to do so, and failure to file is presumptively prejudicial. *State v. Trotter*, 259 Neb. 212, 222 (2000). The rule hinges only on the client's directive to appeal not how the client delivers their intent to appeal. Further, the United States Supreme Court in *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000), applying the *Strickland* held, "Disregarding a client's instruction to appeal "cannot be considered a strategic decision" because filing a notice of appeal is "a purely ministerial task." Nothing in *Flores-Ortega*, nor any other discoverable case, carves out a "no intermediaries" exception.

The trial court denied relief on the ground that Chavez did not personally contact counsel and, according to the court, "does not allege that he directed his mother to take these actions." (T18–19). In reaching this conclusion, the court cited *State v. Thalken*, 299 Neb. 857, 870–71 (2018), for Nebraska Supreme Court's "general rule" that "the right to appeal in criminal cases can be exercised only by a party to whom it is given and that generally, only a person aggrieved or injured by a judgment may take an appeal." (T18). The court further cited *State v. Trotter*, 259 Neb. 212, 222 (2000), "after a trial, conviction, and sentencing, if counsel deficiently fails to file or perfect an appeal after ***being so directed by the criminal defendant***, prejudice will be presumed and counsel will be deemed ineffective, thus entitling the defendant to postconviction relief." *Id emphasis added*.

The trial court's reliance on these authorities is misguided. Neither *Thalken* nor *Trotter* holds that a defendant must personally communicate the directive to appeal in order for the right to be invoked. *Thalken* involved the State filing an appeal after Thalken's motion to suppress was sustained by the trial court. The *Thalken* court simply addressed when the State may exercise the right to appeal an

adverse ruling; it does not restrict the method by which a defendant may communicate the directive to file the appeal. *Trotter* reinforces, rather than weakens, Chavez's position: if it is shown that the appeal was directed by Chavez, counsel's failure to file would be per se deficient.

The district court's reasoning is simply splitting hairs. Nebraska appellate courts have never held that the decision to appeal has to be directly communicated by the client to the lawyer. It is immaterial whether the decision to appeal was given in person, over the phone, by a letter to the lawyer or passed to the lawyer by an intermediary. What matters is the lawyer was informed that the client decided to appeal the judgment of the trial court. Whether Chavez directed his mother to convey the appeal request is purely a question of fact, not a legal question. Yet the trial court erroneously resolved that factual dispute against Chavez without allowing any evidentiary presentation.

The Verified Motions expressly refutes the district court's reasoning. In both Verified Motions it was alleged that "Chavez's ability to communicate directly with trial counsel while incarcerated was limited, he requested assistance from his mother, Mona Castro, in communicating with trial counsel about filing an appeal." (T3 respectively). This is a sworn, specific, nonconclusory allegation that — if true — squarely meets *Trotter's* requirement that the defendant directed counsel to file an appeal in each case.

The trial court created a new trigger for counsel's duty to file an appeal in its ruling that is not supported by case law. The court added language not found in *Neb. Ct. R. § 2-101(F)(1)*, which does not require a personal interaction between client and counsel. The district court misconstrued *Trotter* and *Flores-Ortega* while ignoring the practical systematic impediments of incarcerated appellants. It is because of these impediments courts have specifically allowed inmates to rely on third party intermediaries, even other inmates, to communicate legal requests because access to the courts is a fundamental right. *Johnson v. Avery*, 393 U.S. 483, 485, 89 S. Ct. 747, 749 (1969). In *Johnson*, the court was addressing the federal writ of habeas corpus, however the wisdom and seriousness of an appellant's right to access to the courts does not fade with what specific vehicle of relief that is sought in the judiciary. The district court's interpretation of the court rule effectively means a prisoner will lose their constitutional rights based solely on

jail phone restrictions, institutional contact approval delays, or counsel's unresponsiveness, directly conflicting with *Johnson*.

A request to appeal is valid and imposes a nondiscretionary duty on counsel. The duty is created when two prongs of *Neb. Ct. R. § 2-101(F)(1)* have occurred. 1) The defendant has decided to appeal and 2) that decision is communicated to counsel, by ***any reasonable and reliable means***. Which logically includes family, authorized intermediaries, and third parties acting at the defendant's request, particularly when incarceration limits communication.

Because each of Chavez's verified motions did allege that he instructed his mother to convey his request to appeal, and because Nebraska law does not require a defendant to personally communicate that request, the district court erred in its decision to overrule his motion.

III. THE DISTRICT COURT VIOLATED CHAVEZ'S DUE PROCESS RIGHTS BY RESOLVING FACTUAL DISPUTES ON THE WRITTEN RECORD AND DISMISSING WITHOUT HOLDING AN EVIDENTIARY HEARING.

Whether the court denied due process by resolving factual issues without an evidentiary hearing presents a mixed question of law and fact. Factual findings are reviewed for clear error, and legal conclusions are reviewed de novo. *State v. Jaeger*, 311 Neb. 69 (2022).

Chavez was entitled to an evidentiary hearing as a matter of law because each verified motion alleged facts which, if proven true, establish a violation of his constitutional rights. A postconviction trial court must grant an evidentiary hearing when the motion contains factual allegations which, if true, constitute a violation of constitutional rights. *State v. Britt*, supra, Summary dismissal is appropriate only where the existing record affirmatively refutes those allegations. *State v. Munoz*, 309 Neb. 285. Here, both *Britt* and *Munoz* were violated. Chavez set forth specific factual allegations that, if true, demonstrate a constitutional violation, and none of those allegations were affirmatively refuted by the record.

Chavez's motions contained specific, verified factual allegations that were contested by the State. Chavez alleged in his motion that:

1. He instructed his mother to contact counsel regarding filing an appeal. (T3)

2. Chavez mother attempted to contact counsel repeatedly within the 30-day filing deadline. (T3)
3. Counsel refused to file the appeal. (T3)
4. Counsel did not contact Chavez personally to verify that he wanted to appeal. (T3)

Despite these allegations they were disputed by the State and the district court denied an evidentiary hearing. The State argued that Chavez did not personally direct counsel to appeal and asserted that there were “zero allegations” he instructed his mother to contact counsel. (T12) But each of Chavez’s verified motions expressly alleged the opposite. Rather than accept the verified allegations as true at this stage, the district court adopted the State’s disputed view of facts, erroneously concluding that Chavez did not *personally* direct counsel to file the appeal and that his mother did not act at his direction. (T19-20)

Denying an evidentiary hearing for Chavez’s sworn factual allegations did not allow facts to be put through the crucible that is the judicial process, allowing a trier of fact to weigh the evidence presented and make determinations of their veracity and give appropriate weight to the evidence presented, upholding his due process rights. Due process guarantees the right to be heard “at a meaningful time and in a meaningful manner.” *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). Denying his request for an evidentiary hearing where material facts were contested and outcome-determinative violated these established principles. The question whether Chavez instructed his mother to request trial counsel to file an appeal is a credibility question, not a legal question. It would be impossible for any court to resolve veracity and credibility from a cold, unsupported record, especially a record that contains a defendant who is incarcerated and his communication is so severely limited. When the district court made this determination, despite Chavez’s allegation in his verified motions for postconviction relief, the court denied him his only recourse for a constitutional violation.

When Chavez was denied an evidentiary hearing by the district court he was denied a fundamental right to due process. Though the required procedures may vary according to the interests at stake in a particular context, the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *Hass v. Neth*, 265 Neb. 321, 328 (2003) A meaningful manner

means notice, identification of the accuser, factual basis for the accusation, reasonable time and opportunity to present evidence concerning the accusation, and a hearing before an impartial board. *Id.* In *Hass*, a motorist was deprived of his driver's license and given no meaningful hearing appropriate to the "nature of the case." Chavez's case is similar to *Hass*. Granted Chavez was given a hearing to argue he had met the threshold for an evidentiary hearing. However, even though he had met that threshold for an evidentiary hearing Chavez's due process was denied by the district court denying him the opportunity to prove up those allegations through the crucible of the judicial process in their "particular context" as is required in Nebraska Law.

CONCLUSION

For the foregoing reasons, Chavez requests that this Court find the district court erred when denying his motions for postconviction relief with an evidentiary hearing. The district court's factual finding – that Chavez did not direct counsel to file an appeal – was improper because no evidence was adduced, and such a finding is impossible on a cold record. Furthermore, the district court misapplied Nebraska law, adding language to the law, that concludes an injured person is required to *personally direct* their attorney to appeal. Alternatively, the district court's order denying Chavez an evidentiary hearing violated his right to Due Process. Consequently, Chavez asks this Court to vacate the district court's order and remand with directions to grant an evidentiary hearing so that Chavez may present evidence in support of his claim that trial counsel rendered ineffective assistance when he failed to file a – client directed – notice of appeal after being notified to do so.

Respectfully submitted,

Emanuel Chavez, Appellant

By: /s/ Matthew K. Kosmicki
Matthew K. Kosmicki, #21875
140 N. 8th Street, Suite 250
Lincoln, NE 68508
531-500-0935
mattkosmickilaw@gmail.com

CERTIFICATE OF COMPLIANCE

Pursuant to Neb. Ct. R. App. P. §2-103(C)(4), I hereby certify as follows:

1. That the accompanying brief was prepared using Microsoft® Word for Microsoft 365 MSO (Version 2111 Build 16.0.14701.20240) 32-bit;
2. That the accompanying brief complies with the typeface requirements of Neb.Ct.R.App.P. §2-103(A)(3)&(4); and
3. That the accompanying brief contains 5596 words, excluding this Certificate of Compliance.

In certifying that the accompanying brief complies with Neb.Ct.R.App.P. §2-103(C)(3)(a), I have relied on the word count of the word processing software identified above.

/s/ Matthew K. Kosmicki
Matthew K. Kosmicki, #21875

Certificate of Service

I hereby certify that on Monday, December 01, 2025 I provided a true and correct copy of this *Brief of Appellant Chavez* to the following:

State of Nebraska represented by Michael Thomas Hilgers (24483) service method: Electronic Service to **katie.beiermann@nebraska.gov**

Signature: /s/ Matthew Kosmicki (21875)