

**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

REPLY BRIEF OF APPELLANT

Respectfully submitted:

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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) 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).

ARGUMENT

I. THE STATE'S OWN BRIEF CONFIRMS THAT CHAVEZ ALLEGED HE DIRECTED HIS MOTHER TO COMMUNICATE HIS REQUEST TO APPEAL, CREATING A FACTUAL DISPUTE THAT REQUIRED AN EVIDENTIARY HEARING.

The State incorrectly mischaracterizes Chavez's allegations in his verified motion for postconviction relief. The State's argument that Chavez failed to allege he directed his mother to communicate his request to appeal is contradicted by the State's own brief. On page 11 of its brief, the State quotes Chavez's verified motion as alleging that:

Mr. 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. (State's Brief, p. 11).

That statement expressly acknowledges that Chavez requested his mother's assistance in communicating with counsel regarding filing an appeal. A request for assistance in communicating with counsel about filing an appeal is, by its plain language, an allegation that Chavez directed his mother to convey his desire to appeal.

Yet only three pages later, the State argues the opposite, asserting:

“Chavez did not specifically state that he told his mother to inform his counsel to file an appeal,” and that “[n]owhere in his motion does Chavez state that he told his mother to tell his trial counsel to file a direct appeal.” (State’s Brief, p. 14).

These two positions cannot be reconciled. The State cannot simultaneously acknowledge Chavez’s allegation and deny its existence. The State’s argument is not that Chavez failed to allege facts, but that the State disputes the interpretation or significance of his factual assertion. The State’s argument is circular.

Under Nebraska law, when a verified postconviction motion alleges specific facts which, if true, would establish a constitutional violation, and those facts are not affirmatively refuted by the record, the court must grant an evidentiary hearing. *State v. Britt*, 310 Neb. 69 (2021); *State v. Munoz*, 309 Neb. 285 (2021). At the pleading stage, the court may not resolve disputed factual issues, weigh credibility, or draw adverse factual inferences against the movant. *State v. Gonzalez-Faguaga*, 266 Neb. 72 (2003).

Here, Chavez’s verified motion alleged that he requested his mother to communicate with counsel about filing an appeal. The State disputes the meaning and effect of that allegation. That dispute goes directly to the central factual question in this case: whether Chavez directed counsel to file an appeal. That question cannot be resolved from the pleadings alone. It requires evidence. It requires testimony. It requires an evidentiary hearing.

The State argued, and the District Court accepted, that Chavez “does not allege that he himself spoke, wrote, emailed, or phoned trial counsel and directed him to file an appeal.” (T18; State’s Brief at 11). But this reasoning ignores the very factual allegation Chavez made, specifically that he was unable to directly communicate with counsel because he had been immediately incarcerated and subjected to institutional communication barriers, and obviously requested his mother to convey his directive. (T3). The State’s argument is neither

reasonable nor grounded in common sense; it urges an unduly rigid and unjustifiable narrow interpretation of the allegation in the motion.

The District Court then denied Chavez an evidentiary hearing, thereby preventing him from presenting evidence explaining why he did not personally communicate with counsel. This reasoning is circular. Chavez was denied a hearing because he did not personally communicate with counsel, while at the same time being denied the only procedural mechanism through which he could prove that he was unable to personally communicate and therefore relied on an intermediary. The absence of personal communication between him and his attorney is not intended as proof of his claim, **it is the claim.**

The State's argument in both the District Court and in the brief before this Court and which was adopted by the District Court's in its order is just simply reading Chavez's Verified Motion too literally. The District Court reasoning rests on a hyper-technical semantic distinction that mischaracterizes Chavez's motion.

The State invites this Court to apply tunnel vision and disregard the full set of factual allegations contained in Chavez's verified motion. The District Court should not have viewed each allegation in isolation, but rather considered the allegations as a whole in order to understand the context of Chavez's claim. When the allegations are read together, it is clear that Chavez alleged he asked his trial counsel to file an appeal.

As the State itself acknowledges, "Mr. Chavez's ability to communicate directly with trial counsel while incarcerated was limited, [and] he requested assistance from his mother, Mona Castro, in communicating with trial counsel about filing an appeal." (State's Brief, p. 11). In the very next paragraph of Chavez's motion, he alleged: "Finally, at the zero hour, on June 22, 2023, trial counsel took a call from Ms. Castro. During this call, she expressed to trial counsel **that Mr. Chavez wanted to file an appeal.**" (T3) (emphasis added).

Chavez could not make a more direct factual allegation that he instructed trial counsel to file an appeal. Any contrary interpretation is nonsensical. The logical inference from the allegations is straightforward: because Chavez could not directly contact trial

counsel while incarcerated, he enlisted his mother to convey his request that counsel file an appeal. Chavez's verified motion plainly makes this factual assertion.

The District Court erred by failing to consider Chavez's verified motion for postconviction relief in its entirety. The State's arguments to this Court are without merit and directly conflict with the undisputed factual allegations contained in Chavez's motion.

Courts cannot resolve factual disputes by using the alleged effects of a constitutional violation as proof that no violation occurred. The State's conclusion is dependent entirely on the premise it seeks to prove. Likewise here, Chavez was denied a hearing because he did not personally communicate with counsel, while being denied the opportunity to prove that his inability to personally communicate was the very reason he used an intermediary.

Nebraska law does not permit courts to resolve contested factual questions against a postconviction movant at the pleading stage. When a verified motion alleges facts which, if true, would entitle the movant to relief, and those facts are not affirmatively refuted by the record, the court must grant an evidentiary hearing. *Britt, supra*. Whether Chavez personally communicated with counsel, whether he directed his mother to do so, and whether institutional barriers prevented direct communication are factual questions requiring evidence, credibility determinations, and findings of fact.

By denying Chavez the opportunity to present that evidence and instead accepting the State's interpretation of disputed facts, the District Court improperly resolved factual issues and deprived Chavez of the process required by Neb. Rev. Stat. § 29-3001.

The District Court engaged in a much too hyper-technical semantic reading of Chavez's factual allegations that simply is not reasonable. Because Chavez's verified motion alleged facts which, if true, establish that counsel failed to file an appeal after being directed to do so, and because those allegations are not affirmatively refuted by the record, the District Court was required to grant an evidentiary hearing and should be reversed.

CONCLUSION

Chavez properly alleged in his verified motion that he directed counsel to file an appeal and that counsel refused. The State disputes that allegation, creating a factual question that cannot be resolved on the pleading. The State's argument is misplaced. The District Court erred denying Chavez an evidentiary hearing. Nebraska law requires an evidentiary hearing under these circumstances. Chavez respectfully requests that this Court reverse and remand with directions to grant an evidentiary hearing.

Respectfully submitted,

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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 1,536 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
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Certificate of Service

I hereby certify that on Thursday, March 05, 2026 I provided a true and correct copy of this *Reply Brief* to the following:

State of Nebraska represented by Erin E Tangeman (22924) service method: Electronic Service to **erin.tangeman@nebraska.gov**

Signature: /s/ Matthew Kosmicki (21875)