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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A11-1059**

John Joseph Novicky, petitioner,  
Appellant,

vs.

State of Minnesota,  
Respondent.

**Filed February 21, 2012  
Affirmed  
Bjorkman, Judge**

Stearns County District Court  
File No. 73-K1-02-2482

David W. Merchant, Chief Appellate Public Defender, Benjamin J. Butler, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Janelle P. Kendall, Stearns County Attorney, Michael J. Lieberg, Chief Assistant County Attorney, St. Cloud, Minnesota (for respondent)

Considered and decided by Kalitowski, Presiding Judge; Schellhas, Judge; and Bjorkman, Judge.

**UNPUBLISHED OPINION**

**BJORKMAN**, Judge

Appellant challenges the district court's denial of his postconviction petition, arguing that his untimely petition warrants consideration in the interests of justice and

that the postconviction statute of limitations is unconstitutional as applied to him if it precludes this first review of his conviction. We affirm.

## FACTS

Appellant John Novicky was charged with two counts of attempted first-degree criminal sexual conduct, two counts of kidnapping, second-degree assault, and terroristic threats. Novicky was found guilty of all charges and sentenced in December 2005 to concurrent prison terms of 240 months for kidnapping and 90 months for attempted first-degree criminal sexual conduct. He did not appeal.

On April 15, 2010, Novicky filed a pro se motion for sentence correction. The district court considered the motion to be a petition for postconviction relief and forwarded it to the State Public Defender's Office, which accepted representation of Novicky. In December 2010, Novicky, through his public defender, filed an amended petition for postconviction relief, asserting various evidentiary and trial errors.<sup>1</sup> Novicky acknowledged that he did not file his petition within the two-year limitation period in the postconviction statute but argued that it should be considered because the interests of justice require review. The district court denied Novicky's petition, concluding that the interests of justice do not warrant consideration of the untimely petition, Novicky's invocation of the interests-of-justice exception is itself untimely, and Novicky is not constitutionally entitled to one review of his conviction. This appeal follows.

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<sup>1</sup> Novicky also sought vacation of an order requiring him to reimburse the county attorney's office for the cost of his sex-offender assessment, which the district court granted.

## DECISION

On appeal from a postconviction order, we review issues of law de novo but examine the district court's findings to determine if they are supported by sufficient evidence. *Leake v. State*, 737 N.W.2d 531, 535 (Minn. 2007). We will reverse the denial of postconviction relief only if the district court has abused its discretion. *Id.*

“No petition for postconviction relief may be filed more than two years after the later of . . . the entry of judgment of conviction or sentence if no direct appeal is filed.” Minn. Stat. § 590.01, subd. 4(a) (2010). A petition filed after the two-year deadline is subject to summary dismissal unless the petitioner can establish one of the exceptions in Minn. Stat. § 590.01, subd. 4(b) (2010). *See Johnson v. State*, 801 N.W.2d 173, 177 (Minn. 2011) (stating that an untimely petition that does not satisfy any of the exceptions “should not be considered on the merits”). And a petition advocating an exception to the two-year deadline must be filed “within two years of the date the claim arises.” Minn. Stat. § 590.01, subd. 4(c) (2010).

Novicky argues that his untimely petition should be considered in the interests of justice. *See* Minn. Stat. § 590.01, subd. 4(b)(5) (permitting consideration of an untimely postconviction petition if “the petitioner establishes to the satisfaction of the court that the petition is not frivolous and is in the interests of justice”). He argues that the district court erred in concluding that his interests-of-justice claim was untimely and lacked merit and that application of the postconviction time limitations is unconstitutional if it deprives him of the right to one review of his conviction. We address each argument in turn.

**I. Novicky did not timely assert his interests-of-justice claim.**

The district court concluded that Novicky is not entitled to review under the interests-of-justice exception because (1) Novicky failed to demonstrate any fundamental unfairness in his convictions and (2) his interests-of-justice claim is itself untimely under subdivision 4(c). Novicky challenges both aspects of the district court's decision. But the timeliness of Novicky's interests-of-justice claim is a dispositive threshold issue. *See Roby v. State*, 787 N.W.2d 186, 191 (Minn. 2010). Accordingly, we first consider whether Novicky timely asserted his interests-of-justice claim.

Novicky argues that subdivision 4(c) cannot be a basis for denying his interests-of-justice claim because it is a procedural bar and the state waived the issue by failing to raise it before the district court. We disagree. First, the state's written argument to the district court plainly, if briefly, invokes the time limit in subdivision 4(c). Second, even if the state's reference to subdivision 4(c) is insufficient to raise the issue, Novicky fails to identify any authority holding that the subdivision 4(c) statute of limitations may be waived by the state's failure to raise the issue. The supreme court has determined that the postconviction statute of limitations in subdivision 4(a) is jurisdictional. *Stewart v. State*, 764 N.W.2d 32, 34 (Minn. 2009) (citing *Ortiz v. Gavenda*, 590 N.W.2d 119, 122 (Minn. 1999)). Because we discern no basis for distinguishing between the two time limits in the postconviction statute, we conclude that the two-year limitation in subdivision 4(c) is jurisdictional and a district court may address it sua sponte. *See City of St. Paul v. Eldredge*, 800 N.W.2d 643, 646-47 (Minn. 2011) ("Jurisdiction is a question that may be raised at any time by a party, or sua sponte by a court.").

Novicky also argues that subdivision 4(c) applies only to certain subdivision 4(b) exceptions, not his interests-of-justice claim. We are not persuaded. The plain language of subdivision 4(c) applies broadly to “[a]ny petition invoking an exception provided in paragraph (b).” Minn. Stat. § 590.01, subd. 4(c). Subdivision 4(c) therefore bars petitions asserting an interests-of-justice exception under subdivision 4(b) that are filed more than two years after “the date of an event that establishes a right to relief in the interests of justice.” *Yang v. State*, 805 N.W.2d 921, 925 (Minn. App. 2011), *review granted* (Minn. Jan. 17, 2012); *see also Colbert v. State*, \_\_\_ N.W.2d \_\_\_, \_\_\_, 2012 WL 204532, at \*2-3 (Minn. Jan. 25, 2012) (citing *Roby*, 787 N.W.2d at 191) (applying subdivision 4(c) to the petitioner’s interests-of-justice claims).

Finally, Novicky argues that his petition is timely because his interests-of-justice claim did not arise until he received the trial transcript in September 2010. We disagree. Novicky relies on *Rickert v. State*, in which the supreme court considered an interests-of-justice claim that was premised on a delay in processing transcripts necessary to substantiate the underlying legal challenge. 795 N.W.2d 236, 238-39, 242 (Minn. 2011). The supreme court concluded that the interests of justice required review of Rickert’s petition because the transcript-delivery delay essentially caused his noncompliance with subdivision 4(a), but the court did not substantively address subdivision 4(c) other than to note that it applied and was satisfied. *Id.* at 242. Here, as in *Yang*, the focus of our analysis is subdivision 4(c), specifically the date of an event that establishes Novicky’s right to relief in the interests of justice. *See* 805 N.W.2d at 925. Because Novicky was aware of the bases for his interests-of-justice claim—the aspects of his trial that he claims

were unfair and the fact that he has not yet received review of his conviction—well over two years before he filed his postconviction petition, Novicky’s interests-of-justice claim is untimely under subdivision 4(c). *See Colbert*, 2012 WL 204532, at \*3 (holding that interests-of-justice claim was untimely as a basis for considering an untimely postconviction petition alleging trial errors). We conclude that the district court properly denied Novicky’s untimely petition.<sup>2</sup>

**II. Application of the two-year time limit to bar Novicky’s petition is not unconstitutional.**

Novicky also argues that he is constitutionally entitled to one substantive review of his conviction and that the statutory limits on filing a postconviction petition are unconstitutional as applied to him if they deprive him of the right to review of his convictions. We recently rejected these very arguments:

Because a convicted defendant does not have a constitutional right to appeal under either the United States or the Minnesota Constitution, Minnesota’s two-year time limitation to petition for postconviction relief is not unconstitutional, even if it precludes criminal defendants from raising constitutional-violation claims that have not been reviewed on direct appeal or in a postconviction proceeding.

*Larson v. State*, 801 N.W.2d 222, 229 (Minn. App. 2011), *review granted* (Minn. Oct. 18, 2011). Denial of Novicky’s postconviction petition based on the postconviction statute’s reasonable time limitations is not unconstitutional.

**Affirmed.**

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<sup>2</sup> Because Novicky failed to comply with the threshold requirement for timely assertion of his interests-of-justice claim, we need not address the merits of that claim. *See Colbert*, 2012 WL 204532, at \*3.