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STATE OF NEBRASKA, APPELLEE, V. JOHN L. LOTTER, APPELLANT.

___ N.W.3d ___

Filed October 23, 2026. Nos. S-25-170 through S-25-172.

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: Judgments: Appeal and Error.** Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law which an appellate court reviews independently of the lower court's ruling.
3. **Postconviction: Constitutional Law.** Postconviction relief is a very narrow category of relief, available only to remedy prejudicial constitutional violations that render the judgment void or voidable.
4. **Postconviction.** The need for finality in the criminal process requires that a defendant bring all claims for relief at the first opportunity.
5. **Postconviction: Pleadings.** The effect of Neb. Rev. Stat. § 29-3001(3) (Cum. Supp. 2024) is to require that all available grounds for postconviction relief must be stated in the initial postconviction motion and, once that motion has been judicially determined, any subsequent postconviction motion regarding the same conviction and sentence may be dismissed by the district court unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time of filing the prior motion.
6. ____: ____. A defendant is entitled to bring a successive postconviction motion only when the face of the motion affirmatively shows that the issues raised therein could not have been raised in prior motions.

Appeals from the District Court for Richardson County: JULIE D. SMITH, Judge. Affirmed.

Stuart J. Dornan, of Dornan, Howard, Breitkreutz, Dahlquist & Klein, P.C., L.L.O., for appellant.

Michael T. Hilgers, Attorney General, and Erin E. Tangeman for appellee.

Funke, C.J., Cassel, Stacy, Papik, and Vaughn, JJ., and Pirtle and Freeman, Judges.

Papik, J.

This consolidated appeal involves John L. Lotter's latest attempt at postconviction relief. Lotter and Marvin Thomas Nissen were both charged with multiple offenses in connection with a well-known triple homicide perpetrated in 1993. Three separately numbered cases against Lotter were consolidated for trial. Nissen's testimony at Lotter's jury trial provided the only direct evidence of Lotter's guilt, though the State also presented circumstantial evidence that Lotter was involved in the murders. Lotter was convicted of three counts of first degree murder and related charges and was subsequently sentenced to death and to prison terms. Over the ensuing decades, he has challenged his convictions and sentences many times with minimal success.

In 2024, Lotter filed identical verified motions for postconviction relief in each of his three cases. He claimed the prosecution had violated *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) (*Brady*), by failing to disclose "'a prisoner file'" of Nissen's. The prisoner file contained information that, in Lotter's view, would have helped him utilize Nissen's mental health history to diminish Nissen's credibility at trial. Lotter asserted that there was a reasonable likelihood that, had the jury been presented with the information, Lotter would not have been convicted and sentenced to death. In identical orders, the district court overruled the postconviction motions without an evidentiary hearing. It found that the claims alleged were both filed outside the 1-year

limitations period set forth in Neb. Rev. Stat. § 29-3001 (Cum. Supp. 2024) and procedurally barred.

In this consolidated appeal, the parties primarily dispute whether Lotter's postconviction motions were time barred and procedurally barred. We conclude that Lotter's postconviction motions were procedurally barred and therefore we affirm.

BACKGROUND

Relevant Pretrial Proceedings.

In 1993, three people were found dead in a rural farmhouse. All three people died of gunshot wounds; one of those three had also been stabbed. Lotter and Nissen each faced three homicide charges as a result, among other criminal charges. Three separately numbered cases against Lotter were eventually consolidated for trial.

Prior to Lotter's trial, the district court granted several of his requests for discovery. This included Lotter's general request for medical records of testifying witnesses and any results of mental examinations made in connection with the case. It also included a more specific request for exculpatory evidence that would undermine the State's proof at the guilt and sentencing phases of Lotter's prosecution.

At a suppression hearing in October 1994, a few months before Lotter's trial, a jailer testified that Nissen "appeared upset" and "depressed" and that he asked to speak to a mental health professional. Nissen told the jailer that he had difficulty sleeping and that he had been having nightmares featuring two of the victims. The jailer testified that she was aware that Nissen had been taking medications in custody, but she did not remember what they were.

At a joint motions hearing on November 11, 1994, involving both Lotter and Nissen, Lotter's counsel was present when Nissen's counsel argued a motion requesting that the State produce Nissen's prisoner file. Nissen's counsel stated that he had previously seen Nissen's prisoner file that was being kept in the county sheriff's office and that the file

included medical records that would be useful for trial and for sentencing if Nissen were convicted. The district court sustained the motion. At the same hearing, Lotter's counsel expressed an intent to file a motion to obtain the prisoner file of a cellmate of Nissen's.

Ultimately, Lotter and Nissen were tried separately. Nissen was tried and convicted of murder charges before Lotter's trial. In exchange for the State's agreement not to pursue the death penalty at Nissen's sentencing, Nissen agreed to testify truthfully against Lotter in any criminal proceedings.

Nissen Deposed Before Testifying.

In May 1995, the day before Nissen testified at Lotter's trial, Lotter's defense counsel deposed Nissen. Lotter's counsel asked Nissen whether, after the day of the murders, he had attempted suicide. Nissen stated that he had attempted suicide following the murders while he was at what was then called the Diagnostic and Evaluation Center and while he was at the county jail and that he had made one suicide attempt prior to the murders.

During the deposition, defense counsel also questioned Nissen about medications a psychiatrist prescribed to him not long after he arrived at the Diagnostic and Evaluation Center and "[w]hen [he] was in prison in '93 . . . ." Nissen explained that he needed the medications to help him sleep at night and to avoid migraine headaches.

Lotter's Trial.

As detailed in our opinion on Lotter's direct appeal, Nissen testified at Lotter's trial that Lotter participated in the murders in December 1993. See *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998), *modified on denial of rehearing* 255 Neb. 889, 587 N.W.2d 673 (1999), *cert. denied* 526 U.S. 1162, 119 S. Ct. 2056, 144 L. Ed. 2d 222, *disapproved on other grounds, State v. Hagens*, 320 Neb. 65, 26 N.W.3d 174 (2025). Nissen recounted that after one of the would-be murder victims accused him and Lotter of rape, they made plans

to kill their accuser. Nissen testified that once they found out where their accuser was staying, they entered that residence by force, having agreed to kill anyone inside. According to Nissen's trial testimony, Nissen stabbed one of the victims and Lotter fatally shot all three victims. Nissen's testimony was the only direct evidence that Lotter shot the victims, but there was also circumstantial evidence supporting the State's theory that Lotter was involved in planning and carrying out the murders.

At Lotter's trial, his counsel attempted to challenge Nissen's credibility on cross-examination. Lotter's counsel asked Nissen about his dreams and his medications. Lotter's counsel further asked Nissen about his lying to law enforcement and changing his story to minimize his involvement in the murders, implicating others in the murders to shift the investigation from himself, and agreeing to testify against Lotter to avoid the death penalty. Lotter's counsel elicited Nissen's testimony about raping and physically assaulting one of the murder victims on a prior occasion because he was upset, angry, and "[k]ind of hot headed."

The jury additionally heard the testimony of Nissen's cellmate at the Diagnostic and Evaluation Center. The cellmate testified that in September 1994, Nissen changed his original story and confessed to the cellmate that Nissen, not Lotter, was the one who fired the fatal shots. The cellmate characterized Nissen as initially being "quiet and withdrawn" and having difficulty sleeping, but later Nissen "seemed like a powder keg ready to go off" and began talking about his involvement in the crimes.

Lotter testified in his own defense. He denied any involvement in the crimes. He testified that Nissen had not been truthful in his testimony regarding Lotter's participation and that other incriminating witnesses were either lying or mistaken.

During closing arguments, Lotter's counsel told the jury Nissen would "lie about anybody; he would do anything" to protect himself and referred to Nissen as a "master manipulator."

Convictions and Sentences.

In May 1995, a jury found Lotter guilty of three counts of first degree murder, three counts of use of a weapon to commit a felony, and one count of burglary.

At Lotter's sentencing hearing, defense counsel offered into evidence several exhibits relating to Nissen's past criminal history. Those exhibits included charges for falsely reporting in 1989 that he had been injured by a man when his injuries had actually been self-inflicted with a razor, an escape from jail in 1991, second degree arson and burglary in 1992, and third degree assault in 1992. Documents pertaining to those charges detailed Nissen's thoughts of suicide and his desire to speak to a mental health professional. Lotter also entered into evidence documents related to a 1992 temporary protection order Nissen's mother-in-law obtained against Nissen.

Lotter was eventually sentenced to death for each murder conviction and to terms of imprisonment for the remaining convictions. The three-judge panel that imposed Lotter's death sentences found three statutory aggravating circumstances were present for each homicide, along with one statutory mitigating circumstance and some nonstatutory mitigating circumstances. Throughout its analysis, the sentencing panel relied extensively, though not exclusively, on Nissen's trial testimony.

Prior Challenges to Convictions and Sentences.

On direct appeal, Lotter raised multiple issues attacking his convictions and death sentences, including various claims relating to Nissen's sentencing agreement with the State. See *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998), *modified on denial of rehearing* 255 Neb. 889, 587 N.W.2d 673 (1999), *cert. denied* 526 U.S. 1162, 119 S. Ct. 2056, 144 L. Ed. 2d 222, *disapproved on other grounds, State v. Hagens*, 320 Neb. 65, 26 N.W.3d 174 (2025). This court affirmed his convictions and sentences for the murder and weapons

charges, but we vacated the burglary sentence on double jeopardy grounds.

Lotter subsequently filed numerous motions and appeals. They included multiple unsuccessful attempts at postconviction relief filed prior to the current motion. See, *State v. Lotter*, 311 Neb. 878, 976 N.W.2d 721 (2022), *cert. denied* ___ U.S. ___, 143 S. Ct. 1026, 215 L. Ed. 2d 192 (2023); *State v. Lotter*, 301 Neb. 125, 917 N.W.2d 850 (2018), *cert. denied* 587 U.S. 1065, 139 S. Ct. 2716, 204 L. Ed. 2d 1114 (2019); *State v. Lotter*, 285 Neb. xix (Nos. S-12-837 through S-12-839, Mar. 20, 2013); *State v. Lotter*, 278 Neb. 466, 771 N.W.2d 551 (2009), *cert. denied* 559 U.S. 1014, 130 S. Ct. 1900, 176 L. Ed. 2d 378 (2010); *State v. Lotter*, 267 Neb. xxiii (Nos. S-03-1278 through S-03-1280, Apr. 21, 2024); *State v. Lotter*, 266 Neb. 245, 664 N.W.2d 892 (2003), *cert. denied* 542 U.S. 939, 124 S. Ct. 2904, 159 L. Ed. 2d 815 (2004) (superseded by statute on other grounds as stated in *State v. Harris*, 292 Neb. 186, 871 N.W.2d 762 (2015)). Additionally, Lotter filed an unsuccessful motion for DNA testing and two unsuccessful petitions for federal habeas corpus relief. See, *Lotter v. Houston*, 771 F. Supp. 2d 1074 (D. Neb. 2011), *certificate of appealability denied* No. 11-2223, 2011 WL 13492037 (8th Cir. Aug. 23, 2011), *cert. denied* 565 U.S. 1268, 132 S. Ct. 1760, 182 L. Ed. 2d 545 (2012); *Lotter v. Britten*, No. 4:04CV3187, 2017 WL 744554 (D. Neb. Feb. 24, 2017), *certificate of appealability denied* No. 17-2000, 2017 WL 5015176 (8th Cir. July 31, 2017), *cert. denied, Lotter v. Frakes*, 583 U.S. 1103, 138 S. Ct. 926, 200 L. Ed. 2d 205 (2018); *State v. Lotter*, 266 Neb. 758, 669 N.W.2d 438 (2003).

Two of Lotter's unsuccessful attempts at postconviction relief—sets of motions filed in 1999 and 2008, respectively—raised issues related to Nissen's posttrial statements that Nissen was the shooter, not Lotter.

Lotter first sought postconviction relief in 1999 after learning that in 1997, Nissen had told his cellmate at the Lincoln Correctional Center that Nissen—not Lotter—shot the three

victims. See *State v. Lotter*, 266 Neb. 245, 664 N.W.2d 892 (2003), *cert. denied* 542 U.S. 939, 124 S. Ct. 2904, 159 L. Ed. 2d 815 (2004) (superseded by statute on other grounds as stated in *State v. Harris*, 292 Neb. 186, 871 N.W.2d 762 (2015)). Lotter's postconviction counsel deposed Nissen in connection with the postconviction proceedings, but Nissen refused to testify about the cellmate's statement and other witnesses' statements about his truthfulness at trial. Nissen did, however, testify about his suicide attempts prior to the murders; the suicide attempts occurred in Mississippi and resulted in his hospitalization at a mental institution in Memphis, Tennessee. Nissen, who was 22 years old at the time of the murders, also testified that he was hospitalized in a mental institution when he was a ward of the State.

By 2007, Nissen was willing to put in an affidavit what he had previously told his cellmate at the Lincoln Correctional Center—that his testimony at Lotter's trial regarding "who fired the gun" was false. His affidavit stated that it was Nissen, not Lotter, who had shot all three victims. Lotter relied on that affidavit in his attempt to obtain postconviction relief in 2008 but was again unsuccessful. See *State v. Lotter*, 278 Neb. 466, 771 N.W.2d 551 (2009), *cert. denied* 559 U.S. 1014, 130 S. Ct. 1900, 176 L. Ed. 2d 378 (2010). Lotter asserted that the State knew or should have known that Nissen was lying at trial because it was in possession of evidence that Nissen was a "world class liar" and a "con artist." *Id*. at 473, 771 N.W.2d at 558 (internal quotation marks omitted). Lotter also provided, among other things, police reports related to the 1989 incident in which Nissen cut himself with a razor and blamed someone else so the accused would be arrested.

In 2018, Lotter filed the set of postconviction motions that immediately preceded the motions at issue in this appeal. Lotter alleged that his death sentences were unconstitutional because they had been "re-impos[ed]" after a legislative bill abolishing the death penalty was repealed by public referendum. He also asserted that his death sentences were unconstitutional

because he was intellectually disabled under *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002). The district court entered an order in 2020 denying postconviction relief without an evidentiary hearing. Lotter appealed, and in an opinion issued in 2022, we affirmed, concluding that Lotter's *Atkins* claims were procedurally barred and time barred and that his other claim was legally flawed and, therefore, meritless. See *State v. Lotter*, 311 Neb. 878, 976 N.W.2d 721 (2022), *cert. denied* ___ U.S. ___, 143 S. Ct. 1026, 215 L. Ed. 2d 192 (2023).

Most Recent Postconviction Proceedings.

In July 2024, Lotter filed the most recent verified motions for postconviction relief. In all three cases, Lotter filed identical motions, and the district court ruled on them with identical orders. For ease of reference, we hereinafter refer to the motions, related filings, and orders in the singular.

Lotter's postconviction motion asserted that the State violated *Brady* by failing to disclose material exculpatory evidence about Nissen's mental health. Lotter specifically alleged that he had recently obtained some of Nissen's mental health records from the Nebraska Department of Correctional Services (DCS). Lotter's motion confirmed that those DCS records and the prisoner file that was the subject of the November 11, 1994, pretrial joint motions hearing were one and the same. He asserted that the DCS records were not given to Lotter at trial or sentencing, even though the prosecutor had them and they were encompassed in the district court's discovery order.

Lotter claimed he first accessed the records after Nissen "agreed to" sign a release form that yielded Nissen's DCS medical records in 2023 and Nissen's DCS mental health records in 2024. According to Lotter, he would not have been able to request or receive the DCS records but for Nissen's signed release.

Lotter alleged that the discovery of the DCS records prompted an investigation that allowed Lotter, in 2024, to

obtain additional mental health records of Nissen's. Lotter claimed that, together, the DCS records he obtained through Nissen's signed release and the additional mental health records Lotter discovered thereafter included material exculpatory evidence that Nissen was "severely mentally ill, highly impulsive, and unpredictably violent for years leading up to the murder[s], at the time of the murder[s], and at the time of trial." According to Lotter, the suppressed evidence "undermined Nissen's capacity to be a reliable, credible witness; suggested that he frequently lost touch with reality; and supported the inference that he was capable of and responsible for these murders." And Lotter claimed it was different from mental health evidence that Lotter had previously encountered because it was "uniquely grounded in Nissen's medical history and expressed in the words of medical professionals."

Lotter quoted excerpts from the records, copies of which were attached to the motion. In the records, medical professionals observed in 1992 and 1995 that even in an "institution, [Nissen] will appear troublesome, predatory[,] [and] manipulative," with a "poorly developed conscience," and a "need[] to be watched because of his impulsivity." The records also include Nissen's own reports in 1994 that he had used multiple illegal drugs, as well as Nissen's report that he had attempted suicide in April and December 1994.

Lotter's motion also asserted that the records show that Nissen was diagnosed with "Bi-Polar Disorder, NOS" in 2012 and "[s]chizoaffective disorder bipolar type" in 2017. Lotter acknowledged that these diagnoses were made years after Lotter's 1995 trial, but he alleged that the available evidence from the time of the 1993 murders demonstrated that Nissen had suffered from the symptoms of bipolar disorder for years before. Lotter noted that he had uncovered a record from 1992 in which a mental health professional at a Nebraska crisis center "flagged Nissen for possible Bipolar Disorder" and stated that a "'psychological evaluation might shed additional light on [Nissen's] general level of functioning.'" Lotter

also discovered a record from 2003 that reported Nissen was "'seeing things'" and began taking antipsychotic medication.

Lotter attached to his motion documents he claimed were newly discovered. The documents included declarations signed in 2024 by two family members of Nissen's that discussed Nissen's history, a 1992 discharge summary from the crisis center, and a 2023 letter from the mental institution in Memphis that stated Nissen was discharged in 1990.

The State filed a response in opposition to Lotter's motion for postconviction relief, and Lotter's counsel filed an unverified reply to the State's arguments. Therein, Lotter's counsel asserted that he could not have discovered the whole of Nissen's mental health history earlier because it would have "erroneously require[d] Lotter to have assumed, at trial, that the State hid evidence that had been requested rather than complied with its well-established duty to disclose *Brady* evidence."

District Court Denies Postconviction Relief.

The district court overruled Lotter's motion for postconviction relief without an evidentiary hearing, determining that it was both time barred and procedurally barred. The district court found:

> [T]he record in this case affirmatively shows that [Lotter] and his trial counsel were aware of the existence of Nissen's prisoner file in 1994, were aware that the file would contain psychological history, criminal history, and statements that could potentially be used to impeach Nissen, were aware that Nissen had expressed concerns about his mental health to jail staff, and were aware that this Court had ordered that prisoner files be provided to counsel for the codefendant regarding other potential witnesses. . . . As a result, [Lotter] knew or could have learned of the contents of Nissen's prisoner file through the exercise of due diligence in 1995, when Nissen was disclosed as a witness for the State, and if the State had

> an obligation to disclose such records, [Lotter] needed to raise the State's failure to do so within one year of [Lotter's] conviction becoming final in 1999. [Lotter's] motion is not timely [pursuant to § 29-3001(4)]. Further, these claims were required to be brought at the first opportunity and [Lotter] could have raised the State's failure to disclose Nissen's prisoner file on [Lotter's] direct appeal or in his first motion for postconviction relief.

The district court later overruled Lotter's motion to alter or amend the judgment. Lotter appeals in each case, now consolidated.

ASSIGNMENT OF ERROR

Broadly stated, Lotter assigns that the district court erred in finding his motion for postconviction relief was untimely and procedurally barred.

STANDARD OF REVIEW

[1,2] 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. *State v. Galindo*, 315 Neb. 1, 994 N.W.2d 562 (2023). Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law which an appellate court reviews independently of the lower court's ruling. *Id.*

ANALYSIS

[3] Lotter claims on appeal that the district court erred in denying him postconviction relief without an evidentiary hearing. In Nebraska, postconviction relief is a very narrow category of relief, available only to remedy prejudicial constitutional violations that render the judgment void or voidable. *State v. Lotter*, 311 Neb. 878, 976 N.W.2d 721 (2022),

cert. denied ___ U.S. ___, 143 S. Ct. 1026, 215 L. Ed. 2d 192 (2023). An evidentiary hearing is not required on a motion for postconviction relief when the records and files affirmatively show that the defendant is entitled to no relief. See *State v. Lessley*, 312 Neb. 316, 978 N.W.2d 620 (2022).

"In addition to the substantive rules governing postconviction relief, there are procedural rules which can bar postconviction relief regardless of the merits of a particular claim." *State v. Lotter*, 311 Neb. at 887, 976 N.W.2d at 730. In this case, the district court concluded that Lotter's motion for postconviction relief could be denied without an evidentiary hearing because it ran afoul of two such procedural rules—the time bar imposed by § 29-3001(4) and the procedural bar rooted in § 29-3001(3).

Lotter asserts on appeal that the district court erred in ruling that the claims in his motion for postconviction relief were barred under the foregoing rules. His arguments mainly focus on the district court's finding that he failed to bring his latest postconviction motion within the 1-year time bar set by § 29-3001(4). To a lesser degree, he also asserts that the district court incorrectly concluded that the claims in his motion were procedurally barred. We need not address Lotter's arguments pertaining to the statutory limitations period because, as we are about to illustrate, we conclude in our de novo review that his claims are procedurally barred. See *State v. Rieker*, 318 Neb. 238, 14 N.W.3d 855 (2025) (appellate court is not obligated to engage in analysis that is not necessary to adjudicate case and controversy before it). But before we explain why Lotter's motion is procedurally barred, we first set forth the general principles governing the procedural bar on postconviction relief.

Procedural Bar on Postconviction Relief.

[4-6] The need for finality in the criminal process requires that a defendant bring all claims for relief at the first opportunity. *Lessley, supra*. Not long ago, we applied this principle

to one of Lotter's previous successive motions for postconviction relief and stated:

> [T]he statute governing postconviction relief expressly provides that a "court need not entertain a second motion or successive motions for similar relief on behalf of the same prisoner." [§ 29-3001(3).] We have long construed this provision to require that all available grounds for postconviction relief must be stated in the initial postconviction motion and, once that motion has been judicially determined, any subsequent postconviction motion regarding the same conviction and sentence may be dismissed by the district court unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time of filing the prior motion. [See *State v. Reichel*, 187 Neb. 464, 191 N.W.2d 826 (1971). See, also, *State v. Watkins*, 284 Neb. 742, 746, 825 N.W.2d 403, 406 (2012) (holding "court will not entertain a successive motion for postconviction relief unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time the movant filed the prior motion"); *State v. Ryan*, 257 Neb. 635, 601 N.W.2d 473 (1999).] Stated differently, a defendant is entitled to bring a successive postconviction motion only when the face of the motion affirmatively shows that the issues raised therein could not have been raised in prior motions. [See *State v. Lotter*, 278 Neb. 466, 477, 771 N.W.2d 551, 561 (2009) (finding Lotter's constitutional claim based on allegation of perjured trial testimony was procedurally barred because "Lotter fails to allege that this evidence was unavailable before any of the numerous challenges already made to his convictions and sentences"), *cert. denied* 559 U.S. 1014, 130 S. Ct. 1900, 176 L. Ed. 2d 378 (2010)]. See, also, *State v. Jackson*, 296 Neb. 31, 892 N.W.2d 67 (2017); *State v. Marshall*, 272 Neb. 924, 725 N.W.2d 834 (2007); *State v. Ortiz*, 266 Neb. 959, 670 N.W.2d 788 (2003).] In the

> absence of such affirmative allegations, there is "no justification for allowing a prisoner to continue litigation endlessly by piecemeal post conviction attacks on his conviction and sentence." [*Reichel*, 187 Neb. at 467, 191 N.W.2d at 828.] A prisoner cannot wait to see if some postconviction claims will succeed and, when they do not, dust off other claims and subsequently attempt to litigate them. [See *Ryan, supra*.]

State v. Lotter, 311 Neb. 878, 888-89, 976 N.W.2d 721, 731 (2022), *cert. denied* ___ U.S. ___, 143 S. Ct. 1026, 215 L. Ed. 2d 192 (2023).

With these principles in mind, we now explain why we conclude Lotter's latest motion was procedurally barred.

Procedural Bar Applied.

The district court concluded that Lotter's motion was procedurally barred based on its determination that Lotter could have raised the *Brady* claims he asserted in the motion either on direct appeal or at the time of his first postconviction motion, which was filed in 1999. The district court determined Lotter could have brought his *Brady* claims earlier, based on its finding that Lotter would have been aware of the existence of Nissen's prisoner file from DCS, what the file would have generally contained, and Nissen's mental health issues in 1994. Under the procedural bar principles discussed above, however, the district court did not have to determine that Lotter could have raised his *Brady* claims as early as his direct appeal or as early as his first postconviction motion to conclude that his current motion was procedurally barred.

A successive motion for postconviction relief is procedurally barred if it raises grounds for relief that could have been raised in *any* prior motion that has been judicially determined. See *State v. Lotter*, 278 Neb. 466, 477, 771 N.W.2d 551, 561 (2009) (finding Lotter's constitutional claim based on allegation of perjured trial testimony was procedurally barred because "Lotter fails to allege that this evidence was

unavailable before any of the numerous challenges already made to his convictions and sentences"), *cert. denied* 559 U.S. 1014, 130 S. Ct. 1900, 176 L. Ed. 2d 378 (2010). In addition, a defendant pursuing a successive motion for postconviction relief bears an obligation to affirmatively show on the face of a postconviction motion that the issues raised therein could not have been raised in prior motions. See *State v. Lotter*, 311 Neb. 878, 976 N.W.2d 721 (2022), *cert. denied* ___ U.S. ___, 143 S. Ct. 1026, 215 L. Ed. 2d 192 (2023). Under these principles, Lotter's current motion was procedurally barred if it failed to affirmatively show on its face that his *Brady* claims could not have been raised in any of his prior motions, including the motion he filed prior to this one in 2018.

Despite this obligation, Lotter's motion says quite little about why his *Brady* claims could not have been brought at the time of his last motion for postconviction relief. Lotter asserts in his motion that he received Nissen's medical records from DCS in August 2023 and his mental health records from DCS in January 2024. Lotter also states that his receipt of these records prompted an investigation that led him to discover other pieces of evidence pertaining to Nissen's mental health of which he was previously unaware. Finally, Lotter claims that he was able to access Nissen's records only after Nissen agreed to allow his records to be released.

But Lotter's motion raises far more questions about how he came to possess Nissen's medical and mental health records than it answers. To begin, the motion does not make clear whether Lotter came into possession of the records as a result of his specific request for the records or whether the State provided them without prompting from Lotter. If the records were requested by Lotter, the motion does not specify when the request was made. Neither does the motion shed any light on what, if anything, induced Lotter to make a request for the records or why such a request could not have been made earlier. As to Nissen's release, there are more gaps. The motion does not address whether Lotter asked Nissen to permit his

records to be turned over to Lotter or whether Nissen volunteered permission on his own. If Lotter did request a release from Nissen, the motion says nothing about when Lotter requested the release, when Nissen agreed to provide it, what prompted Lotter to make such a request, or why such a request was not made earlier.

In our view, this missing information is significant because, without it, we have no way to assure ourselves that Lotter could not have brought the *Brady* claims he seeks to bring in this postconviction motion when he brought his last postconviction motion. All Lotter's motion alleges is that he did not have the records on which his *Brady* claims are based in his possession until August 2023 and January 2024 and that Nissen had to provide a release for him to get those records. If those records truly came to Lotter out of the blue, that is to say, without some reason that he should have previously known about their existence, it is difficult to see how he could have brought his *Brady* claims earlier. But, on the other hand, if Lotter obtained the records because information he long possessed gave him reason to know of the records' existence, the opposite would be true. See, e.g., *State v. Lotter*, 311 Neb. 878, 976 N.W.2d 721 (2022) (concluding that *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002), claim was procedurally barred because Lotter could have discovered factual predicate to support claim through exercise of due diligence and raised it in earlier postconviction motion), *cert. denied* ___ U.S. ___, 143 S. Ct. 1026, 215 L. Ed. 2d 192 (2023)). The problem with Lotter's motion is that it makes no affirmative showing that his case falls into the former category, and not the latter. Rather than affirmatively showing that he had no way of obtaining the records at issue before he did, Lotter merely stated when he received the records and left reviewing courts to wonder why he received them when he did and whether he was on notice of their existence earlier.

Along the same lines, by alleging merely that he was able to access the records only after Nissen provided a release,

Lotter has not affirmatively shown that he could not have brought his *Brady* claims at the time of his last motion for postconviction relief. On this point, it must be recalled that Lotter pursued postconviction relief in 2008 and again thereafter relying, in part, on affidavits from Nissen affirming that he was the shooter, not Lotter. Given Nissen's longstanding cooperation with Lotter, Lotter could not make the requisite "affirmative showing" merely by asserting that he could not get the records until Nissen provided a release. To the contrary, Lotter was obligated to show why he could not have asked for and obtained a release and the corresponding records in time to assert his *Brady* claims in his last motion for postconviction relief.

Lotter resists any suggestion that his motion was time barred or procedurally barred. As noted above, his arguments mainly address the district court's conclusion that his motion was time barred, but he appears to also apply some of the same reasoning to challenge the district court's determination that his motion was procedurally barred. Specifically, Lotter relies on cases from the U.S. Supreme Court and other federal courts to argue that because the State had an obligation under *Brady* to turn over the records at issue, he had no obligation to try to discover such information and cannot be faulted for failing to bring his *Brady* claims earlier than he did. Lotter also takes exception to the district court's conclusion that based on information that was available to him, he could have asserted his current *Brady* claims on direct appeal or in his first motion for postconviction relief. Again, Lotter emphasizes that at that time, he was accepting the State's representation that he had been provided with all material *Brady* required it to disclose.

With respect to the cases cited by Lotter, we acknowledge that some federal courts of appeal have held that diligence on the part of the defense is not a substantive element of a *Brady* claim. See, e.g., *Fontenot v. Crow*, 4 F.4th 982 (10th Cir. 2021); *Dennis v. Secretary, PA Dept. of Corrections*, 834

F.3d 263 (3d Cir. 2016). We likewise acknowledge that the U.S. Supreme Court has held that a federal habeas petitioner can show the necessary cause to excuse a failure to present a *Brady* claim in state court by showing that prosecutors represented that they turned over all exculpatory information, see *Banks v. Dretke*, 540 U.S. 668, 124 S. Ct. 1256, 157 L. Ed. 2d 1166 (2004), and that some federal courts of appeal have held that postconviction due diligence requirements do not require federal habeas petitioners to "search for *Brady* material of which [they are] unaware and which [they are] entitled to presume is non-existent," see *Bracey v. Superintendent Rockview SCI*, 986 F.3d 274, 291 (3d Cir. 2021).

In our view, however, it does not follow from the foregoing authority that a defendant raising *Brady* claims in a postconviction proceeding cannot be required to act with diligence when he or she has reason to believe the State failed to disclose *Brady* material. In fact, several federal courts have recognized that under provisions of the federal Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), a habeas petitioner's *Brady* claims can be barred because he or she was aware of potentially undisclosed *Brady* material and failed to act with diligence to discover it. See, e.g., *Johnson v. Mahanoy*, 144 F.4th 178 (3d Cir. 2025); *Solorio v. Muniz*, 896 F.3d 914 (9th Cir. 2018); *Johnson v. Dretke*, 442 F.3d 901 (5th Cir. 2006). See, also, *Bracey*, 986 F.3d at 294 ("as far as *Brady* claims go, due diligence requirements remain substantial: If there is a reasonable basis for a petitioner to believe additional investigation will yield undisclosed *Brady* material, that petitioner must investigate or else risk the statutory consequences").

Nebraska's procedural bar on postconviction relief operates much like the provisions of AEDPA referenced above. It allows for the dismissal of second or successive motions for postconviction relief when the factual predicate for such motion could have been discovered at the time of an earlier motion for postconviction relief. See *State v. Lotter*, 311 Neb.

878, 976 N.W.2d 721 (2022), *cert. denied* ___ U.S. ___, 143 S. Ct. 1026, 215 L. Ed. 2d 192 (2023). It also requires a defendant filing a second or successive motion for postconviction relief to affirmatively show on the face of the motion that the issues could not have been raised in prior motions. See *id.* Applied to Lotter's current *Brady* claim, the procedural bar required Lotter to affirmatively show that he had no reason to know of the records upon which his *Brady* claim was based at a time that would have allowed him to assert his claims in his previous motion for postconviction relief. As we have discussed, the motion did not do so. The cases Lotter relies on do not persuade us that the procedural bar does not apply or cannot be applied in this circumstance.

Finally, we note that unlike the district court, our determination that Lotter has not overcome the procedural bar on second and successive motions for postconviction relief does not depend on a determination that Lotter could have raised his *Brady* claims on direct appeal or in his first motion for postconviction relief. To avoid the procedural bar, Lotter was required to affirmatively show on the face of his motion that he could not have asserted his *Brady* claims when he pursued his last motion for postconviction relief. Because we conclude that he failed to do so, his motion was procedurally barred.

As we have previously stated, "A prisoner cannot wait to see if some postconviction claims will succeed and, when they do not, dust off other claims and subsequently attempt to litigate them." *State v. Lotter*, 311 Neb. at 889, 976 N.W.2d at 731. Because Lotter had sought postconviction relief before, he was obligated to make an affirmative showing in his motion that he was not dusting off claims that could have been raised in a prior motion and attempting to litigate them. For the reasons we have detailed, Lotter's motion for postconviction relief failed to do so. Accordingly, the district court did not err in concluding that his motion was procedurally barred.

CONCLUSION

Because Lotter's motion for postconviction relief did not affirmatively show that the claims raised therein could not have been raised in prior motions, those claims are procedurally barred. We therefore affirm the district court's order dismissing Lotter's motion without an evidentiary hearing.

AFFIRMED.

FREUDENBERG and BERGEVIN, JJ., not participating.