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whether the evaluation period in question was a "competency proceeding."

In reaching his conclusion, Judge Cassel noted that Tamayo's counsel stated, in part, that the purpose of the evaluation at issue was to examine Tamayo "'for competence to assist me in his defense and to stand trial.'"[1] I agree that this was a judicial admission on the part of Tamayo. And when this admission is considered with other evidence suggesting Tamayo was also being evaluated for competence, it is clear to me that the district court did not clearly err in reaching its conclusion that a "competency proceeding" was held from April 8 to October 20, 2008.

I would reverse the judgment of the Court of Appeals and instead affirm the judgment of the district court denying the motion to discharge.

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[1] *State v. Tamayo*, 18 Neb. App. 430, 447, 783 N.W.2d 240, 252 (2010) (Cassel, Judge, dissenting) (emphasis omitted).

STATE OF NEBRASKA, APPELLEE, V.
RAYMOND MATA, JR., APPELLANT.
790 N.W.2d 716

Filed November 19, 2010. No. S-10-121.

1. **Pleadings.** The decision to grant or deny an amendment to a pleading rests in the discretion of the trial court.
2. **Postconviction: Right to Counsel.** In the absence of a showing of an abuse of discretion, the failure to provide court-appointed counsel in postconviction proceedings is not error.
3. ____: ____. Where the record shows that a justiciable issue of law or fact is presented in a postconviction action, an indigent defendant is entitled to the appointment of counsel.
4. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.

Appeal from the District Court for Scotts Bluff County: LEO DOBROVOLNY, Judge. Reversed and remanded with directions.

Brian J. Lockwood, Deputy Scotts Bluff County Public Defender, for appellant.

Jon Bruning, Attorney General, and J. Kirk Brown for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MCCORMACK, J.

NATURE OF CASE

This case presents an appeal from the denial of a motion for postconviction relief without an evidentiary hearing. The defendant, Raymond Mata, Jr., sought to show an infringement of his constitutional rights in relation to his conviction of murder and his sentence of death. On appeal, he does not assert that the allegations in his motion were sufficient to warrant an evidentiary hearing, but, rather, that the court should have appointed counsel and allowed him to amend.

BACKGROUND

Mata was found guilty of first degree premeditated murder, first degree felony murder, and kidnapping in association with the death of 3-year-old Adam Gomez. Mata was sentenced to life imprisonment for kidnapping and sentenced to death for first degree premeditated murder. In *State v. Mata*,[1] we affirmed the convictions of first degree premeditated murder and kidnapping, and we affirmed the sentence of life imprisonment for the kidnapping. Based on *Ring v. Arizona*,[2] we vacated his death sentence. We remanded the cause with directions for a new penalty phase hearing and resentencing on the conviction of first degree premeditated murder.

On remand, Mata was again sentenced to death on the conviction of first degree premeditated murder. He appealed,

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[1] *State v. Mata*, 266 Neb. 668, 668 N.W.2d 448 (2003), *abrogated on other grounds, State v. Rogers*, 277 Neb. 37, 760 N.W.2d 35 (2009).

[2] *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002).

and in an opinion issued February 8, 2008, we affirmed the imposition of the death sentence.[3] However, we concluded that electrocution, as a means of carrying out that sentence, was cruel and unusual punishment in violation of the Nebraska Constitution, article I, § 9. Accordingly, we issued an indefinite stay of Mata's execution.

On July 2, 2009, Mata filed a pro se verified motion for postconviction relief and request for appointment of counsel. The State filed its response on October 2. On October 20, the district court held a preliminary hearing to determine whether to grant the request for counsel and whether to grant an evidentiary hearing. Mata participated telephonically. Mata explained to the court that he believed the motion for an evidentiary hearing was premature because he was not "ready." Mata wished for the court to first consider whether to appoint him counsel. He hoped that counsel could assist him in evaluating the record and in amending his motion for postconviction relief before the merits of the motion would be determined.

Mata explained that he filed the motion for postconviction relief without first fully reviewing the record because he needed to toll the 1-year statute of limitations for filing an application for a writ of habeas corpus in federal court.[4] He claimed that our indefinite stay of his execution had placed him in a legal "limbo" which prevented him from filing a habeas action within a year from the final judgment. The motion for postconviction relief had been prepared by Mata's trial counsel, but the seven alleged grounds for relief included claims of ineffective assistance at trial. Mata emphasized at the hearing that his main purpose was to obtain appointment of counsel to assist him in further developing these and other claims. Mata stated he would like an opportunity to amend his motion, with or without counsel.

After the State argued that Mata's petition failed to raise a justiciable issue, Mata reiterated that he "would like a chance to go through the record preferably with counsel and

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[3] See *State v. Mata*, 275 Neb. 1, 745 N.W.2d 229 (2008).

[4] See 28 U.S.C. § 2244(d)(1) (2006). See, also, *Lawrence v. Florida*, 549 U.S. 327, 127 S. Ct. 1079, 166 L. Ed. 2d 924 (2007).

have a chance to amend this." The following colloquy then took place:

> [Mata]: Okay. I have one question. What if you were to decide not to give me legal counsel? Can I still — well, do you think you can consider letting me amend it even if I have to go through the record on my own?
>
> THE COURT: You can make that request. I can't tell you whether I would grant the request here today.
>
> [Mata]: Okay.
>
> THE COURT: That's a request that you could make.
>
> [Mata]: Okay. Well, I would like to make that request because I think there is a lot of stuff — well, I think once I go — because I really don't know much about it, but there is [sic] people around here that I could probably get, you know, to get to help me to go through the record and — because I think there is a lot more in there, that because those issues that were raised were just — I think they were last-minute issues that they put together so we could get the clock stopped because we wasted already eight or nine months of it. So just keep that in mind. I would appreciate it, your Honor.
>
> THE COURT: Well . . . are you asking me for permission to amend this motion on an immediate basis? I mean, is that something that you are asking to do now?
>
> [Mata]: Well, no. I was asking if for some reason if you decided not to appoint counsel, would you let me go through the record and amend it to see what constitutional issues I could find that any of my constitutional issues that, you know, that I could find in there.
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> THE COURT: If . . . you still have something pending in front of this Court, you can proceed on your own without counsel if you wish to. So I think the answer to your question is probably yes, if I did not appoint you an attorney and there was [sic] still issues for me to decide as a judge, you could act on your own behalf, yes.
>
> [Mata]: Okay. Well, see, honestly, I don't know anything about this process. I know what people are telling me here and there and I really don't know a whole lot about it.

THE COURT: All right. Well . . . I have to examine this record in order to make this decision —

[Mata]: Okay.

Thereafter, in a single final order, the district court denied both an evidentiary hearing on the postconviction motion and Mata's request for appointment of counsel. The court did not specifically determine whether the motion for postconviction relief presented any justiciable issue which would entitle Mata to appointment of counsel.[5] Instead, relying on the standard for determining whether a motion for postconviction relief may be denied without an evidentiary hearing,[6] the court found that the files and records of the case affirmatively showed that Mata was entitled to no relief, based on the allegations in his motion. Presumably because there was no longer anything pending before the district court, Mata did not again ask to amend his motion for postconviction relief. He instead appealed to this court.

ASSIGNMENTS OF ERROR

Mata alleges that the district court erred by refusing to (1) appoint an attorney to assist him and (2) allow him to amend his motion for postconviction relief.

STANDARD OF REVIEW

[1] The decision to grant or deny an amendment to a pleading rests in the discretion of the trial court.[7]

ANALYSIS

[2,3] In the absence of a showing of an abuse of discretion, the failure to provide court-appointed counsel in postconviction proceedings is not error.[8] However, where the record shows that a justiciable issue of law or fact is presented in a

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[5] See, e.g., *State v. Gonzalez-Faguaga*, 266 Neb. 72, 662 N.W.2d 581 (2003); *State v. Silvers*, 255 Neb. 702, 587 N.W.2d 325 (1998); *State v. Boppre*, 252 Neb. 935, 567 N.W.2d 149 (1997).

[6] See, e.g., *State v. McLeod*, 274 Neb. 566, 741 N.W.2d 664 (2007); *State v. Hudson*, 270 Neb. 752, 708 N.W.2d 602 (2005).

[7] *Otey v. State*, 240 Neb. 813, 485 N.W.2d 153 (1992).

[8] *State v. Keithley*, 238 Neb. 966, 473 N.W.2d 129 (1991).

postconviction action, an indigent defendant is entitled to the appointment of counsel.[9] In this case, Mata argues that the court erred in failing to grant him leave to amend his petition to state a justiciable issue.

While the State asserts that Mata withdrew his motion to amend, we disagree with its reading of the record. It is clear that Mata wished to amend his motion for postconviction relief and that based on his discussion with the court, he believed the court would consider whether to allow him to amend after determining his request for appointment of counsel. Mata stated: "I was asking if for some reason if you decided not to appoint counsel, would you let me go through the record and amend it to see what constitutional issues I could find that any of my constitutional issues that, you know, that I could find in there." The court responded: "So I think the answer to your question is probably yes . . . ."

Mata's ability to amend his petition is governed by Neb. Ct. R. Pldg. § 6-1115(a), which states that a party may amend "the party's pleading once as a matter of course before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted, the party may amend it within 30 days after it is served." By the time of the hearing on Mata's motion for postconviction relief, the period of amendment as a matter of course had elapsed and Mata could amend his pleading only by leave of court or written consent of the adverse party.[10]

We review the district court's decision refusing to grant leave to amend under such circumstances for abuse of discretion.[11] However, § 6-1115(a) also states that "leave shall be freely given when justice so requires." Because Nebraska's

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[9] *State v. Wiley*, 228 Neb. 608, 423 N.W.2d 477 (1988).

[10] See Neb. Ct. R. Pldg. § 6-1115(a).

[11] See, e.g., *Bjorgung v. Whitetail Resort, LP*, 550 F.3d 263 (3d Cir. 2008); *Carroll v. Fort James Corp.*, 470 F.3d 1171 (5th Cir. 2006); *Porat v. Lincoln Towers Community Ass'n*, 464 F.3d 274 (2d Cir. 2006); *Epstein v. C.R. Bard, Inc.*, 460 F.3d 183 (1st Cir. 2006); *Kaba v. Stepp*, 458 F.3d 678 (7th Cir. 2006); *Inge v. Rock Financial Corp.*, 388 F.3d 930 (6th Cir. 2004); *State v. Silvers*, 260 Neb. 831, 620 N.W.2d 73 (2000).

current notice pleading rules are modeled after the Federal Rules of Civil Procedure, we look to federal decisions for guidance.[12] Federal courts interpreting this provision have explained that the liberal pleading philosophy of the federal rules limits a district court's discretion to deny leave to amend.[13] A district court's denial of leave to amend pleadings is appropriate only in those limited circumstances in which undue delay, bad faith on the part of the moving party, futility of the amendment, or unfair prejudice to the nonmoving party can be demonstrated.[14] More specifically, federal decisions have held that it is an abuse of discretion for the district court to dismiss a suit on the basis of the original complaint without first considering and ruling on a pending motion to amend.[15]

[4] In this case, Mata attempted to explain the circumstances which necessitated leave to amend, and no prejudice to the State was established which would justify the denial of leave to amend. Counsel appointed for purposes of this appeal argues that Mata has viable ineffective assistance of counsel and other claims and that if he is not allowed to amend his motion, he will be procedurally barred from ever bringing those claims before being put to death. An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.[16] We agree that under the circumstances of this case, it was an abuse of discretion for the district court to deny Mata leave to amend his motion for postconviction relief. We therefore reverse the judgment of the

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[12] *Kellogg v. Nebraska Dept. of Corr. Servs.*, 269 Neb. 40, 690 N.W.2d 574 (2005).

[13] See, *Bjorgung v. Whitetail Resort, LP, supra* note 11; *Theme Promotions v. News America Marketing FSI*, 546 F.3d 991 (9th Cir. 2008).

[14] *Roberson v. Hayti Police Dept.*, 241 F.3d 992 (8th Cir. 2001); *Bailey v. First Nat. Bank of Chadron*, 16 Neb. App. 153, 741 N.W.2d 184 (2007), citing *Foman v. Davis*, 371 U.S. 178, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962). See, also, *Kills on Top v. State*, 279 Mont. 384, 928 P.2d 182 (1996) (applying similar standard in postconviction action).

[15] See, e.g., *Ellison v. Ford Motor Co.*, 847 F.2d 297 (6th Cir. 1988).

[16] *State v. Thorpe, ante* p. 11, 783 N.W.2d 749 (2010).

district court and remand the cause with directions to appoint counsel for Mata and grant him leave to amend.

CONCLUSION

For the foregoing reasons, we reverse, and remand with directions to appoint Mata counsel and grant him leave to amend his motion for postconviction relief.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V.
KIM D. ERWIN-LONCKE, RESPONDENT.

790 N.W.2d 721

Filed November 19, 2010. No. S-10-1071.

Original action. Judgment of disbarment.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

PER CURIAM.

INTRODUCTION

This case is before the court on the voluntary surrender of license filed by respondent, Kim D. Erwin-Loncke, on November 2, 2010. The court accepts respondent's surrender of her license and enters an order of disbarment.

STATEMENT OF FACTS

Respondent was admitted to the practice of law in the State of Nebraska on July 26, 2007, and has maintained an office in Omaha, Nebraska. On August 2, 2010, the Counsel for Discipline of the Nebraska Supreme Court received an overdraft notice with respect to the respondent's trust account. In addition, the record shows that on September 14, the Counsel for Discipline received a grievance against respondent from a health care provider claiming that respondent had failed to pay a bill on behalf of an individual for whom respondent was acting as a conservator. At the time respondent filed her voluntary