THIS IS A CAPITAL CASE
No.

IN THE SUPREME COURT OF THE UNITED STATES

JEFFREY HESSLER,
Petitioner,

v.

STATE OF NEBRASKA,
Respondent.

On Petition for a Writ of Certiorari
To the Nebraska Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

On August 17, 2016, Mr. Hessler filed a verified motion for postconviction relief asserting that *Hurst v. Florida*, 136 S. Ct. 616 (2016)—a case yet to be decided at the time of the decision on his latest petition—was applicable to his case and provided him a basis for relief. The district court held that the *Hurst* case did not create a new legal rule but rather applies the principles in *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct 2428 (2002). Furthermore, it cited *State v. Lotter*, 301 Neb. 125 (2018) as having an "identical" claim for relief, the denial of which was affirmed on appeal. The district court found that Nebraska Revised Statute § 29-3001(4)(d) did not apply, meaning that Mr. Hessler's claim—like Lotter's—was time barred. It therefore denied his motion without an evidentiary hearing. Mr. Hessler appealed to the Nebraska Supreme Court. The Nebraska Supreme Court affirmed the district court in its April 3, 2020 order, holding that *Lotter* is dispositive of the issues presented in this appeal. The question presented is:

> **Are the Sixth, Eighth and Fourteenth Amendments, as well as *Ring* and *Hurst*, violated when eligibility for the death penalty is asserted to be decided when a jury finds aggravating circumstances, but eligibility—in practice—is actually decided by a three-judge panel?**

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Jeffrey Hessler, respectfully requests that a writ of certiorari issue to review the decision of the Nebraska Supreme Court that affirmed the district court's holding that Hessler's motion for postconviction relief was time barred, which it denied without a hearing.

DECISIONS BELOW

The Nebraska Supreme Court's November 30, 2007 opinion affirming the district court on direct appeal is reported at 274 Neb. 478 (2007). It appears in the Appendix at App. J. The district court's April 11, 2011 order denying Mr. Hessler's motion for postconviction relief is not reported. It appears in the Appendix at I. The Nebraska Supreme Court's December 23, 2011 order affirming the denial of Mr. Hessler's petition for postconviction relief is found at 2011 WL 6450616 (Neb.); it appears in the Appendix at App. H.

On August 24, 2012, Mr. Hessler filed a successive petition for postconviction relief and petition for writ of error coram nobis in the District Court for Scotts Bluff County, Nebraska. The district court denied relief on this petition on September 11, 2013. It appears in the Appendix at App. G. This denial was appealed to the Nebraska Supreme Court, which affirmed the denial of relief on July 25, 2014 and is reported at 288 Neb. 670 (2014). It appears in the Appendix at App. F.

Mr. Hessler also challenged his conviction of First Degree Sexual Assault on a Child in a petition filed in the District Court of Scotts Bluff County, Nebraska, on

August 24, 2012. This prior conviction was alleged by the State of Nebraska and found by the sentencing jury to be an aggravating circumstance. After considering this petition, the district court determined the allegations in the petition merited an evidentiary hearing. This order, dated May 31, 2013, appears in the Appendix at App. E.

The evidentiary hearing was held on April 13, 2015, and the district court denied the motion on September 25, 2015. It appears in the Appendix at App D. Hessler appealed the denial to the Nebraska Supreme Court, which affirmed the district court's denial on October 28, 2016. It is reported at 295 Neb. 70 (2016) and appears in the Appendix at App. C.

A verified motion for post-conviction relief was filed on August 14, 2016 challenging Nebraska's sentencing scheme as unconstitutional under *Hurst v. Florida*, 136 S.Ct. 616 (2016) and *Ring v. Arizona*, 536 U.S. 584 (2002). An amended motion was filed on October 25, 2016. The motion was denied via an unreported order dated June 5, 2019, that appears in the Appendix at App. B. Mr. Hessler appealed the denial to the Nebraska Supreme Court, which affirmed the district court's denial in its April 3, 2020 order reported at 305 Neb. 451 (2020); the order appears in the Appendix at App. A.

STATEMENT OF JURISDICTION

The Nebraska Supreme Court's decision denying Mr. Hessler's motion for postconviction relief is a final decree rendered by the highest court of the State of

Nebraska. Accordingly, certiorari is proper under 28 U.S.C. § 1257(a) which provides "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States."

The Nebraska Supreme court issued its opinion affirming the district court on direct appeal, on November 30, 2007. Thereafter, on August 24, 2012, Mr. Hessler filed two separate motions for postconviction relief and petitions for writ of error coram nobis in Scotts Bluff County: one motion dealt with his capital murder conviction and sentence and the other motion dealt with his accepted guilty plea to first degree sexual assault on a child, which served as the basis for an aggravating circumstance in his capital murder trial. The former, capital-murder related petition was denied by the district court on September 11, 2013, and affirmed by the Nebraska Supreme Court on July 25, 2014. The latter, sexual-assault-related petition led the district court to grant Mr. Hessler an evidentiary hearing in an order entered May 31, 2013. The evidentiary hearing was held on April 13, 2015, with the district court entering its order denying Mr. Hessler's motion on September 25, 2015. Hessler

appealed the denial to the Nebraska Supreme Court, which affirmed the district court's denial on October 28, 2016.

A verified motion for post-conviction relief was filed on August 14, 2016, challenging Nebraska's sentencing scheme as unconstitutional under *Hurst v. Florida*, 136 S.Ct. 616 (2016) and *Ring v. Arizona*, 536 U.S. 584 (2002). An amended motion was filed on October 25, 2016. The district court denied the motion in a June 5, 2019 order. Mr. Hessler appealed the denial to the Nebraska Supreme Court, which affirmed the district court's denial in an April 3, 2020 order. Mr. Hessler filed a motion to stay the mandate in order to allow a certiorari petition to be filed with this Court on Mr. Hessler's behalf. The motion was granted in an order dated April 21, 2020.

This petition is timely under Supreme Court Rule 13.1, which provides that a petition for writ of certiorari to review a judgment entered by a state court of last resort is timely when filed with the Clerk of this Court within 90 days after entry of the judgment. This petition has been filed in accordance with Supreme Court Rule 29.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury[.]" The Eighth Amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The Fourteenth Amendment provides in pertinent part that no State shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Mr. Hessler seeks review of the Nebraska Supreme Court's order affirming the district court's denial of his amended motion for postconviction relief on claims that his conviction and sentence were imposed in violation of the Sixth, Eighth and Fourteenth Amendments, as well as the decisions in *Ring* and *Hurst*.

Mr. Hessler was convicted of capital murder and sentenced to death by a Scottsbluff, Nebraska jury in 2004. On December 8, 2004, an aggravation hearing was held. Mr. Hessler was not present in court for the hearing. Despite Mr. Hessler's absence from the hearing, on December 9, 2004, the same jury found the existence of the three aggravating circumstances alleged by the prosecution. This would be the extent of the jury's role in determining Mr. Hessler's sentence.

On May 16, 2005, a three-judge panel, including the trial judge, was convened pursuant to Nebraska's statutory-capital-sentencing scheme to determine whether

Mr. Hessler should be sentenced to death or life imprisonment. *See* Neb. Rev. Stat. § 29-2520—§ 29-2525 (1995 reissue). Mr. Hessler—who had previously been found on March 31, 2005, to have "knowingly, intelligently, and voluntarily decided to represent himself"—continued pro se during this proceeding.

After hearing the evidence, the three-judge panel found all three aggravating circumstances beyond a reasonable doubt under Nebraska Revised Statute § 29-2523: under (1)(a) that the "offender was previously convicted of another murder or a crime involving the use or threat of violence to the person, or has a substantial prior history of serious assaultive or terrorizing criminal activity"; under (1)(b) that the "murder was committed in an effort to conceal the commission of a crime, or to conceal the identity of the perpetrator of such crime"; and under (1)(d) that the "murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence[.]" The panel then considered mitigating circumstances but unanimously concluded that no statutory or non-statutory mitigating factors were established in this case.

Finding that the aggravating circumstances were severe and mitigating circumstances, if any, were far from compelling, the three-judge panel unanimously concluded that an imposition of death in this case would not be excessive or disproportionate to the sentences previously imposed in the same or similar circumstances. It then sentenced Mr. Hessler to death for first-degree premeditated murder. Following Mr. Hessler's direct appeal, the Nebraska Supreme Court, issued

an opinion affirming the district court on November 30, 2007.

Thereafter, Mr. Hessler petitioned for postconviction relief in Scotts Bluff County asserting that both trial and appellant counsel were ineffective. This district court denied the petition, which was affirmed by the Nebraska Supreme Court on December 23, 2011, asserting that Mr. Hessler failed to prove prejudice.

On August 24, 2012, Mr. Hessler filed a successive verified petition for postconviction relief and petition for writ of error coram nobis challenging his conviction and sentence in the District Court for Scotts Bluff County, Nebraska. Therein, he asserted that the claims he then made were unavailable to him at the time of the trial and would have "prevented" the outcome. He specifically raised sixteen claims that can be grouped into four categories—evidentiary claims, ineffective-assistance claims, mental-competency claims, and unfair-trial claims—in addition to a claim that the cumulative error of the claims entitled him to postconviction or coram nobis relief.

The district court found that Mr. Hessler failed to show that had counsel called for a competency hearing, he would have been found incompetent to stand trial and waive counsel. It further found that the majority of Mr. Hessler's claims were issues previously known to him and either were or could have been litigated either on direct appeal or in the first postconviction claim. Accordingly, it denied that Mr. Hessler was entitled to an evidentiary hearing and denied the relief he requested in a Memorandum Order entered September 11, 2013. The Nebraska Supreme Court

affirmed the denial on July 25, 2014.

Mr. Hessler also challenged his conviction of first degree sexual assault on a child in the District Court of Scotts Bluff County, Nebraska, in a separately-filed verified petition for postconviction relief and petition for writ of error coram nobis on August 24, 2012. This prior conviction was alleged by the State of Nebraska, and the three-judge panel accepted the jury's recommendation of the same, as an aggravating circumstance.

Therein, Mr. Hessler sought to vacate or set aside his accepted no contest plea for first degree sexual assault on a child—and his resulting sentence—from which he failed to appeal. Mr. Hessler argued that he was not competent to plead no contest to the charge and that his counsel was ineffective for 1) advising him to plead no contest to the charge, 2) failing to discover and present mitigating evidence at the sentencing hearing and 3) failing to advise him to appeal. The district court granted Mr. Hessler an evidentiary hearing in an order dated May 31, 2013.

The evidentiary hearing was held on April 13, 2015. Following the evidentiary hearing, the district court denied Mr. Hessler's motion on September 25, 2015. It found that Mr. Hessler's evidence "failed to demonstrate a reasonable probability that he was, in fact, incompetent to enter a [plea] of no-contest . . . or that the trial court would have found him incompetent had a hearing been conducted[;]" failed to prove his "trial counsel were not effective by attempting novel legal defenses[,]" i.e. that counsel's actions were trial strategy; and that Mr. Hessler failed to provide any

evidence that he ever requested to appeal his conviction or sentence and had shown no prejudice from counsel's failure to file an appeal. Mr. Hessler appealed the denial to the Nebraska Supreme Court, which affirmed the district court's denial on October 28, 2016.

A verified motion for post-conviction relief was filed on August 14, 2016, challenging Nebraska's sentencing scheme as unconstitutional under *Hurst v. Florida*, 136 S.Ct. 616 (2016) and *Ring v. Arizona*, 536 U.S. 584 (2002). An amended motion was filed on October 25, 2016.

In its June 5, 2019 order, the district court denied the motion, finding that "[t]he holding in the *Hurst* case does not create a new legal rule but rather applies the principles in *Ring v. Arizona*." Mr. Hessler appealed the denial to the Nebraska Supreme Court, which affirmed the district court's denial in an April 3, 2020 order, and added even if Mr. Hessler's motion was not time-barred, "there is no merit to the underlying premise of Hessler's postconviction claims" because:

McKinney [*v. Arizona*, 140 S.Ct.702 (2020)] explained:

> Under *Ring* and *Hurst*, a jury must find the aggravating circumstance that makes the defendant death eligible. But importantly, in a capital sentencing proceeding just as in an ordinary sentencing proceeding, a jury (as opposed to a judge) is not required to weigh the aggravating and mitigating circumstances or to make the ultimate sentencing decision within the relevant sentencing range.

Despite affirming the denial of Mr. Hessler's motion, the Nebraska Supreme Court stayed issuance of its mandate to allow Mr. Hessler to seek review in this Court.

REASONS FOR GRANTING THE PETITION

I. The Sixth, Eighth and Fourteenth Amendments, as well as *Ring* and *Hurst,* are violated when eligibility for the death penalty is asserted to be decided when a jury finds aggravating circumstances, but eligibility—in practice—is actually decided by a three-judge panel.

The United States Supreme Court, in a series of decisions spanning a number of years, has addressed the issue of what facts are required to be submitted for jury determination. In *Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. 3047 (1990)—where the defendant was sentenced to death by a trial court after a jury found the defendant guilty of committing first-degree murder—the United States Supreme Court stated that "[a]ny argument that the Constitution requires that a jury impose the sentence of death or make the findings prerequisite to imposition of such a sentence has been soundly rejected by prior decisions of this Court." *Walton*, 497 U.S. at 647–48, 110 S. Ct. at 3054 (quoting *Clemons v. Mississippi*, 494 U.S. 738, 745, 110 S.Ct. 1441, 1446 (1990)). It further held that Walton's suggestion that Arizona's aggravating factors were "elements of the offense" as opposed to sentencing "considerations" lacked merit because "[a]ggravating circumstances are not separate penalties or offenses, but are 'standards to guide the making of [the] choice' between the alternative verdicts of death and life imprisonment. Thus, under Arizona's capital sentencing scheme, the judge's finding of any particular aggravating circumstance does not of itself 'convict' a defendant (i.e., require the death penalty), and the failure to find any particular aggravating circumstance does not 'acquit' a defendant (i.e., preclude the death penalty)." *Walton*, 497 U.S. at 648, 110 S. Ct. at 3054 (quoting *Poland v. Arizona*, 476

U.S. 147, 106 S.Ct. 1749, 1755 (1986)).

In *Jones v. United States*, 526 U.S. 227, 119 S. Ct. 1215 (1999), the Court stated "[m]uch turns on the determination that a fact is an element of an offense rather than a sentencing consideration, given that elements must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt. *Jones*, 526 U.S. at 232, 119 S. Ct. at 1219 (citing *Hamling v. United States*, 418 U.S. 87, 117, 94 S.Ct. 2887 (1974); *United States v. Gaudin*, 515 U.S. 506, 509–510, 115 S.Ct. 2310 (1995)). The *Jones* Court went on to state that "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Jones*, 526 U.S. at 243, n. 6, 119 S. Ct. at 1215.

Then in *Apprendi v. United States*, 530 U.S. 466, 120 S. Ct. 2348 (2000), the Court ultimately held that "[o]ther that the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."*Appren*di, 530 U.S. at 490, 120 S. Ct. at 2362–63. It stated, regarding the elemental nature of a factor, the relevant inquiry is not one of form but effect, namely, "does the required finding expose the defendant to a great punishment than that authorized by the jury's guilty verdict?" *Apprendi*, 530 U.S. at 494, 120 S. Ct. at 2365. In answering the question, it

held that the New Jersey Supreme Court's recognition that "[l]abels do not afford an acceptable answer" to whether a finding is characterized as one of intent or motive, likewise applies to the "constitutionally novel and elusive distinction between 'elements' and 'sentencing factors.'" *Apprendi*, 530 U.S. at 494, 120 S. Ct. at 2365.

Two years later in *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428 (2002), the United States Supreme Court overruled *Walton* "to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty." *Ring*, 536 U.S. at 609, 122 S.Ct. at 2443 (citing *Walton*, 497 U.S., at 647–649, 110 S.Ct. 3047). The *Ring* Court stated Arizona's enumerated aggravating factors operate as "the functional equivalent of an element of a greater offense," which is required by the Sixth Amendment to be found be a jury. *Ring*, 536 U.S. at 609, 122 S. Ct. at 2443 (citing *Apprendi*, 530 U.S., at 494, n. 19, 120 S.Ct. 2348. This years-long back-and-forth was the legal backdrop at the time of Mr. Hessler's case.

Mr. Hessler was charged by an information filed on February 26, 2003, with the premeditated murder of Heather Guerrero, the felony murder of Ms. Guerrero as well as kidnaping, first degree sexual assault, and the use of a firearm to commit first degree murder. The information also alleged three aggravating circumstances: that 1) Mr. Hessler has a substantial prior history of serious assaultive or terrorizing criminal activity; 2) the murder was committed in an effort to conceal the commission of the crimes of kidnaping and first degree sexual assault of Heather Guerrero and

the crime of first degree sexual assault of J. B.; and 3) the murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence. In July of 2003, in a separate case, Mr. Hessler pled guilty to the sexual assault charge alleged as an aggravating circumstance in this, his capital murder case. He was sentenced in that case in August of 2003.

On November 30, 2004, trial began in this matter in Scotts Bluff County. A jury found Mr. Hessler guilty of first degree murder, kidnapping, first degree sexual assault and use of a firearm to commit a felony. Immediately thereafter, the same jury found the existence of the three aggravating circumstances alleged by the prosecution. On May 16, 2005, a panel of three judges conducted a sentencing determination hearing. This same panel then sentenced Mr. Hessler to death. The Nebraska Supreme Court affirmed this conviction and sentence of death on direct appeal. *State v. Hessler*, 274 Neb. 478, 741 N.W.2d 406 (2007). Multiple filings, denials and affirmances, followed the affirmance of Mr. Hessler's direct appeal, during which time *Hurst v. Florida*, 288 Neb. 670, 850 N.W2d 777 (2014) was decided.

The *Hurst* court held unconstitutional Florida's sentencing scheme in which a penalty-phase jury made a sentencing recommendation, but state law required a judge to hold a separate hearing and determine whether sufficient aggravating circumstances existed to justify imposing the death penalty. *Hurst*, 136 S. Ct. at 619;

see Fla. Stat. Ann. § 921.14.[1] It held "the Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death[,]" not just to offer a recommendation. *Hurst*, 136 S. Ct. at 619.

A verified Motion for Post-Conviction relief was filed by Mr. Hessler on August 14, 2016, challenging Nebraska's sentencing scheme as unconstitutional under *Hurst*—a case yet to be decided at the time of the decision on his latest petition—and the Sixth and Fourteenth Amendments because Nebraska's death penalty statutes do not require a unanimous jury recommendation regarding whether a death sentence should be imposed. An amended motion was filed on October 25, 2016, adding an Eighth Amendment violation to Claim One and incorporating the Florida Supreme Court' s decision in *Hurst* on remand. Mr. Hessler argued that Nebraska's sentencing scheme was in violation of not only the Sixth Amendment for allowing a three-judge panel, instead of a jury, to determine facts necessary to impose a death sentence, but also the Eighth and Fourteenth Amendments to the extent that the Nebraska's statutes do not require a unanimous recommendation from a jury regarding whether a death sentence should be imposed.[2]

[1] The court refers to the jury as an "advisory jury", *Hurst*, 136 S. Ct. at 620, 622 and its recommendation as an "advisory sentence" that *Hurst*, 136 S. Ct. at 620.

[2] The aggravating circumstance findings must be unanimously determined by the jury, but the death sentence determination is made by a unanimous three-judge panel, not a unanimous jury determination. (*See* Neb. Rev. Stat. § 29-2520(4)(f)).

Nebraska's statutes provide that "[w]hen a person has been found guilty of murder in the first degree and a jury renders a verdict finding the existence of one or more aggravating circumstances as provided in section 29-2520 [. . .] the sentence of such person shall be determined by: [a] panel of three judges, including the judge who presided at the trial of guilt or who accepted the plea and two additional active district court judges named at random by the Chief Justice of the Supreme Court." Neb. Rev. Stat. § 29-2521(1)(a). Accordingly, the jury finds the existence of aggravating factors only; not mitigating factors. *See* Neb. Rev. Stat. § 29-2521(1); *see also* Neb. Rev. Stat. § 29-2520(4)(a) ("At an aggravation hearing before a jury for the determination of the alleged aggravating circumstances, the state may present evidence as to the existence of the aggravating circumstances alleged in the information."), (4)(c) ("If the jury serving at the aggravation hearing is the jury which determined the defendant's guilt, the jury may consider evidence received at the trial of guilt for purposes of reaching its verdict as to the existence or nonexistence of aggravating circumstances in addition to the evidence received at the aggravation hearing."), (4)(f) ("The jury at the aggravation hearing shall deliberate and return a verdict as to the existence or nonexistence of each alleged aggravating circumstance."), and (4)(g) ("Upon rendering its verdict as to the determination of the aggravating circumstances, the jury shall be discharged."). Evidence regarding mitigation and sentence excessiveness or disproportionality is only submitted to the three-judge panel. *See* Neb. Rev. Stat. § 29-2521(3).

After a jury finds a defendant guilty of first-degree murder, and determines whether one or more statutory aggravating circumstances existed, Nebraska Revised Statute § 29-2522 states "[t]he panel of judges for the sentencing determination proceeding shall either unanimously fix the sentence at death or, if the sentence of death was not unanimously agreed upon by the panel, fix the sentence at life imprisonment." It goes on to state that the "sentence determination must be made on" certain, enumerated considerations, specifically:

> (1) Whether the aggravating circumstances as determined to exist justify imposition of a sentence of death;
>
> (2) Whether sufficient mitigating circumstances exist which approach or exceed the weight given to the aggravating circumstances; or
>
> (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.
>
> Neb. Rev. Stat. § 29-2522(1)–(3).

In its June 5, 2019 order, the district court denied Mr. Hessler's motion, finding that "[t]he holding in the *Hurst* case does not create a new legal rule but rather applies the principles in *Ring*[.]" It cited *State v. Lotter*, 301 Neb. 125 (2018) as having an "identical" claim for relief, the denial of which was affirmed on appeal.

Mr. Hessler appealed the denial to the Nebraska Supreme Court, which affirmed the district court's denial in an April 3, 2020 order, and added even if Mr. Hessler's motion was not time-barred, "there is no merit to the underlying premise of Hessler's postconviction claims" because:

McKinney [*v. Arizona*, 140 S.Ct.702 (2020)] explained:

> Under *Ring* and *Hurs*t, a jury must find the aggravating circumstance that makes the defendant death eligible. But importantly, in a capital sentencing proceeding just as in an ordinary sentencing proceeding, a jury (as opposed to a judge) is not required to weigh the aggravating and mitigating circumstances or to make the ultimate sentencing decision within the relevant sentencing range.

The pertinent facts are that nearly 20 years later, on federal habeas corpus review, an en banc panel of the U.S. Court of Appeals for the Ninth Circuit held that the sentencing judge had failed to properly consider McKinney's posttraumatic stress disorder, further stating that a capital sentencer may not refuse as a matter of law to consider relevant mitigating evidence. *Id.* (citing *Eddings v. Oklahoma*, 455 U.S. 104, 113-114, 102 S.Ct. 869). Upon remand, the Arizona Supreme Court agreed with the state that it was proper for the Court to conduct a reweighing of the aggravating and mitigating circumstances as permitted by *Clemons v. Mississippi*, 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990), rather than to have McKinney's resentencing heard by a jury, for which McKinney had argued. *McKinney*, 140 S. Ct. at 706. The *McKinney* Court held that *Ring* and *Hurst* did not require jury weighing of aggravating circumstances and mitigating circumstances, and that *Ring* and *Hurst* did not overrule *Clemons* so as to prohibit appellate reweighing of aggravating circumstances and mitigating circumstances. *McKinney*, 140 S. Ct. at 708. Both the facts and Nebraska's statutes make it clear that the jury did not weigh aggravating circumstances and mitigating circumstances for mitigating circumstances are not submitted to the jury. Evidence of mitigating circumstances—and any other evidence

that may have been relevant to context of who Mr. Hessler was, the crime he committed and the appropriate sentence he should receive—were never before the jury. According to Nebraska statutes, the only evidence received by the jury at the aggravation hearing is any evidence supporting the aggravating circumstance and "may" also include "evidence received at the trial of guilt for purposes of reaching its verdict[.]" Neb. Rev. Stat. § 29-25020(4)(c) ("If the jury serving at the aggravation hearing is the jury which determined the defendant's guilt, the jury may consider evidence received at the trial of guilt for purposes of reaching its verdict as to the existence or nonexistence of aggravating circumstances in addition to the evidence received at the aggravation hearing.").

Mr. Hessler does not here argue that the Nebraska statutes are invalid because they allow a three-judge panel to weigh aggravating circumstances and mitigating circumstances, though he avers that aggravating circumstances should not be permitted to be submitted to the jury in a vacuum for mitigating circumstances and evidence of sentence excessiveness or disproportionality—which are provided to the three-judge panel—give context to both the crime and appropriateness of the sentence. He affirms that there is no reweighing here where the jury is not allowed to weigh aggravating circumstances against mitigating circumstances to begin with. However, Mr. Hessler does contend that because he does not argue that the Nebraska statutes are unconstitutional for allowing a three-judge panel to weigh relevant evidence, *McKinney* does not apply. More importantly, Mr. Hessler argues that the

Sixth, Eighth and Fourteenth Amendments, as well as *Ring* and *Hurst*, are violated when eligibility for the death penalty is asserted to be decided when a jury finds aggravating circumstances, but eligibility—in practice—is actually decided by a three-judge panel.

Nebraska Revised Statute § 29-2520 requires, upon the jury's determination that an aggravating factor exists, that a sentencing hearing be held before a three-judge panel. Neb. Rev. Stat. § 29-2520(4)(h) ("If one or more aggravating circumstances are found to exist, the court shall convene a panel of three judges to hold a hearing to receive evidence of mitigation and sentence excessiveness or disproportionality as provided in subsection (3) of section 29-2521".). Nebraska Revised Statute § 29-2522 states "[t]he panel of judges for the sentencing determination proceeding shall either unanimously fix the sentence at death or, if the sentence of death was not unanimously agreed upon by the panel, fix the sentence at life imprisonment." Neb. Rev. Stat. § 29-2522. According to statute, if the jury finds that an aggravating factor exists, it is up to the three-judge panel to determine "[w]hether the aggravating circumstances as determined to exist justify imposition of a sentence of death." Neb. Rev. Stat. § 29-2522(1).

Regardless of the statutes' form in stating that the three-judge panel simply decides whether imposition of the death sentence is justified; the actual, practical effect of the statutes is that the three-judge panel determines whether the aggravating factor exists and correspondingly, whether a death sentence is

warranted. *Apprendi*, 530 U.S. at 494, 120 S.Ct. at 2365 (it is the effect, not the form, that determines the nature of a fact as elemental or a sentencing factor). A death sentence cannot be imposed on the jury's findings alone. A sentencing determination hearing must be held by a three judge panel and it is not until that panel makes certain required findings that a sentence of death may be entered. *E.g. State v. Sandoval*, 280 Neb. 309, 319, 788 N.W.2d 172, 191 (2010) ("After the jury determined the existence of four aggravating factors, the court proceeded with the mitigation and sentencing phase of the trial. [. . .] The three-judge panel received evidence of mitigation and sentence excessiveness or disproportionality."); *State v. Ellis*, 281 Neb. 571, 577, 799 N.W.2d 267, 280 (2011) ("The jury found Ellis guilty of first degree murder, and an aggravation hearing was held at which the jury found two aggravating circumstances to exist. A three-judge sentencing panel sentenced Ellis to death."). This scheme violates *Ring*. Under Nebraska's statutory scheme, the jury is yet another impermissible "advisory jury" giving yet another impermissible "advisory sentence." *See* Fn. 1 citing *Hurst*, 136 S.Ct. at 620, 622. The jury's determination is therefore unconstitutional, as was held in *Hurst*.

In accordance with Nebraska's statutes, Mr. Hessler was convicted by a jury which, in effect, recommended that three aggravating circumstances existed and recommended a death sentence. It was not until the statutorily-mandated hearing that the aggravating circumstances were actually deemed to exist. It was not until the statutorily-mandated hearing that Mr. Hessler was actually sentenced to death.

Mr. Hessler could not have been sentenced to death without the statutorily-mandated hearing. Because, in practical effect, it is the three-judge panel's determination that sentenced Mr. Hessler to death—and not the jury's determination—the court should find that such an effect invalidates the asserted form of Nebraska's statutes and is unconstitutional in violation of the Sixth, Eighth and Fourteenth Amendments, as well as *Ring* and *Hurst*.

CONCLUSION

WHEREFORE, for all the reasons set forth above, this Court should grant the writ of certiorari to review the decision below.

Respectfully Submitted,

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305 Neb. 451
Supreme Court of Nebraska.

STATE of Nebraska, appellee,
v.
Jeffrey HESSLER, appellant.

No. S-19-652.
|
Filed April 3, 2020

Synopsis
Background: Inmate convicted of capital murder, 274 Neb. 478, 741 N.W.2d 406, filed petition for post-conviction relief, alleging death sentence was invalid because Nebraska's capital sentencing statutes violated his rights under the 6th, 8th, and 14th Amendments to the U.S. Constitution. The District Court, Scotts Bluff County, Andrea D. Miller, J., denied the petition, and inmate appealed.

[Holding:] The Supreme Court, Stacy, J., held that United States Supreme Court ruling in *Hurst v. Florida*, 136 S. Ct. 616, did not announce a new rule of law and thus did not trigger one-year limitations period for filing motion for postconviction relief.

Affirmed.

See also 282 Neb. 935, 288 Neb. 670.

West Headnotes (4)

[1] **Criminal Law** Review De Novo

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 Cases that cite this headnote

[2] **Criminal Law** Interlocutory, Collateral, and Supplementary Proceedings and Questions

Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law which is reviewed independently of the lower court's ruling.

3 Cases that cite this headnote

[3] **Criminal Law** Time for proceedings

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United States Supreme Court ruling in *Hurst v. Florida*, 136 S. Ct. 616, did not announce a new rule of law, but rather applied constitutional rule from *Ring*, and thus ruling did not trigger one-year limitations period for filing motion for postconviction relief under the Nebraska Postconviction Act. Neb. Rev. Stat. § 29-3001(4)(d).

[4] **Constitutional Law** Fourteenth Amendment in general

Jury Death penalty

Sentencing and Punishment Procedure

Nebraska's capital sentencing statutes do not violate the 6th, 8th, and 14th Amendments by allowing a panel of judges, and not a jury, to make factual findings in imposing a death sentence, and by not requiring a unanimous recommendation from a jury regarding whether a sentence of death should be imposed; jury is not constitutionally required to weigh the aggravating and mitigating circumstances or to make the ultimate sentencing decision within the relevant sentencing range. U.S. Const. Amends. 6, 8, 14.

Syllabus by the Court

***451** 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 is reviewed independently of the lower court's ruling.

Appeal from the District Court for Scotts Bluff County: Andrea D. Miller, Judge. Affirmed.

Attorneys and Law Firms

Jerry M. Hug, Omaha, for appellant.

Douglas J. Peterson, Attorney General, and James D. Smith, Solicitor General, for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, and Papik, JJ.

Opinion

Stacy, J.

****837** In October 2016, Jeffrey Hessler filed this motion for postconviction relief. The motion relies on the U.S. Supreme Court's decision in *Hurst v. Florida*[1] and alleges Hessler's death sentence is invalid because Nebraska's capital sentencing statutes violate Hessler's rights under the 6th, 8th, and ***452** 14th Amendments to the U.S. Constitution. We addressed an identical argument in *State v. Lotter*[2] and held *Hurst* was not a proper triggering event for the 1-year limitations period of the Nebraska Postconviction Act.[3] Citing *Lotter*, the district court found Hessler's motion was time barred and denied it without conducting an evidentiary hearing. Hessler appeals, and we affirm.

FACTS

In 2004, Hessler was convicted by a jury of first degree murder, kidnapping, first degree sexual assault, and use of a firearm to commit a felony. He was sentenced to death on the murder conviction. He unsuccessfully challenged his convictions and sentences on direct appeal[4] and in two prior postconviction proceedings.[5]

On January 12, 2016, the U.S. Supreme Court decided *Hurst*.[6] *Hurst* found that Florida's capital sentencing scheme was unconstitutional, because it required the trial court alone to find both that sufficient aggravating circumstances existed to justify imposition of the death penalty and that there were insufficient mitigating circumstances to outweigh the aggravating circumstances. Roughly 10 months after *Hurst* was decided, Hessler filed this successive motion for postconviction relief. The motion asserts:

> Jurisdiction is proper in this Court as the decision in *Hurst v. Florida* ... was issued by the United States Supreme Court on January 12, 2016 and ... Hessler is asserting that *Hurst* is applicable in his case and therefore has one year from the date of that decision to file this motion pursuant to ...§ 29-3001 ....

***453** Hessler's motion relies on *Hurst* and alleges that Nebraska's capital sentencing statutes[7] violate the 6th, 8th, and 14th Amendments. It specifically alleges the Sixth amendment is violated because the Nebraska statutes allow a panel of judges, and not a jury, to "make factual findings in imposing a death sentence." The motion further alleges "to the extent that Nebraska's death-penalty statutes do not require ****838** a unanimous recommendation from a jury regarding whether a sentence of death should be imposed, [the statutes] violate[ ] the 8th and 14th Amendments."

Identical 6th, 8th, and 14th Amendment claims based on *Hurst* were raised in a successive motion for postconviction relief in *Lotter*,[8] and we rejected them in an opinion released September 28, 2018. We reasoned that the Nebraska Postconviction Act contains a 1-year limitations period for filing a verified motion for postconviction relief, which runs from one of four triggering events or from August 27, 2011, whichever is later.[9] The triggering events under § 29-3001(4) are:

> (a) The date the judgment of conviction became final by the conclusion of a direct appeal or the expiration of the time for filing a direct appeal;
>
> (b) The date on which the factual predicate of the constitutional claim or claims alleged could have been discovered through the exercise of due diligence;
>
> (c) The date on which an impediment created by state action, in violation of the Constitution of the United States or the Constitution of Nebraska or any law of this state, is removed, if the prisoner was prevented from filing a verified motion by such state action;
>
> (d) The date on which a constitutional claim asserted was initially recognized by the Supreme Court of the United States or the Nebraska Supreme Court, if the ***454** newly recognized right has been made applicable retroactively to cases on postconviction collateral review[.]

Like Hessler's postconviction claims, the claims alleged in *Lotter* regarding the 6th, 8th, and 14th Amendments were all based on *Hurst*, and the defendant in *Lotter* relied on the triggering event in § 29-3001(4)(d) to contend the claims were timely. We rejected this contention.

We held in *Lotter* that *Hurst* could not trigger the 1-year statute of limitations under § 29-3001(4)(d), because *Hurst* did not announce a new rule of law and merely applied the constitutional rule from the 2002 case of *Ring v. Arizona.*[10] *Lotter* also held that the "plain language of *Hurst* reveals no holding that a jury must find beyond a reasonable doubt that the aggravating factors outweigh the mitigating circumstances."[11] Finally, *Lotter* reasoned that even if *Hurst* announced a new rule of law, it would not

apply retroactively to cases on collateral review, because it was based on *Ring* and the U.S. Supreme Court has held that *Ring* announced a procedural rule that does not apply retroactively.[12] Having concluded in *Lotter* that *Hurst* did not announce a new rule of law, we rejected the defendant's contention that *Hurst* could trigger the 1-year statute of limitations under § 29-3001(4)(d), and we found the defendant's postconviction claims were time barred.[13] The defendant's petition for a writ of certiorari was denied by the U.S. Supreme Court on June 17, 2019.[14]

Citing to our analysis and holding in *Lotter*, the district court here found that Hessler's motion was time barred, and it ****839** dismissed the motion without an evidentiary hearing. Hessler timely appealed.

***455** ASSIGNMENT OF ERROR

Hessler assigns, restated, that the district court erred in denying his postconviction motion without an evidentiary hearing, because Nebraska's capital sentencing scheme violates *Hurst* and the 6th, 8th, and 14th Amendments to the U.S. Constitution.

STANDARD OF REVIEW

[1] 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.[15]

[2] Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law which is reviewed independently of the lower court's ruling.[16]

ANALYSIS

At oral argument before this court, Hessler conceded the claims made in his successive motion for postconviction relief are identical to those raised and rejected by this court in *Lotter*. Hessler further conceded there was no factual distinction between his postconviction claims and those asserted in *Lotter*, and he pointed to no change in the relevant law since our decision in *Lotter*.

[3] Our decision in *Lotter* is dispositive of the issues presented in this appeal, and Hessler does not contend otherwise. *Hurst* did not announce a new rule of law, and thus it cannot trigger the 1-year statute of limitations under § 29-3001(4)(d). Because this is the only triggering event relied upon by Hessler in contending that his postconviction claims are timely, we agree with the district court that Hessler's postconviction claims are time barred.

[4] For the sake of completeness, we note that even if Hessler's claims were not time barred, they would not entitle him to ***456** postconviction relief. After oral arguments in this case, the U.S. Supreme Court decided *McKinney v. Arizona*.[17] *McKinney* explained:

> Under *Ring* and *Hurst*, a jury must find the aggravating circumstance that makes the defendant death eligible. But importantly, in a capital sentencing proceeding just as in an ordinary sentencing proceeding, a jury (as opposed to a judge) is not constitutionally required to weigh the aggravating and mitigating circumstances or to make the ultimate sentencing decision within the relevant sentencing range.[18]

As such, *McKinney* makes clear there is no merit to the under-lying premise of Hessler's postconviction claims.

Appendix A

We thus affirm the district court's order denying postconviction relief without an evidentiary hearing.

Affirmed.

Freudenberg, J., not participating.

All Citations

305 Neb. 451, 940 N.W.2d 836

Footnotes

1 *Hurst v. Florida*, ––– U.S. ––––, 136 S. Ct. 616, 193 L. Ed. 2d 504 (2016).

2 *State v. Lotter*, 301 Neb. 125, 917 N.W.2d 850 (2018).

3 Neb. Rev. Stat. § 29-3001(4) (Reissue 2016).

4 *State v. Hessler*, 274 Neb. 478, 741 N.W.2d 406 (2007).

5 *State v. Hessler*, 282 Neb. 935, 807 N.W.2d 504 (2011); *State v. Hessler*, 288 Neb. 670, 850 N.W.2d 777 (2014).

6 *Hurst, supra* note 1.

7 See Neb. Rev. Stat. §§ 29-2521 to 29-2522 (Cum. Supp. 2018).

8 *Lotter, supra* note 2.

9 § 29-3001(4).

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

11 *Lotter, supra* note 2, 301 Neb. at 144, 917 N.W.2d at 864.

12 *Schriro v. Summerlin*, 542 U.S. 348, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004).

13 Accord *State v. Mata*, 304 Neb. 326, 934 N.W.2d 475 (2019).

14 *Lotter v. Nebraska*, ––– U.S. ––––, 139 S. Ct. 2716, 204 L. Ed. 2d 1114 (2019).

15 *Mata, supra* note 13.

16 *Id.*

17 *McKinney v. Arizona*, ––– U.S. ––––, 140 S. Ct. 702, –––, ––– L.Ed.2d –––– (2020).

18 *Id.*, 140 S. Ct. at 707.

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Filed in Scotts Bluff District Court
*** EFILED ***
Case Number: D21CR030000039
Transaction ID: 0008787540
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ORDER

IN THE DISTRICT COURT OF SCOTTS BLUFF COUNTY, NEBRASKA

STATE V. JEFFREY HESSLER — Case ID: CR03-39

This is a subsequent postconviction relief matter filed by Jeffrey Hessler. Mr. Hessler has filed prior postconviction relief motions which have been denied by this court and upheld on appeal. Mr. Hessler was found guilty by a jury and sentenced to death by a three (3) judge panel. Mr. Hessler now claims his conviction is void or voidable under the findings of the United State Supreme Court in *Hurst v. Florida*, 136 S.Ct. 616, (2016).

A brief schedule was set forth by Judge Randall Lippstreau prior to his retirement. The briefs have been submitted to Judge Andrea Miller and the matter is ready for decision.

The requested relief by Mr. Hessler is denied. The holding in the *Hurst* case does not create a new legal rule but rather applies the principles in *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct 2428 (2002). The Nebraska Supreme Court has upheld a postconviction challenge to the dealth penalty based on the Hurst decision. *State v. Lotter*, 301 Neb. 125 (2018). In the *Lotter* case, the identical claim for relief was made to the district court in a postconviction relief motion. Mr. Lotter appealed his denial of relief which was affirmed on appeal See State v. Lotter supra. The Court in *Lotter* stated:

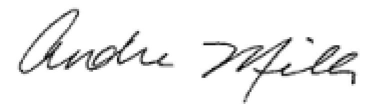
> Even if we found that *Hurst* did announce a new law, it would not apply retroactively to Lotter. As we concluded above, *Hurst* merely applied *Ring*. And it is well established that *Ring* does not apply retroactively to cases on collateral review. The U.S. Supreme Court

declared that "*Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct review." And in one of Lotter's previous postconviction appeals, we explained in great detail why *Ring* did not apply retroactively to his case.

Likewise, *Hurst* has no retroactive application to cases on collateral review. Because *Hurst* is tethered to *Ring*, we see no reason why Hurst would apply retroactively on collateral review when *Ring* does not. In considering an identical issue raised in Lotter's petition for habeas corpus, the Nebraska federal district court reached the same conclusion. Lotter appealed that decision, but the Eighth Circuit denied his application for a certificate of appealability and the U.S. Suprme Court denied his petition for certiorari. We observed that several federal circuit courts of appeals have found that *Hurst* does not apply retroactively to cases on collateral review. Other federal courts agree. Most state courts have reached the same conclusion.

Hurst does not create a newly recognized right; under Neb. Rev. Stat. §29-3001 (4) as a consequence, the Motion for Post-Conviction Relief is dismissed.

IT IS SO ORDERED.



Andrea D Miller

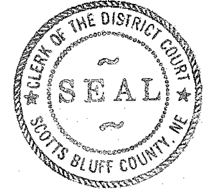
Appendix B

CERTIFICATE OF SERVICE

I, the undersigned, certify that on June 5, 2019 , I served a copy of the foregoing document upon the following persons at the addresses given, by mailing by United States Mail, postage prepaid, or via E-mail:

Jeffrey Hessler
#59078, P.O. Box 2500
Lincoln, NE 68542-2500

Douglas L Warner
doug.warner@nebraska.gov



Date: June 5, 2019 BY THE COURT: ______________________
CLERK

295 Neb. 70
Supreme Court of Nebraska.

STATE of Nebraska, appellee,
v.
Jeffrey HESSLER, appellant.

No. S-15-960.
|
Filed October 28, 2016.

Synopsis

Background: Movant filed postconviction relief motion and petition for writ of error coram nobis challenging conviction pursuant to no contest plea for first degree sexual assault on a child. The District Court, Scotts Bluff County, Randall L. Lippstreu, J., overruled motion and denied petition. Movant appealed.

Holdings: The Supreme Court, Miller-Lerman, J., held that:

[1] claims relating to movant's mental incompetence and for ineffective assistance of counsel did not warrant coram nobis relief;

[2] movant was legally competent to enter no contest plea at the time of his conviction;

[3] trial counsel's advice to enter no contest plea did not constitute ineffective assistance of counsel;

[4] counsel's failure to discover and present mitigating evidence at sentencing was not ineffective assistance; and

[5] trial counsel's failure to advise movant to appeal and to raise certain issues on appeal did not constitute ineffective assistance.

Affirmed.

West Headnotes (24)

[1] **Criminal Law** Post-conviction relief

Findings of district court in connection with its ruling on a motion for a writ of error coram nobis will not be disturbed unless they are clearly erroneous. Neb. Rev. Stat. § 49-101.

[2] **Criminal Law** Questions of law or fact

In an evidentiary hearing on a motion for postconviction relief, trial judge, as trier of fact, resolves conflicts in evidence and questions of fact. Neb. Rev. Stat. § 29-3001 et seq.

1 Cases that cite this headnote

[3] **Criminal Law** Interlocutory, Collateral, and Supplementary Proceedings and Questions

Criminal Law Post-conviction relief

Appellate court upholds trial court's findings in proceedings on motion for postconviction relief unless they are clearly erroneous; in contrast, appellate court independently resolves questions of law. Neb. Rev. Stat. § 29-3001 et seq.

1 Cases that cite this headnote

[4] **Criminal Law** Interlocutory, Collateral, and Supplementary Proceedings and Questions

With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test for ineffective assistance of counsel claims, appellate court reviews such legal determinations independently of the lower court’s decision in proceedings on motion for postconviction relief. U.S. Const. Amend. 6; Neb. Rev. Stat. § 29-3001 et seq.

1 Cases that cite this headnote

[5] **Criminal Law** Error Coram Nobis

Purpose of writ of error coram nobis is to bring before the court rendering judgment matters of fact which, if known at the time the judgment was rendered, would have prevented its rendition. Neb. Rev. Stat. § 49-101.

1 Cases that cite this headnote

[6] **Criminal Law** Error Coram Nobis

Writ of error coram nobis reaches only matters of fact unknown to applicant at the time of judgment, not discoverable through reasonable diligence, and which are of a nature that, if known by the court rendering judgment, would have prevented entry of judgment. Neb. Rev. Stat. § 49-101.

2 Cases that cite this headnote

[7] **Criminal Law** Error Coram Nobis

Writ of error coram nobis is not available to correct errors of law. Neb. Rev. Stat. § 49-101.

[8] **Criminal Law** Factual questions or errors

Criminal Law Burden of proof

Burden of proof in a proceeding to obtain a writ of error coram nobis is upon the applicant claiming error, and alleged error of fact must be such as would have prevented a conviction; it is not enough to show that it might have caused a different result. Neb. Rev. Stat. § 49-101.

1 Cases that cite this headnote

[9] **Criminal Law** Denial of fair trial

Criminal Law Effectiveness of Counsel

Claims of error or misconduct at trial and ineffective assistance of counsel are inappropriate for coram nobis relief. U.S. Const. Amend. 6; Neb. Rev. Stat. § 49-101.

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[10] **Criminal Law** Competency to stand trial

Criminal Law Effectiveness of Counsel

Claims related to petitioner's alleged mental incompetence at time he pled no contest to first degree sexual assault on a child and for ineffective assistance of trial counsel did not warrant coram nobis relief; petitioner did not identify a fact that would have prevented entry of judgment, and substance of petitioner's claims was either not appropriate for coram nobis relief or was without merit. U.S. Const. Amend. 6; Neb. Rev. Stat. § 49-101.

[11] **Criminal Law** Adequacy of Representation

Proper ineffective assistance of counsel claim alleges a violation of the fundamental constitutional right to a fair trial. U.S. Const. Amend. 6.

1 Cases that cite this headnote

[12] **Criminal Law** Deficient representation and prejudice in general

To prevail on a claim of ineffective assistance of counsel, defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced defendant. U.S. Const. Amend. 6.

5 Cases that cite this headnote

[13] **Constitutional Law** Incompetency or Mental Illness

Criminal Law Right to plead guilty; mental competence

Defendant was legally competent to enter no contest plea at the time of his conviction for sexual assault on a child, and thus trial court did not violate defendant's due process rights by accepting plea; at the time of his conviction, defendant was able to provide counsel with background information and appeared reasonably intelligent and to understand the evidence and strategy of the case, psychologist who treated defendant at time of conviction stated that defendant was able to understand important aspects of the proceedings against him, and psychiatric nurse who treated defendant stated that medications defendant was given helped him and that defendant's responses to nurse's questions were appropriate. U.S. Const. Amend. 14.

[14] **Criminal Law** Right to plead guilty; mental competence

Mental Health Mental disorder at time of trial

A person is competent to plead or stand trial if he or she has the capacity to understand the nature and object of the proceedings against him or her, to comprehend his or her own condition in reference to such proceedings, and to make a rational defense.

4 Cases that cite this headnote

[15] **Criminal Law** Right to plead guilty; mental competence

Mental Health Mental disorder at time of trial

Test of mental capacity to plead is the same as that required to stand trial.

4 Cases that cite this headnote

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[16] **Criminal Law** Right to plead guilty; mental competence

Criminal Law Waiver of right to counsel

Court is not required to make a competency determination in every case in which a defendant seeks to plead guilty or to waive his or her right to counsel; competency determination is necessary only when court has reason to doubt defendant's competence. U.S. Const. Amend. 6.

5 Cases that cite this headnote

[17] **Criminal Law** Competence to stand trial; sanity hearing

In order to demonstrate prejudice, as element of ineffective assistance of counsel claim, from counsel's failure to investigate competency and for failing to seek a competency hearing, defendant must demonstrate that there is a reasonable probability that he or she was, in fact, incompetent and that trial court would have found him or her incompetent had a competency hearing been conducted. U.S. Const. Amend. 6.

7 Cases that cite this headnote

[18] **Criminal Law** Plea

Trial counsel's advice to enter no contest plea did not constitute deficient performance and, thus, was not ineffective assistance of counsel, in prosecution for sexual assault on a child, though the advice was partly based on unsuccessful and untested strategy to prevent current offense from being used as aggravator in separate murder case against defendant; defendant agreed to the strategy with knowledge of its uncertainty, there was overwhelming evidence against defendant, including that defendant had confessed to the sexual assault of victim and that DNA evidence was consistent with the confession, and defendant had stated his desire to avoid trial. U.S. Const. Amend. 6.

[19] **Criminal Law** Plea

To show prejudice, as element of ineffective assistance of counsel claim, when the alleged ineffective assistance relates to the entry of a plea, defendant must show that there is a reasonable probability that, but for counsel's errors, he or she would not have entered the plea and would have insisted on going to trial. U.S. Const. Amend. 6.

4 Cases that cite this headnote

[20] **Criminal Law** Plea

Trial counsel's advice to enter no contest plea did not prejudice defendant and, thus, was not ineffective assistance of counsel, in prosecution for sexual assault on a child, absent showing that defendant would have gone to trial but for counsel's advice; given the strength of state's case against defendant and defendant's own stated desire to avoid trial, defendant had sufficient reason to enter plea independently of counsel's advice. U.S. Const. Amend. 6.

[21] **Criminal Law** Adequacy of investigation of sentencing issues

Criminal Law Presentation of evidence regarding sentencing

Trial counsel's failure to discover and present mitigating evidence at sentencing, after defendant pled no contest to first-degree sexual assault on a child, was not ineffective assistance, although defendant claimed counsel should have presented evidence regarding defendant's alleged mental incompetence; record indicated that defendant was able to understand the proceedings against him, including sentencing, and psychologist indicated that defendant understood

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the potential consequences of the charges and that he would go to the penitentiary as a result of entering a plea. U.S. Const. Amend. 6.

[22] **Criminal Law** Appeal

Prejudice, as element of ineffective assistance of counsel claim, would not be presumed based on trial counsel's failure to appeal from conviction and sentence pursuant to no contest plea for sexual assault on a child, where there was no showing that defendant ever requested counsel appeal conviction and sentence, and there was indication that defendant was in agreement with counsel's strategy to enter a plea and refrain from filing a direct appeal in order to have a final judgment before trial in unrelated murder case. U.S. Const. Amend. 6.

[23] **Criminal Law** Counsel

Criminal Law Appeal

After trial, conviction, and sentencing, if counsel deficiently fails to file or perfect an appeal after being so directed by criminal defendant, prejudice will be presumed and counsel will be deemed ineffective, thus entitling the defendant to postconviction relief. U.S. Const. Amend. 6; Neb. Rev. Stat. § 29-3001 et seq.

1 Cases that cite this headnote

[24] **Criminal Law** Appeal

Trial counsel's failure to advise defendant to appeal conviction and sentence pursuant to no contest plea for sexual assault on a child and to raise certain issues on appeal did not constitute deficient performance and, thus, was not ineffective assistance of counsel; although defendant described certain issues that could have been raised on appeal, defendant did not demonstrate that such issues would have been successful on appeal, and defendant did not show that any of the issues were of such merit that counsel's advice to enter plea was deficient. U.S. Const. Amend. 6.

1 Cases that cite this headnote

Syllabus by the Court

***70** 1. **Judgments: Appeal and Error.** The findings of the district court in connection with its ruling on a motion for a writ of error coram nobis will not be disturbed unless they are clearly erroneous.

2. **Postconviction: Evidence: Appeal and Error.** In an evidentiary hearing on a motion for postconviction relief, the trial judge, as the trier of fact, resolves conflicts in the evidence and questions of fact. An appellate court upholds the trial court’s findings unless they are clearly erroneous. In contrast, an appellate court independently resolves questions of law.

3. **Effectiveness of Counsel: Appeal and Error.** With regard to the questions of counsel’s performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court’s decision.

4. **Judgments: Constitutional Law: Legislature: Appeal and Error.** The common-law writ of error coram nobis exists in this state under Neb. Rev. Stat. § 49–101 (Reissue 2010), which adopts English common law to the extent that it is not inconsistent with the Constitution of the United States, the organic law of this state, or any law passed by our Legislature.

5. **Judgments: Evidence: Appeal and Error.** The purpose of the writ of error coram nobis is to bring before the court rendering judgment matters of fact which, if known at the time the judgment was rendered, would have prevented its rendition. The writ reaches only matters of fact unknown to the applicant at the time of judgment, not discoverable through reasonable diligence, and which are of a nature that, if known by the court, would have prevented entry of judgment. The writ is not available to correct errors of law.

***71** 6. **Convictions: Proof: Appeal and Error.** The burden of proof in a proceeding to obtain a writ of error coram nobis is upon the applicant claiming the error, and the alleged error of fact must be such as would have prevented a conviction. It is not enough to show that it might have caused a different result.

7. **Trial: Effectiveness of Counsel: Appeal and Error.** Claims of errors or misconduct at trial and ineffective assistance of counsel are inappropriate for coram nobis relief.

8. **Postconviction: Judgments: Constitutional Law.** The Nebraska Postconviction Act, Neb. Rev. Stat. § 29–3001 et seq. (Reissue 2008 & Cum. Supp. 2014), provides that postconviction relief is available to a prisoner in custody under sentence who seeks to be released on the ground that there was a denial or infringement of his or her constitutional rights such that the judgment was void or voidable.

9. **Constitutional Law: Effectiveness of Counsel.** A proper ineffective assistance of counsel claim alleges a violation of the fundamental constitutional right to a fair trial.

10. **Effectiveness of Counsel: Proof: Appeal and Error.** To prevail on a claim of ineffective assistance of counsel ****284** under *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant.

11. **Trial: Pleas: Mental Competency.** A person is competent to plead or stand trial if he or she has the capacity to understand the nature and object of the proceedings against him or her, to comprehend his or her own condition in reference to such proceedings, and to make a rational defense.

12. **Pleas: Mental Competency: Right to Counsel: Waiver.** A court is not required to make a competency determination in every case in which a defendant seeks to plead guilty or to waive his or her right to counsel; a competency determination is necessary only when a court has reason to doubt the defendant's competence.

13. **Effectiveness of Counsel: Mental Competency: Proof.** In order to demonstrate prejudice from counsel's failure to investigate competency and for failing to seek a competency hearing, the defendant must demonstrate that there is a reasonable probability that he or she was, in fact, incompetent and that the trial court would have found him or her incompetent had a competency hearing been conducted.

14. **Effectiveness of Counsel: Pleas: Proof.** To show prejudice when the alleged ineffective assistance relates to the entry of a plea, the defendant must show that there is a reasonable probability that, but for counsel's errors, he or she would not have entered the plea and would have insisted on going to trial.

***72** 15. **Postconviction: Effectiveness of Counsel: Presumptions: Appeal and Error.** 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.

****283** Appeal from the District Court for Scotts Bluff County: Randall L. Lippstreu, Judge. Affirmed.

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Attorneys and Law Firms

Alan G. Stoler and Jerry M. Hug, of Alan G. Stoler, P.C., L.L.O., Omaha, for appellant.

Douglas J. Peterson, Attorney General, and James D. Smith, Lincoln, for appellee.

Wright, Miller–Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Miller–Lerman, J.

I. NATURE OF CASE

Jeffrey Hessler appeals the order of the district court for Scotts Bluff County which overruled his motion for postconviction relief and denied his petition for a writ of error coram nobis. Hessler claimed that he had received ineffective assistance of trial counsel and was not competent to enter the plea on which his conviction for first degree sexual assault on a child was based. We affirm.

II. STATEMENT OF FACTS

In 2003, Hessler pled no contest to a charge of first degree sexual assault on a child. Hessler had been charged with sexually assaulting J.B., a girl under 16 years of age, on August 20, 2002. The district court accepted Hessler's plea and sentenced him to imprisonment for 30 to 42 years. No direct appeal was taken from the conviction and sentence.

While Hessler was facing the charge in that first case, he was also facing charges in a second case: first degree murder, ****285** kidnapping, first degree sexual assault on a child, and use of a firearm in connection with the assault and death of another girl ***73** under 16 years of age, Heather Guerrero. Hessler pled no contest in the first case before the jury trial was held in the second case. Following the jury trial in the second case, Hessler was convicted and sentenced to death for Guerrero's murder. Hessler's convictions and sentences for the charges relating to Guerrero were affirmed on direct appeal to this court. *State v. Hessler,* 274 Neb. 478, 741 N.W.2d 406 (2007). This court also affirmed the overruling of Hessler's subsequent motions for postconvction relief relating to such convictions. *State v. Hessler,* 282 Neb. 935, 807 N.W.2d 504 (2011) (first postconviction motion); *State v. Hessler,* 288 Neb. 670, 850 N.W.2d 777 (2014) (second postconviction motion and motion for writ of error coram nobis).

On August 24, 2012, Hessler filed a pleading he titled as "Verified Motion for Postconviction Relief and Petition for Writ of Error Coram Nobis" in the instant case involving the sexual assault of J.B. That filing gives rise to the present appeal. Hessler alleged that the claims set forth in the filing entitled him to postconviction relief or, in the alternative, a writ of error coram nobis.

The district court determined that Hessler was entitled to an evidentiary hearing on claims which the court characterized as follows:

(1) a claim that Hessler was not competent to enter a plea of no contest, because at the time of the plea "he was suffering from bipolar disorder, severe, with psychotic features"; and

(2) claims that trial counsel was ineffective in

(a) "[f]ailing to investigate, raise, and prove" a claim that Hessler was not competent to enter a plea of no contest;

(b) "[a]dvising Hessler to plead 'no contest' ";

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(c) "[a]dvising Hessler that a plea of 'no contest' [in this case] would benefit him" by providing him with a double jeopardy defense to the pending charges involving the assault and death of Guerrero;

(d) "[f]ailing to investigate, discover, and present mitigating evidence at the sentencing hearing"; and

***74** (e) "[f]ailing to advise Hessler to file a direct appeal" or to advise him that he "had a right to appeal and a right to counsel to pursue his appeal."

At the evidentiary hearing, the court received evidence including, inter alia, depositions of the two attorneys who had represented Hessler in the original conviction, depositions of a psychologist and a psychiatric nurse who had worked with Hessler in 2003, and the deposition of a psychiatrist who had reviewed Hessler's records and had met with Hessler in 2012 and 2013. Hessler did not testify. Following the evidentiary hearing, the court rejected all of Hessler's claims, overruled his motion for postconviction relief, and denied his petition for a writ of error coram nobis.

With regard to the claim that Hessler was not competent to enter a plea of no contest, the court noted that both attorneys who had represented Hessler in the original conviction were experienced criminal defense attorneys and that both had determined there was nothing indicating that Hessler was not competent to stand trial or that a mental health defense would be successful. The court noted trial counsel had stated that Hessler "was able to provide counsel with background information" and that he "appeared reasonably intelligent and appeared to understand the evidence and strategy of the case."

The court further noted that the psychologist who treated Hessler at the time ****286** of the conviction stated that although Hessler "suffered from a bi-polar mood disorder, depression, and paranoid delusional disorder," Hessler still "understood the release he signed, understood the potential consequences of his charges," "understood he was charged with sexual assault[,] and knew he was going to plead and would go to the penitentiary." The court noted the psychologist also stated that at the time of the plea, Hessler "was well aware of who [trial counsel] was and understood [trial counsel's] role in the case." The court further noted that the psychiatric nurse who treated Hessler stated that the medications he was given to treat his bipolar depression would clear his thinking such that he would ***75** be " 'more in reality' " and that Hessler "appeared to understand her questions and his responses were appropriate."

In connection with the issue pertaining to Hessler's competence to enter a plea, the court noted that Hessler presented the deposition of a psychiatrist who had been hired in connection with this postconviction action to review Hessler's records from the original conviction in 2003. Although the psychiatrist opined that in 2003, Hessler was "depressed" and had "paranoid thinking," the court noted that the psychiatrist stated he did not have adequate information to form a definitive opinion on "what [e]ffect [such conditions] would have on Hessler's ability for rational choices about entering a plea of no contest."

Considering the evidence presented, the court concluded that "Hessler's evidence failed to demonstrate a reasonable probability that he was, in fact, incompetent to enter a plea of no-contest to sexually assaulting J.B., or that the trial court would have found him incompetent had a competency hearing been conducted." The court further determined that because the record showed Hessler to be competent, "his counsel could not have been ineffective in not raising an issue of competency."

The court then considered Hessler's other claims directed at ineffective assistance of counsel. Regarding Hessler's claim that counsel was ineffective for advising him to plead no contest, the court noted that prior to trial in this case, counsel knew "(1) that Hessler had confessed to the sexual assault of J.B., (2) efforts to suppress Hessler's confession had not been successful, and (3) DNA testing had scientifically confirmed his confession." The court also noted that "Hessler had advised [counsel] early on that he did not want a trial in the J.B. sexual assault case." The court further noted that the same counsel who represented Hessler in this case represented him in connection with the charges related to the assault and killing of Guerrero. Counsel knew that Hessler would be at risk of a death sentence for the murder of Guerrero and that the ***76** State would attempt to use the sexual assault of J.B. to prove an aggravating circumstance in the murder trial. The postconviction court found that "counsel embarked on a global strategy encompassing both cases with the ultimate goal of saving [Hessler's] life." Because counsel had

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determined that there was "no viable defense to the J.B. sexual assault case," counsel attempted to "preclude use of the sexual assault of J.B. as an aggravating circumstance in the [Guerrero] homicide case."

Counsel's strategy was to have "a final conviction and sentence in the sexual assault case [involving J.B.] prior to trial in the homicide case [involving Guerrero]" and then "to later present a double jeopardy / plea in bar argument against its use as an aggravating circumstance in the homicide trial." The court noted that counsel had explained this strategy to Hessler and had advised him that the double jeopardy or plea in bar "theory was untested." ****287** Hessler agreed to the strategy and advised counsel he wanted to plead in the instant case.

The postconviction court noted that the strategy to preclude the sexual assault conviction in this case from being used in the homicide case ultimately proved to be unsuccessful and that the sexual assault of J.B. was allowed to be used to prove an aggravating circumstance in the homicide sentencing trial. The court concluded, however, that counsel was not ineffective for advising Hessler to plead no contest or for so advising him as part of the global strategy for both cases. The court concluded that "[c]onfronted with overwhelming evidence of guilt, Hessler's trial counsel were not ineffective by attempting novel legal defenses." The court further noted that counsel's advice was "consistent with Hessler's expressed desire to admit to the sexual assault" of J.B.

With respect to Hessler's claim that counsel was ineffective for failing to investigate, discover, and present mitigating evidence at the sentencing hearing, the postconviction court did not explicitly reject the claim. However, the court found that "[c]ounsel were never concerned about a sentence in the sexual ***77** assault [of J.B.] case because Hessler would never live outside prison in the homicide [of Guerrero] case." The court considered such lack of focus on the sentence in the instant case to be part of the global strategy that encompassed counsel's advice to plead no contest in this case in hopes of improving Hessler's outcome in the homicide case. The court determined that such global strategy did not constitute ineffective assistance of counsel.

Finally, with respect to Hessler's claim that counsel was ineffective for failing to advise him to file a direct appeal in this case, the court found that "Hessler provided no evidence that he ever requested counsel appeal his conviction and sentence in this case." The court further concluded that Hessler had "shown no prejudice by the failure to file a direct appeal."

Hessler appeals the order which overruled his motion for postconviction relief and denied his petition for a writ of error coram nobis.

III. ASSIGNMENTS OF ERROR

Hessler claims that the postconviction district court erred when it rejected his claims that (1) he was denied due process and effective assistance of counsel because he was not competent to enter a plea of no contest, (2) trial counsel's advice to plead no contest was ineffective assistance of counsel, (3) trial counsel's failure to discover and present mitigating evidence at sentencing was ineffective assistance of counsel, and (4) trial counsel's failure to advise him to file a direct appeal was ineffective assistance of counsel.

IV. STANDARDS OF REVIEW

[1] The findings of the district court in connection with its ruling on a motion for a writ of error coram nobis will not be disturbed unless they are clearly erroneous. *State v. Harrison,* 293 Neb. 1000, 881 N.W.2d 860 (2016).

[2] **[3]** In an evidentiary hearing on a motion for postconviction relief, the trial judge, as the trier of fact, resolves conflicts in the evidence and questions of fact. An appellate court ***78** upholds the trial court's findings unless they are clearly erroneous. In contrast, an appellate court independently resolves questions of law. *State v. Saylor,* 294 Neb. 492, 883 N.W.2d 334 (2016).

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[4] With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in ****288** *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision. *State v. Saylor, supra.*

V. ANALYSIS

1. District Court Did Not Err When It Denied Hessler's Petition for Writ of Error Coram Nobis

In this action Hessler set forth various claims and alleged that such claims entitled him to postconviction relief or, in the alternative, a writ of error coram nobis. A writ of error coram nobis is relief distinct from relief available under the Nebraska Postconviction Act, Neb. Rev. Stat. § 29–3001 et seq. (Reissue 2008 & Cum. Supp. 2014). As we noted in *State v. Harris,* 292 Neb. 186, 871 N.W.2d 762 (2015), § 29–3003 provides that relief under that act "is not intended to be concurrent with any other remedy existing in the courts of this state," including a writ of error coram nobis. Therefore, we consider whether Hessler's claims would entitle him to a writ of error coram nobis separately from our consideration of Hessler's claims for relief under the Nebraska Postconviction Act. We conclude that the district court did not err when it denied Hessler's petition for a writ of error coram nobis.

[5] **[6]** **[7]** **[8]** The common-law writ of error coram nobis exists in this state under Neb. Rev. Stat. § 49–101 (Reissue 2010), which adopts English common law to the extent that it is not inconsistent with the Constitution of the United States, the organic law of this state, or any law passed by our Legislature. *State v. Sandoval,* 288 Neb. 754, 851 N.W.2d 656 (2014). The ***79** purpose of the writ of error coram nobis is to bring before the court rendering judgment matters of fact which, if known at the time the judgment was rendered, would have prevented its rendition. *State v. Harrison, supra.* The writ reaches only matters of fact unknown to the applicant at the time of judgment, not discoverable through reasonable diligence, and which are of a nature that, if known by the court, would have prevented entry of judgment. *Id.* The writ is not available to correct errors of law. *Id.* The burden of proof in a proceeding to obtain a writ of error coram nobis is upon the applicant claiming the error, and the alleged error of fact must be such as would have prevented a conviction. It is not enough to show that it might have caused a different result. *State v. Harris, supra.*

[9] **[10]** In *State v. Hessler,* 288 Neb. 670, 850 N.W.2d 777 (2014), we affirmed the denial of Hessler's request for a writ of error coram nobis in connection with his convictions related to the assault and murder of Guerrero. In that case, Hessler raised claims that were similar to claims he raises here. In that appeal, we stated that claims of errors or misconduct at trial and ineffective assistance of counsel are inappropriate for coram nobis relief. Similarly, most of Hessler's claims in the present action are claims of ineffective assistance of trial counsel, and thus, such claims are inappropriate for coram nobis relief.

Hessler's claim in this case with regard to his mental competence was based in part on his claim of a denial of his right to effective assistance of counsel, but the claim was also based in part on an alleged denial of his due process rights. Hessler made similar allegations with regard to his mental competence in his request for a writ of error coram nobis in connection with the convictions related to the homicide of Guerrero. See *id.* Without explicitly deciding whether a meritorious claim of a denial of due process based on a defendant's mental incompetence would ****289** be appropriate for coram nobis relief, we determined on appeal that Hessler's claim relating to mental competence was without merit and therefore did not ***80** entitle him to coram nobis relief. *Id.* As discussed below in connection with Hessler's request for postconviction relief in this case, Hessler's claims related to mental competence are also without merit and similarly do not entitle him to a writ of error coram nobis.

Hessler has not identified a fact which would have prevented entry of judgment. The substance of Hessler's claims in this action either is not appropriate for coram nobis relief or is without merit. Accordingly, we conclude that the district court did not err when it denied Hessler's petition for a writ of error coram nobis.

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2. District Court Did Not Err When It Overruled Hessler's Motion for Postconviction Relief

Before considering Hessler's specific claims for postconviction relief, we review the applicable general standards. The Nebraska Postconviction Act, § 29–3001 et seq., provides that postconviction relief is available to a prisoner in custody under sentence who seeks to be released on the ground that there was a denial or infringement of his or her constitutional rights such that the judgment was void or voidable. *State v. Starks,* 294 Neb. 361, 883 N.W.2d 310 (2016).

[11] **[12]** Most of Hessler's claims in this action center on the alleged ineffective assistance provided by his trial counsel. A proper ineffective assistance of counsel claim alleges a violation of the fundamental constitutional right to a fair trial. *Id.* To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant. See *State v. Saylor,* 294 Neb. 492, 883 N.W.2d 334 (2016).

(a) Mental Competence

[13] Hessler first claims that the district court erred when it rejected his claim that because he was not competent to enter ***81** a plea of no contest, he was denied due process and effective assistance of counsel. Hessler argues both that he was denied due process because the court accepted his plea when he was mentally incompetent and that trial counsel was ineffective for failing to investigate and pursue a claim that he was not competent to stand trial or enter a plea. We find no merit to this assignment of error.

[14] **[15]** **[16]** **[17]** A person is competent to plead or stand trial if he or she has the capacity to understand the nature and object of the proceedings against him or her, to comprehend his or her own condition in reference to such proceedings, and to make a rational defense. *State v. Dunkin,* 283 Neb. 30, 807 N.W.2d 744 (2012). The test of mental capacity to plead is the same as that required to stand trial. *Id.* A court is not required to make a competency determination in every case in which a defendant seeks to plead guilty or to waive his or her right to counsel; a competency determination is necessary only when a court has reason to doubt the defendant's competence. *Id.* In order to demonstrate prejudice from counsel's failure to investigate competency and for failing to seek a competency hearing, the defendant must demonstrate that there is a reasonable probability that he or she was, in fact, incompetent and that the trial court would have found him or her incompetent had a competency hearing been conducted. *Id.*

****290** At the evidentiary hearing in this case, Hessler's trial counsel testified that there was nothing that indicated that Hessler was not competent to stand trial or that a mental health defense would be successful. To the contrary, the court noted that trial counsel testified that Hessler "was able to provide counsel with background information" and "appeared reasonably intelligent and appeared to understand the evidence and strategy of the case." In addition, the court noted the psychologist who treated Hessler at the time of the conviction stated that although Hessler suffered from conditions including "bi-polar mood disorder, depression, and paranoid delusional disorder," Hessler was still able to understand important aspects of the ***82** proceedings against him including "the release he signed, ... the potential consequences of his charges, [that] he was charged with sexual assault and [that] he was going to plead and would go to the penitentiary." The psychologist stated that Hessler knew who his trial counsel were and their role in the proceedings. In addition, the court noted the psychiatric nurse who treated Hessler stated that the medications he was given helped him and that he "appeared to understand her questions and his responses were appropriate."

Such evidence would indicate that Hessler was mentally competent at the time of his conviction under the legal standards set forth above. The evidence indicated that he had "the capacity to understand the nature and object of the proceedings against him ..., to comprehend his ... own condition in reference to such proceedings, and to make a rational defense." See *State v. Dunkin,* 283 Neb. at 44, 807 N.W.2d at 756. The evidence recounted above indicated that Hessler was competent, and Hessler failed to present evidence to call his competence into question. With regard to the latter proposition, Hessler presented the

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deposition of a psychiatrist who had been retained in connection with this postconviction action to review Hessler's records from the original conviction in 2003. Although the psychiatrist opined that in 2003, Hessler was "depressed" and had "paranoid thinking," the court noted that the psychiatrist stated that he did not have adequate information to form a definitive opinion on "what [e]ffect [such conditions] would have on Hessler's ability for rational choices about entering a plea of no contest." As noted above, the psychologist who treated Hessler at the time of the conviction also determined that Hessler had mental health issues, but that despite such conditions, he was able to understand the proceedings.

The record indicates that Hessler was legally competent at the time of his conviction, and in this postconviction action, he failed to present evidence to dispute such determination. Because there was nothing to indicate to either the trial court ***83** or counsel that Hessler was not competent to stand trial or enter a plea, there is no merit to Hessler's claims that the court violated his due process rights by accepting his plea and that counsel provided ineffective assistance by failing to investigate or pursue a claim that he was not competent. The district court therefore did not err when it denied postconviction relief on Hessler's claims related to mental competence.

(b) Plea Advice

[18] Hessler next claims that the district court erred when it rejected his claim that trial counsel's advice to plead no contest was ineffective assistance of counsel. Hessler argues that counsel's advice was deficient because it was based on a strategy pursuant to which he would enter a plea in this case in order to prevent the sexual assault of J.B. from being used to prove an aggravator in the murder case ****291** involving Guerrero. The strategy did not work out, and the sexual assault of J.B. was ultimately used to prove an aggravator in the murder case. We find no merit to this assignment of error.

[19] To show prejudice when the alleged ineffective assistance relates to the entry of a plea, the defendant must show that there is a reasonable probability that, but for counsel's errors, he or she would not have entered the plea and would have insisted on going to trial. *State v. Crawford,* 291 Neb. 362, 865 N.W.2d 360 (2015). Therefore, Hessler needed to show that if counsel had not given the allegedly erroneous advice to enter a plea in this case, he would have insisted on going to trial.

Hessler contends that counsel's strategy was unreasonable because it was based on a mistaken reading of the law as it existed at the time of his conviction. However, whether or not the strategy was based on a good reading of the law at the time, we note that counsel testified that the strategy had been explained to Hessler, and the court observed that Hessler had been told that the strategy was "untested." Counsel made no guarantee that the strategy would be successful, and Hessler agreed to the strategy with knowledge of its uncertainty.

***84** Furthermore, even without considering the global strategy relating to the separate homicide case against Hessler, the record indicates that counsel had reasons to advise Hessler to plead in this case. The district court in this postconviction action noted in its order that Hessler had confessed to the sexual assault of J.B., that efforts to suppress the confession were unsuccessful, and that DNA evidence was consistent with the confession. The court also noted that Hessler had advised counsel that he did not want a trial in this case. As the district court concluded, counsel's advice to enter a plea was not deficient in light of the "overwhelming evidence" against Hessler and his stated desire to avoid a trial.

[20] Whether or not counsel's advice regarding the global strategy proved erroneous, Hessler has not shown that if counsel had not given such advice, he would have insisted on going to trial. The record indicates that given the strength of the State's case against him in this case and his own stated desire to avoid a trial, Hessler had sufficient reason to enter a plea independently of counsel's advice regarding the global strategy. Therefore, Hessler has not shown that but for the allegedly erroneous advice he would have gone to trial. We conclude that the district court did not err when it rejected Hessler's claim that counsel was ineffective for advising him to enter a plea.

(c) Mitigating Evidence

[21] Hessler next claims that the district court erred when it rejected his claim that trial counsel's failure to discover and present mitigating evidence at sentencing was ineffective assistance of counsel. Hessler's arguments focus on counsel's alleged failure to adequately investigate and address issues of his mental competence; he argues that if the trial court had been made aware of his mental health issues, the court would have determined that he was not competent to understand the sentencing process. We find no merit to this assignment of error.

***85** As we discussed above, Hessler did not present evidence to show that he did not meet the legal standard of competence, and instead, the record indicated that he was able to understand the proceedings against him, including the sentencing aspects of the proceedings. We note in particular with regard to sentencing that the psychologist who treated Hessler at the ****292** time of the conviction stated that Hessler "understood the potential consequences of his charges" and that Hessler knew that by entering a plea, he "would go to the penitentiary."

Other than his alleged mental incompetence, Hessler presented no evidence of mitigating circumstances that counsel should have discovered and presented at his sentencing. We therefore conclude that the district court did not err when it rejected Hessler's claim that trial counsel was ineffective for failing to discover and present mitigating evidence at sentencing.

(d) Direct Appeal

[22] Hessler finally claims that the district court erred when it rejected his claim that trial counsel's failure to advise him to appeal was ineffective assistance of counsel. Hessler contends various issues could have been raised on appeal. We find no merit to this assignment of error.

[23] 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. Dunkin,* 283 Neb. 30, 807 N.W.2d 744 (2012). The court in this postconviction case found that "Hessler provided no evidence that he ever requested counsel appeal his conviction and sentence in this case." Such finding was consistent with the court's determination that Hessler was in agreement with counsel's global strategy to enter a plea in this case and refrain from filing a direct appeal in order to have a final judgment before the trial in the murder case. The postconviction court's finding that Hessler has not shown that counsel failed to file a direct appeal after ***86** being directed to do so is not clearly erroneous. See *State v. Saylor,* 294 Neb. 492, 883 N.W.2d 334 (2016).

[24] In connection with the direct appeal issue, Hessler contends that trial counsel was deficient because counsel should have advised him to appeal and to raise certain issues on appeal. In this respect, the district court in this postconviction action concluded that Hessler has "shown no prejudice by the failure to file a direct appeal." Although Hessler describes certain issues which could have been raised on appeal, such as the denial of his motion to discharge the jury panel and the denial of his motions to suppress, he did not demonstrate that such issues would have been successful on appeal. Furthermore, because Hessler entered a plea, certain issues related to his conviction were waived. See *State v. Lee,* 290 Neb. 601, 861 N.W.2d 393 (2015) (noting that normally, voluntary guilty plea waives all defenses to criminal charge). We have recognized that in a postconviction proceeding brought by a defendant convicted because of a guilty plea or a plea of no contest, a court will consider an allegation that the plea was the result of ineffective assistance of counsel. *Id.* Above, we considered and rejected Hessler's allegation that his plea was the result of ineffective assistance of counsel, and Hessler has not shown that any of the issues he suggests could have been raised on direct appeal were of such merit that counsel's advice to enter the plea was deficient.

To illustrate Hessler's assertion that colorable issues should have been presented on appeal, we note that Hessler contends that on direct appeal, he could have shown a denial of due process because the trial court and court reporter failed to make a verbatim

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record of the plea hearing. He asserts that an appellate court would have vacated his conviction and remanded the matter for new proceedings to be held in the presence of a court reporter. The district ****293** court in this postconviction action acknowledged that a verbatim record of the plea hearing was unavailable and that the court reporter was now incompetent to provide such a record. The district court ***87** determined, however, that the lack of a verbatim record did not prejudice Hessler, because counsel's strategy was to enter a plea with no appeal.

In its order, the court cited *State v. Deckard,* 272 Neb. 410, 722 N.W.2d 55 (2006), in which we concluded that the lack of a verbatim record did not violate defendant's due process rights with respect to his postconviction proceeding because the trial court's journal entries were sufficient to review the defendant's postconviction claims. Hessler asserts that *Deckard* does not apply here because the record in this case is not sufficient to review his various claims, including that he was mentally incompetent, and that without the verbatim record, it cannot be determined whether the trial court knew of his mental health issues and therefore whether the court properly considered whether he was competent to enter his plea.

However, as we determined above, Hessler has not shown that he was not mentally competent to enter a plea, and instead, the evidence and record indicated that he was competent, as the postconviction court found. The court's acceptance of his plea indicates that the court viewed him as competent to enter the plea, and a verbatim record of the proceeding was not necessary to review that claim.

Hessler has not shown either that counsel ignored his request to file a direct appeal or that counsel was ineffective for failing to advise him to take a direct appeal. We therefore conclude that the district court did not err when it rejected this claim.

VI. CONCLUSION

Having rejected each of Hessler's claims on appeal, we affirm the district court's order which overruled his motion for postconviction relief and denied his petition for a writ of error coram nobis.

Affirmed.

Heavican, C.J., not participating.

All Citations

295 Neb. 70, 886 N.W.2d 280

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IN THE DISTRICT COURT FOR SCOTTS BLUFF COUNTY, NEBRASKA

THE STATE OF NEBRASKA, **Plaintiff,** **vs.** **JEFFREY HESSLER,** **Defendant.**	**CASE NO. CR 03-40** **MEMORANDUM ORDER**

PROCEDURAL BACKGROUND

On February 26, 2003, two separate Informations were filed in Scotts Bluff County, Nebraska, against Defendant Jeffrey Hessler. In Case No. CR 03-39 Hessler was charged with kidnapping, sexual assault of a child, use of a firearm to commit a felony, and capital murder, all related to the February 11, 2003, death of Heather Guerrero. In Case No. CR 03-40, Hessler was charged with the August 20, 2002, sexual assault of J.B., a person less than sixteen years of age. In both cases Hessler was represented by James R. Mowbray and Jeffery A. Pickens, attorneys with the Nebraska Commission on Public Advocacy.

On July 14, 2003, Hessler entered a no contest plea to the underlying charge in Case No. CR 03-40, and was later sentenced to serve 30 – 42 years in prison. Hessler filed no direct appeal. On December 7, 2004, a jury convicted Hessler on all counts in Case No. CR 03-39. Hessler eventually received, inter alia, a sentence of death for Guerrero's murder. His conviction and sentence were affirmed on direct appeal. State v. Hessler, 274 Neb. 478 (2007).

On August 24, 2012, Hessler filed the pending Verified Motion For Postconviction Relief and Petition For Writ of Error Coram Nobis in Case No. CR 03-40. On May 31, 2013, the Court determined Hessler was entitled to a limited evidentiary hearing on the following issues:

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I. Hessler was not competent to plead "no contest" to first degree sexual assault of a child, because at the time of the plea he was suffering from bipolar disorder, severe, with psychotic features.

II. Trial counsel were ineffective as follows:

(a). Failing to investigate, raise, and prove Hessler was incompetent to plead "no contest."

(b). Advising Hessler to plead "no contest."

(c). Advising Hessler that a plea of "no contest" would benefit him on more serious charges pending in a separate case. Specifically, a plea of "no contest" would provide Hessler with a double-jeopardy defense in the other case.

(d). Failing to investigate, discover, and present mitigating evidence at the sentencing hearing.

(e). Failing to advise Hessler to file a direct appeal; and/or advising Hessler he had a right to appeal and a right to counsel to pursue his appeal.

The evidentiary hearing was conducted on April 13, 2014, followed by written briefs. The case was deemed submitted on July 20, 2015.

ANALYSIS

To establish a right to post conviction relief based on issues of competency, a defendant must demonstrate that there is a reasonable probability that he or she was, in fact, incompetent and that the trial court would have found the defendant incompetent had a competency hearing been conducted. State v. Baker, 286 Neb. 524 (2013); State v. Hessler, 282 Neb. 935 (2011).

To establish a right to post conviction relief based on a claim of ineffective counsel, a defendant must first show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case. The defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. State v. Williams, 259 Neb. 234, 239 (2000). In determining whether a trial counsel's performance was deficient there is a strong presumption that counsel acted reasonably. When reviewing a claim of ineffective assistance of counsel the court will not second-guess reasonable strategic decisions by counsel. State v. Benzel, 269 Neb. 1, 9 (2004). The two prong test for an ineffective assistance of counsel claim, deficient performance and prejudice, may be addressed in any order.

I. COMPETENCY

Hessler initially claims he was not competent on July 14, 2003, to plead "no contest" to the charge of first degree sexual assault of J.B.; and counsel was ineffective for failing to investigate, raise, and prove that issue. Hessler must demonstrate a reasonable probability that if counsel had raised competency issues, the result of the proceedings would have been different. A defendant is competent to plead or stand trial if:

(1) He now has the capacity to understand the nature and object of the proceedings against him;

(2) He now has the capacity to comprehend his condition in reference to his current legal proceedings; and

(3) He now has the capacity to make a rational defense.

State v. Guatney, 207 Neb. 501 (1980). A court is not required to make a competency determination in every case in which a defendant seeks to plead guilty or to waive his or her right to counsel; a competency determination is necessary only when a court has reason to doubt the defendant's competence. State v. Vo, 279 Neb. 964 (2010).

The question of competency to stand trial or plead is separate and distinct from a diagnosis of mental illness. There are many different conditions that are recognized as mental illness – not all of which would render a person incompetent to plead or stand trial. In Guatney, supra, Chief Justice Krivosha (concurrence) proposed the following 20 points of consideration in determining competency to plead or stand trial (a mental illness diagnosis not being one):

> (1) That the defendant has sufficient mental capacity to appreciate his presence in relation to time, place, and things; (2) That his elementary mental processes are such that he understands that he is in a court of law charged with a criminal offense; (3) That he realizes there is a judge on the bench; (4) That he understands that there is a prosecutor present who will try to convict him of a criminal charge; (5) That he has a lawyer who will undertake to defend him against the charge; (6) That he knows that he will be expected to tell his lawyer all he knows or remembers about the events involved in the alleged crime; (7) That he understands that there will be a jury present to pass upon evidence in determining his guilt or innocence; (8) That he has sufficient memory to relate answers to questions posed to him; (9) That he has established rapport with his lawyer; (10) That he can follow the testimony reasonably well; (11) That he has the ability to meet stresses without his rationality or judgment breaking down; (12) That he has at least minimal contact with reality; (13) That he has the minimum intelligence necessary to grasp the events taking place; (14) That he can confer coherently with some appreciation of proceedings; (15) That he can both give and receive advice from his attorneys; (16) That he can

divulge facts without paranoid distress; (17) That he can decide upon a plea; (18) That he can testify, if necessary; (19) That he can make simple decisions; and (20) That he has a desire for justice rather than undeserved punishment.

Both Mowbray and Pickens were experienced criminal defense attorneys. Mowbray had practiced criminal law exclusively since 1982 including many serious felonies and over 50 homicide cases. Mowbray was aware of the standards for competency in the State of Nebraska to include the Guatney criteria. Starting with his initial meeting with any criminal defendant Mowbray customarily looked for the need of a competency evaluation. Mowbray had several face-to-face meetings with Hessler and concluded Hessler displayed no symptoms or behavior to warrant a competency evaluation. He had no issues communicating with Hessler. Hessler seemed to understand their conversations, understood the charges and consequences, and understood the strategy of pleading to the sexual assault charge to hopefully avoid the death penalty. Hessler would ask questions. He understood what was going on, the particular roles involved, the DNA reports, etc. Mowbray "never . . . had any doubt that [Hessler] understood exactly what we were doing."

Pickens was also an experienced criminal attorney – both as a prosecutor and as defense counsel. Pickens met with Hessler initially in February, 2003. Hessler seemed clear minded and had no trouble communicating. Pickens had no concerns about Hessler's competency, and had no concerns about Hessler's competency through July 14, 2003. From February through July, 2003, counsel had good rapport with Hessler, good communications with Hessler, and Hessler seemed to understand. Regarding the J.B. rape case Hessler advised he was aware of what he had dome and felt bad about it. Pickens concluded he would not be successful with any kind of a mental health defense.

According to Pickens and Mowbray, Hessler was able to provide counsel with background information. He appeared reasonably intelligent and appeared to understand the evidence and

strategy of the case. Pickens observed nothing that led him to believe Hessler did not fully understood everything. Based on his observations and experience Pickens "was certain [Hessler] was competent to stand trial in the J.B. rape case."

Regardless, following their initial meeting with Hessler, Mowbray and Pickens had Hessler evaluated by Neuropsychologist Robert G. Arias, Ph.D. The forensic evaluation took place on March 22 – 23, 2003. Dr. Arias' diagnostic impression was "longstanding antisocial, narcissistic personality disorder" (Exhibit 29, attachment 1). Defense counsel did not feel Arias' report was helpful for Hessler's case, especially the antisocial personality diagnosis. Moreover, Mowbray concluded Dr. Arias' report offered no helpful mitigation information for sentencing in the sexual assault case.

Hessler was interviewed by Sergeant Michael Zitterkopf, Nebraska State Patrol on February 12, 2003. The interview was recorded. Hessler knowingly and voluntarily waived his Miranda rights and gave a voluntary statement. He was capable of understanding Zitterkopf's questions and providing appropriate responses.

Clinical Psychologist Daniel Scharf, Ph.D. was hired by defense counsel to provide Hessler with counselling and therapy while incarcerated – primarily focusing on his depression. Dr. Scharf was hired to provide therapy rather than perform a forensic evaluation like Dr. Arias. Dr. Scharf saw Hessler approximately weekly starting in May, 2003. Dr. Scharf believed Hessler suffered from a bi-polar mood disorder, depression, and paranoid delusional disorder. Delusional disorder was described as a mental illness. Dr. Scharf opined that Hessler understood the release he signed, understood the potential consequences of his charges, seemed to understand Scharf's bi-polar diagnosis, and understood his medications were necessary and appropriate. Dr. Scharf testified, "[O]verall we could communicate and he would understand what I was saying and asking." Hessler was of average intelligence, and was cooperative with therapy. Hessler understood he was charged with sexual assault and knew he was going to plead and would go to

the penitentiary. Hessler was well aware of who Pickens was and understood Pickens role in the case.

Ginger Brasuell was a psychiatric nurse practitioner. She was licensed to diagnose and treat mental illness, and to prescribe medications. Her employer provided those services to inmates under a contract with the Scotts Bluff County Detention Center. She first saw Hessler on June 19, 2003, and again on July 3, 2003. Nurse Brasuell prescribed various medications for Hessler. She believed she was dealing with bi-polar depression. She agreed with Dr. Scharf's impression of bi-polar disorder and psychosis. When asked if the medications she prescribed would affect one's ability to comprehend or understand proceedings she responded, "Yes . . . it should clear their thinking up a little bit better so they are more in reality." Her primary function was therapeutic and to prescribe medications. When she met with Hessler on June 19, 2003, he appeared to understand her questions and his responses were appropriate. He was able to provide accurate information regarding his prior medications. Hessler told her he expected to be sentenced next week and would be sent to Lincoln.

Psychiatrist William S. Logan, M.D. was asked by Hessler's post-conviction counsel to evaluate Hessler. Dr. Logan saw Hessler twice – in late 2012 and early 2013. He also reviewed Hessler's relevant records. Dr. Logan opined that in July, 2003, Hessler's symptoms were consistent with someone who was depressed and having paranoid thinking. However, when asked his opinion what affect that would have on Hessler's ability for rational choices about entering a plea of no contest Dr. Logan stated, "I don't think I have an adequate information base to really make a definitive opinion on that."

Hessler's evidence failed to demonstrate a reasonable probability that he was, in fact, incompetent to enter a pela of no-contest to sexually assaulting J.B., or that the trial court would have found him incompetent had a competency hearing been conducted. Because the record affirmatively reflects Hessler was competent at the time of his plea, his counsel could not have

been ineffective in not raising an issue of competency. "Defense counsel is not ineffective for failing to raise arguments that have no merit." State v. Vo, 279 Neb. 964, 972 (2010).

II. INEFFECTIVENESS OF COUNSEL

In the case at bar Hessler was charged with the first degree sexual assault of J.B. during the early morning hours of August 20, 2002. The sexual assault had included penile penetration of J.B.'s vagina with emission of semen. Following the assault a vaginal swab was taken from J.B. at Regional West Medical Center. On February 12, 2003, Hessler was interviewed at the Scottsbluff Nebraska State Patrol office where he admitted to the sexual assault. Following his arrest a buccal swab was obtained from Hessler. The buccal swab and the vaginal swab were submitted to the Human DNA Laboratory at the University of Nebraska Medical Center for DNA profiling. A DNA profile was generated from the sperm cell enriched vaginal swab. The probability that Hessler could be excluded as the sperm donor was one in one hundred fifty two trillion for Caucasians.

Accordingly, prior to trial Pickens and Mowbray knew (1) that Hessler had confessed to the sexual assault of J.B., (2) efforts to suppress Hessler's confession had not been successful, and (3) DNA testing had scientifically confirmed his confession.

Pickens and Mowbray also represented Hessler for the February 11, 2003, killing of fifteen year old Heather Guerrero. From the very beginning it was obvious to counsel the Guerrero murder would be a capital case wherein their client would be at risk for a death sentence. They, also, concluded it would be unlikely a plea bargain could be reached to save Hessler's life (Exhibit 18; 14:22 – 15:1). Finally, it was clear to counsel that the State would attempt to use the J.B. sexual assault as an aggravating circumstance in the murder trial.

With that background counsel embarked on a global strategy encompassing both cases

with the ultimate goal of saving their client's life. Plea agreements to avoid the death penalty were unsuccessful (Exhibit 18; 22:2 – 15). On May 19, 2003, counsel unsuccessfully attempted to force a plea agreement by announcing in open court (Case No. CR 03-39) that Hessler would plead guilty to felony murder and sexual assault. Hessler's attempt to plea was rejected by the Court. That issue was litigated and was the subject of an interlocutory appeal.

Hessler had advised Pickens early on that he did not want a trial in the J.B. sexual assault case (Exhibit 18; 43:10; 83:19 – 84:16). That was confirmed by Dr. Scharf. Hessler had told Dr. Scharf he was going to plead to the sexual assault case and would be going to the penitentiary (Exhibit 17; 45:15 – 46:10). They discussed how to cope with living in prison.

On June 22, 2002, the United States Supreme Court released its opinion in Ring v. Arizona, 536 U.S. 584 (2002) which significantly impacted capital trials in Nebraska. Ring held that a defendant had the right to have a jury, rather than a judge, decide the existence of an aggravating factor that made the defendant eligible for the death penalty. That ruling was contrary to Nebraska's statute and prior Nebraska case law. Nebraska eventually amended its capital punishment statutes during a special legislative session during the fall of 2002.

Defense counsel had concluded they had no viable defense to the J.B. sexual assault case. Pickens devised a strategy to hopefully preclude use of the sexual assault of J.B. as an aggravating circumstance in the homicide case. Pickens wanted Hessler to receive a final conviction and sentence in the sexual assault case prior to trial in the homicide case. He then intended to later present a double jeopardy / plea in bar argument against its use as an aggravating circumstance in the homicide trial. (Exhibit 18; 29:13 – 32:24).

According to counsel, there was never an intent to go to trial on the sexual assault case. The whole point of jury selection was to see if a jury could be selected in Scotts Bluff County, NE to be later used in efforts to change venue in the homicide case (Exhibit 18; 35:14 – 22; 38:13 –

19). On May 18, 2003, the strategy was explained to Hessler and he concurred (Exhibit 18; 39:10 – 23). Hessler had also been advised that counsel's theory was untested. Hessler advised counsel he wanted to plead guilty at the conclusion of the jury selection (Exhibit 18; 44:5).

Counsel's strategy eventually proved to be unsuccessful. The sexual assault against J.B. was deemed admissible in the homicide case as an aggravating circumstance State v. Hessler, 274 Neb. 478 (2007). However, when pursued counsel was aware of the following circumstances:

(1) The Ring v. Arizona decision was less than one year old.

(2) In the fall of 2002 the Nebraska death penalty statutes had been materially amended.

(3) The State was unwilling to plea bargain away the death penalty.

(4) Hessler had confessed to the sexual assault. Efforts to suppress his confession had been unsuccessful.

(5) DNA results confirmed Hessler had sexually assaulted J.B.

(6) Hessler did not want a trial in the sexual assault case.

(7) Counsel concluded a conviction in the sexual assault case "was [a] slam dunk." (Exhibit 18; 68:4).

(8) Counsel were convinced Hessler would be found guilty of first degree murder in the homicide case.

(9) Counsel were never concerned about a sentence in the sexual assault case because Hessler would never live outside prison in the homicide case.

(10) The ultimate goal was to avoid the death penalty in the homicide case and keep Hessler alive.

When formulating trial strategy, there is a strong presumption that counsel acted reasonably. State v. Ruegge, 21 Neb. App. 249 (2013). Confronted with overwhelming evidence of guilt, Hessler's trial counsel were not ineffective by attempting novel legal defenses. Trial counsel's efforts were, also, consistent with Hessler's expressed desire to admit to the sexual assault case.

Hessler provided no evidence that he ever requested counsel appeal his conviction and sentence in this case. He has shown no prejudice by the failure to file a direct appeal.

III. VERBATIM RECORD

On July 14, 2003, the sexual assault case came on for jury selection and trial. Voir dire of the jury panel continued through part of that day. Later that same day Hessler entered a plea of no contest to the underlying charge. The Court accepted the plea and scheduled sentencing for August 21, 2003 (Journal Entries dated July 19, 2003). Apparently a verbatim record of the July 14, 2003, proceeding is unavailable (It is the Court's understanding that the substitute court reporter for that date is now incompetent).

As it applies to the facts of this case the lack of a verbatim record does not prejudice Hessler. Counsels' strategy was always to enter a plea of no contest with no appeal. The strategy was to obtain a final conviction in the sexual assault case prior to the homicide trial. Therefore, any lack of a verbatim record more closely is related to Hessler's claim that trial

counsel were ineffective for pursuing a faulty, novel strategy.

In State v. Decker, 272 Neb. 410 (2006) a verbatim record was unavailable for defendant's motion for post-conviction relief. Citing Norvell v. Illinois, 373 U.S. 420 (1963), the Nebraska Supreme Court held (at 414-15):

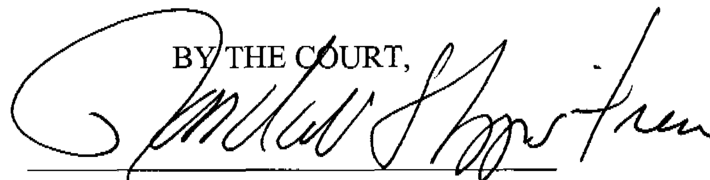
> Notably, the instant case involves a postconviction proceeding, not a direct appeal. Moreover, in Nebraska the controlling rule is that in appellate proceedings, unless there is proof to the contrary, the journal entry in a duly authenticated record of the trial court imports absolute verity. Alder v. First Nat. Bank & Trust Co., 241 Neb. 873, 491 N.W.2d 686 (1992). The judge's entries on the docket sheet in the record before us provide an adequate basis for our review of Deckard's postconviction claims. We conclude that the lack of verbatim record of the proceedings does not violate Deckard's right to due process.

IV. CONCLUSION

Having considered the evidence and submissions of counsel and for all the above reasons the Court finds that Hessler's Verified Motion For Postconviction Relief AND Petition For Writ of Error Coram Nobis should be overruled.

DATED Sept 25, 2015

BY THE COURT,



District Judge

cc: Douglas L. Warner
Alan G. Stoler

CERTIFICATE OF SERVICE

I, the undersigned, certify that on September 25, 2015, I served a copy of the foregoing document upon the following persons at the addresses given, by mailing by United States Mail, postage prepaid, or via E-mail:

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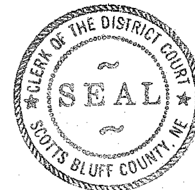

Date: September 25, 2015 BY THE COURT: Ann Rosenberry
CLERK

IN THE DISTRICT COURT FOR SCOTTS BLUFF COUNTY, NEBRASKA

THE STATE OF NEBRASKA, **Plaintiff,** **vs.** **JEFFREY HESSLER,** **Defendant.**	**CASE NO. CR 03-40** **MEMORANDUM ORDER**

Defendant Jeffrey A. Hessler has filed a Verified Motion For Post Conviction Relief And Petition For Writ Of Error Coram Nobis. At issue is whether Hessler is entitled to an evidentiary hearing on his motion.

PROCEDURAL HISTORY

On February 26, 2003, an Information was filed in the District Court charging Hessler with first degree sexual assault of a child, a Class II felony. On July 14, 2003, the matter came on for trial. Hessler appeared with counsels James R. Mowbray and Jeffery A. Pickens. A recess was taken during jury selection, at which time Hessler entered a plea of no contest to the underlying charge. The Court accepted Hessler's plea, and he was adjudged guilty. On August 21, 2003, Hessler was sentenced to 30 to 42 years imprisonment with credit for 190 days served prior to sentencing. There was no direct appeal. Hessler remains incarcerated with the Nebraska Department of Correctional Services serving this sentence.

PROCEDURAL BACKGROUND

A.

(Post Conviction)

Post conviction proceedings are treated as civil in nature. A defendant requesting post

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FILED May 31, 2013
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conviction relief must establish the basis for such relief. The defendant must allege facts which, if proved, constitute a denial or violation of his or her rights under the United States or Nebraska Constitution, causing the judgment against him or her to be void or voidable. An evidentiary hearing is required when the factual allegations, if proved, constitute an infringement of the movant's constitutional rights. An evidentiary hearing on a motion for post conviction relief may be denied when the record and files affirmatively show that the defendant is entitled to no relief. Moreover, a court is not required to grant an evidentiary hearing on a motion for post conviction relief which alleges only conclusions of law or fact; nor is an evidentiary hearing required when (1) the motion does not contain sufficient factual allegations concerning a denial or violation of constitutional rights affecting the judgment against the defendant, or (2) notwithstanding a proper pleading of facts, the files and records in the defendant's case do not show a denial or violation of constitutional rights affecting the judgment against the defendant. State v. Williams, 253 Neb. 111 (1997); State v. Schoonmaker, 249 Neb. 330 (1996); State v. Glover, 276 Neb. 662 (2008).

A motion for post conviction relief cannot be used to secure review of issues that were known to the defendant and could have been litigated on direct review, no matter how those issues may be phrased or rephrased. State v. Ryan, 248 Neb. 405 (1995).

B.

(Writ of Error Coram Nobis)

A writ of error coram nobis is used to correct a judgment in the same court in which it was rendered based on an error of fact, rather, than an error of law. In State v. Diaz, 283 Neb. 414 (2012) the Nebraska Supreme Court addressed the relief available under a writ of error coram nobis, at length, as follows (Id. at 419-22 (citations omitted)):

> The common-law writ of error coram nobis exists in this state under Neb. Rev. Stat. § 49-101 (Reissue 2010), which adopts English common law to the extent that it is

not inconsistent with the Constitution of the United States, the organic law of this state, or any law passed by our Legislature. The purpose of the writ of error coram nobis is to bring before the court rendering judgment matters of fact which, if known at the time the judgment was rendered, would have prevented its rendition. It enables the court to recall some adjudication that was made while some fact existed which would have prevented rendition of the judgment but which, through no fault of the party, was not presented. The burden of proof in a proceeding to obtain a writ of error coram nobis is upon the applicant claiming the error, and the alleged error of fact must be such as would have prevented a conviction. It is not enough to show that it might have caused a different result.

We have stated that a writ of error coram nobis reaches only matters of fact unknown to the applicant at the time of judgment, not discoverable through reasonable diligence, and which are of a nature that, if known by the court, would have prevented entry of judgment. The writ of error coram nobis is not available to correct errors of law. Regarding errors of law in the coram nobis context, we have concluded that where a criminal defendant alleged he was denied the right to be present at a suppression hearing, the "allegations present[ed] no fact or facts unknown to the defendant and his counsel and not reasonably discoverable by the defendant, and the existence of which would have prevented the judgment," and that, instead, the allegations "present[ed] at most a question of error of law, which is not reachable by writ of error coram nobis." Although the instant case does not concern a motion alleging legal error by a trial court, for completeness, we note that we have also concluded that a writ of error coram nobis is not the appropriate remedy for an alleged failure of the trial court to properly inform a defendant of his or her constitutional rights, because such error would clearly be an error of law.

Diaz seeks coram nobis relief based on his assertion that his counsel provided

ineffective assistance when counsel failed to advise him of potential deportation consequences. We have stated that a claim that defense counsel provided ineffective assistance presents a mixed question of law and fact and that, in particular, determinations regarding whether counsel was deficient and whether the defendant was prejudiced are questions of law. Granting relief to Diaz would run contrary to State v. Schnatz, 194 Neb. 516, 518, 233 N.W.2d 778, 780 (1975), in which the defendant sought to vacate his original county court judgment "because his attorney did not fully explain his legal rights"; we stated that the issue was a question of law that "is not cognizable under a writ of error coram nobis." Similar to the appellant in Schnatz, Diaz seeks relief from an error of law, not an error of fact, and his claim is not cognizable under a writ of error coram nobis.

Courts in other states agree that claims of ineffective assistance of counsel are not appropriate for coram nobis relief. The California Supreme Court observed: "That a claim of ineffective assistance of counsel, which relates more to a mistake of law than of fact, is an inappropriate ground for relief on *coram nobis* has long been the rule." Because Diaz' challenge to his plea-based conviction involves a question of law and not solely an error of fact, relief was not available in a motion for a writ of error coram nobis.

The California Supreme Court, in a case where the defendant sought coram nobis relief from a plea-based conviction, observed:

> To qualify as the basis for relief on *coram nobis*, newly discovered facts must establish a basic flaw that would have prevented rendition of the judgment. . . . New facts that would merely have affected the willingness of a litigant to enter a plea, or would have encouraged or convinced him or her to make different strategic choices or seek a different disposition, are not facts that would have

prevented rendition of the judgment.

We agree . . .

If Diaz had been aware of the possible deportation consequences of his plea, it might have caused him to make different strategic choices, but it would not have prevented the court from rendering judgment. Diaz did not claim that judgment could not be entered due to an overriding legal impediment or flaw that would have prevented the court from rendering judgment. Diaz' motion for a writ of error coram nobis was not an appropriate method to resolve the issue he raises.

ANALYSIS

Hessler's pending pleading, reassigned and restated, can generally be summarized as follows:

I. Hessler was not competent to plead "no contest" to first degree sexual assault of a child. At the time of the plea he was suffering from bipolar disorder, severe, with psychotic features.

II. Trail counsel were ineffective as follows:

(a). Failing to investigate, raise, and prove Hessler was incompetent to plead "no contest."

(b). Advising Hessler to plead "no contest."

(c). Advising Hessler that a plea of "no contest" would benefit him on more serious charges pending in a separate case. Specifically, a plea of "no contest" would provide Hessler with a double-jeopardy defense in the other case.

(d). Failing to investigate, discover, and present mitigating evidence at the

sentencing hearing.

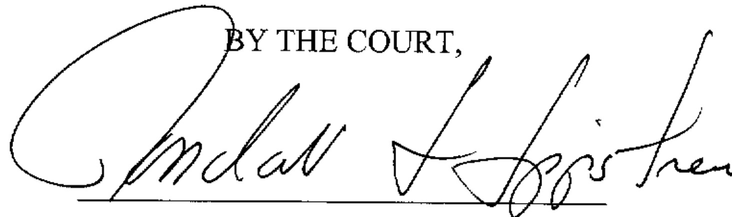
(e). Failing to advise Hessler to file a direct appeal; and/or advising Hessler he had a right to appeal and a right to counsel to pursue his appeal.

CONCLUSION

Having reviewed the pending motion the Court concludes Hessler is entitled to an evidentiary hearing on the issues set forth in the Analysis section of this order.

DATED May 31, 2013.

BY THE COURT,



District Judge

cc: Douglas L. Warner
Alan G. Stoler

288 Neb. 670
Supreme Court of Nebraska.

STATE of Nebraska, appellee,
v.
Jeffrey A. HESSLER, appellant.

No. S–13–850
|
Filed July 25, 2014

Synopsis
Background: After convictions and sentences for capital murder and related offenses were affirmed on direct appeal, 274 Neb. 478, 741 N.W.2d 406, and denial of first motion for postconviction relief was affirmed, 282 Neb. 935, 807 N.W.2d 504, defendant filed second motion for postconviction and for writ of error coram nobis. The District Court, Scotts Bluff County, Randall L. Lippstreu, J., denied postconviction motion as procedurally barred, and denied motion for writ of error coram nobis. Defendant appealed.

Holdings: The Supreme Court, Cassel, J., held that:

[1] defendant's claims that, due to mental illness, he was mentally incompetent to waive his rights to stand trial, to remain silent, to counsel, and right to be present at trial were procedurally barred;

[2] defendant was procedurally barred from obtaining successive postconviction review of claim that he was deprived of right to impartial jury due to pretrial publicity;

[3] defendant was procedurally barred from obtaining successive postconviction review of claim of improper comments made by trial judge and prosecution, juror misconduct, prosecutorial misconduct, improperly admitted evidence, and cumulative error;

[4] defendant was procedurally barred from obtaining successive postconviction review of claims of ineffective assistance of trial and direct appeal counsel;

[5] defendant did not have Sixth Amendment right to effective assistance of postconviction counsel; and

[6] writ of error coram nobis would not issue to permit successive postconviction review of procedurally barred claims.

Affirmed.

West Headnotes (24)

[1] **Criminal Law** Post-conviction relief
Criminal Law Burden of proof

A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous.

1 Cases that cite this headnote

[2] **Criminal Law** Necessity for Hearing

An evidentiary hearing on a motion for postconviction relief must be granted when the motion contains factual allegations which, if proved, constitute an infringement of the movant's rights under the Nebraska or federal Constitution.

3 Cases that cite this headnote

[3] **Criminal Law** Necessity for Hearing

If a motion for postconviction relief alleges only conclusions of fact or law, or the records and files in the case affirmatively show that the movant is entitled to no relief, no evidentiary hearing is required.

3 Cases that cite this headnote

[4] **Criminal Law** Questions of law or fact

Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law.

1 Cases that cite this headnote

[5] **Criminal Law** Scope of Inquiry

When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.

[6] **Criminal Law** Necessity

The Supreme Court would review merits of death-sentenced defendant's claims that trial court's "mental anguish" jury instruction was unconstitutional and that defendant was incompetent to stand trial for capital murder and related offenses, even though he failed to assign them as error, where it was clear he intended to do so, but instead mistakenly duplicated two other assignments of error, and in view of seriousness of death sentence.

[7] **Criminal Law** Necessity

An appellate court does not consider errors which are argued but not assigned.

[8] **Criminal Law** Excuses for Failure to Raise Issue in Previous Post-Conviction Proceeding

A defendant is entitled to bring a second proceeding for postconviction relief only if the grounds relied upon did not exist at the time the first motion was filed.

2 Cases that cite this headnote

[9] **Criminal Law** Matters which either were or could have been adjudicated previously, in general

The need for finality in the criminal process requires that a defendant bring all claims for relief at the first opportunity.

1 Cases that cite this headnote

[10] **Criminal Law** Counsel

Criminal Law Newly discovered evidence

There are two circumstances which provide a new ground for postconviction relief constituting an exception to the procedural bar in successive postconviction proceedings: first, if a defendant brings a motion for postconviction relief based on ineffective assistance of trial or direct appeal counsel which could not have been raised earlier, and second, if a defendant brings a successive motion for postconviction relief based on newly discovered evidence that was not available at the time the prior motion was filed, as the evidence did not exist at the time of the prior proceeding because it was not available to the defendant. U.S. Const. Amend. 6.

5 Cases that cite this headnote

[11] **Criminal Law** Particular issues and cases

Defendant's claims that, due to mental illness, he was mentally incompetent to waive his rights to stand trial, to remain silent, to counsel, and right to be present at trial for capital murder and related offenses were procedurally barred on second motion for postconviction relief, where defendant challenged his competency to waive right to counsel at sentencing on direct appeal, and claims relating to his competency to waive other rights to remain silent, to stand trial, and to be present could have been asserted on direct appeal. U.S. Const. Amends. 5, 6.

[12] **Criminal Law** Post-conviction proceeding not a substitute for appeal

A motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal.

3 Cases that cite this headnote

[13] **Criminal Law** Particular issues and cases

Defendant was procedurally barred from obtaining successive postconviction review of claim that he was deprived of right to impartial jury, due to pretrial publicity, in trial for capital murder and related offenses, where claim was raised and rejected on direct appeal. U.S. Const. Amend. 6.

[14] **Criminal Law** Particular issues and cases

Defendant was procedurally barred from obtaining successive postconviction review of claim of alleged improper comments made by trial judge and prosecution that diminished jury's role in sentencing for capital murder and related offenses, alleged juror misconduct, alleged prosecutorial misconduct, alleged improperly admitted evidence, and cumulative error, where claims were known to defendant at time of direct appeal, and therefore, should have been raised then.

[15] **Criminal Law** Particular issues and cases

Defendant was procedurally barred from obtaining successive postconviction review of claims of ineffective assistance of trial and direct appeal counsel, based on trial counsel's alleged failure to take various actions regarding competency, juror bias and misconduct, venue, cross-examination of witnesses, jury instructions, evidence, and

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prosecutorial misconduct, and appellate counsel's alleged failure to adequately raise and argue all meritorious issues, where claims were raised and rejected in prior motion for postconviction relief. U.S. Const. Amend. 6.

1 Cases that cite this headnote

[16] **Criminal Law** Right to counsel

Defendant did not have Sixth Amendment right to effective assistance of postconviction counsel. U.S. Const. Amend. 6.

2 Cases that cite this headnote

[17] **Criminal Law** Other proceedings following conviction

Postconviction relief cannot be obtained on the basis of ineffective assistance of postconviction counsel.

3 Cases that cite this headnote

[18] **Criminal Law** Other proceedings following conviction

Criminal Law Right to counsel

There is no constitutional guarantee of effective assistance of counsel in a postconviction action and therefore no claim for ineffective assistance of postconviction counsel. U.S. Const. Amend. 6.

5 Cases that cite this headnote

[19] **Criminal Law** Right to counsel

Habeas Corpus Ineffectiveness or want of counsel

Habeas Corpus State court decision on procedural grounds, and adequacy of such independent state grounds

United States Supreme Court's holding in *Martinez v. Ryan*, 132 S.Ct. 1309, that a state procedural default does not bar a federal habeas court from hearing a substantial claim of ineffective assistance of counsel at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective, did not recognize a constitutional right to effective assistance of postconviction counsel; rather, based upon principles of equity, it expanded only the types of cause permitting a federal habeas court to excuse a procedural default in a federal habeas proceeding, and nothing in *Martinez* prevented state courts from enforcing procedural defaults in accordance with state law. U.S. Const. Amend. 6.

3 Cases that cite this headnote

[20] **Criminal Law** Error Coram Nobis

The common-law writ of error coram nobis exists in Nebraska under a statute which adopts English common law to the extent that it is not inconsistent with the Constitution of the United States, the organic law of Nebraska, or any law passed by the Legislature. Neb. Rev. Stat. § 49-101.

3 Cases that cite this headnote

[21] **Criminal Law** Error Coram Nobis

The purpose of the writ of error coram nobis is to bring before the court rendering judgment matters of fact which, if known at the time the judgment was rendered, would have prevented its rendition. Neb. Rev. Stat. § 49-101.

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2 Cases that cite this headnote

[22] **Criminal Law** Error Coram Nobis

A writ of error coram nobis enables the court to recall some adjudication that was made while some fact existed which would have prevented rendition of the judgment but which, through no fault of the party, was not presented. Neb. Rev. Stat. § 49-101.

2 Cases that cite this headnote

[23] **Criminal Law** Error Coram Nobis

Criminal Law Burden of proof

The burden of proof in a proceeding to obtain a writ of error coram nobis is upon the applicant claiming the error, and the alleged error of fact must be such as would have prevented a conviction; it is not enough to show that it might have caused a different result. Neb. Rev. Stat. § 49-101.

4 Cases that cite this headnote

[24] **Criminal Law** Particular issues and cases

Writ of error coram nobis would not issue to permit successive postconviction review of defendant's claims challenging his mental competency to waive constitutional rights to stand trial, to counsel, to be present at trial and to remain silent, alleged trial errors, and alleged ineffective assistance of counsel, which were otherwise procedurally barred, where he did not allege facts not presented in prior proceedings which would have prevented his convictions. U.S. Const. Amends. 5, 6; Neb. Rev. Stat. § 49-101.

1 Cases that cite this headnote

Syllabus by the Court

***670** 1. **Postconviction: Proof: Appeal and Error.** A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous.

2. **Postconviction: Constitutional Law: Proof.** An evidentiary hearing on a motion for postconviction relief must be granted when the motion contains factual allegations which, if proved, constitute an infringement of the movant's rights under the Nebraska or federal Constitution. However, if the motion alleges only conclusions of fact or law, or the records and files in the case affirmatively show that the movant is entitled to no relief, no evidentiary hearing is required.

3. **Postconviction: Judgments: Appeal and Error.** Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law. When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.

4. **Appeal and Error.** An appellate court does not consider errors which are argued but not assigned.

***671** 5. **Postconviction.** A defendant is entitled to bring a second proceeding for post-conviction relief only if the grounds relied upon did not exist at the time the first motion was filed.

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6. **Postconviction.** The need for finality in the criminal process requires that a defendant bring all claims for relief at the first opportunity.

7. **Postconviction: Effectiveness of Counsel: Appeal and Error.** If a defendant brings a motion for postconviction relief based on ineffective assistance of trial or direct appeal counsel which could not have been raised earlier, this is a basis for relief that did not exist at the time of the prior proceeding.

8. **Postconviction: Appeal and Error.** If a defendant brings a successive motion for postconviction relief based on newly discovered evidence that was not available at the time the prior motion was filed, this is a basis for relief that did not exist at the time of the prior proceeding because it was not available to the defendant.

9. **Postconviction: Appeal and Error.** A motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal.

10. **Postconviction: Effectiveness of Counsel.** Postconviction relief cannot be obtained on the basis of ineffective assistance of postconviction counsel.

11. **Postconviction: Constitutional Law: Effectiveness of Counsel.** There is no constitutional guarantee of effective assistance of counsel in a postconviction action and therefore no claim for ineffective assistance of postconviction counsel.

12. **Postconviction: Constitutional Law: Effectiveness of Counsel: Habeas Corpus: States.** *Martinez v. Ryan,* ––– U.S. –––, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012), did not recognize a constitutional right to effective assistance of postconviction counsel. Based upon principles of equity, it expanded only the types of cause permitting a federal habeas court to excuse a procedural default in a federal habeas proceeding. Nothing in *Martinez* prevents state courts from enforcing procedural defaults in accordance with state law.

13. **Judgments: Constitutional Law: Legislature: Appeal and Error.** ****781** The common-law writ of error coram nobis exists in this state under Neb.Rev.Stat. § 49–101 (Reissue 2010), which adopts English common law to the extent that it is not inconsistent with the Constitution of the United States, the organic law of this state, or any law passed by our Legislature.

14. **Judgments: Evidence: Appeal and Error.** The purpose of the writ of error coram nobis is to bring before the court rendering judgment matters of fact which, if known at the time the judgment was rendered, would have prevented its rendition. It enables the court to recall some adjudication that was made while some fact existed which would have prevented rendition of the judgment but which, through no fault of the party, was not presented.

15. **Convictions: Proof: Appeal and Error.** The burden of proof in a proceeding to obtain a writ of error coram nobis is upon the applicant claiming the error, and the alleged error of fact must be such as would have prevented a conviction. It is not enough to show that it might have caused a different result.

16. **Judgments: Appeal and Error.** The writ of error coram nobis is not available to correct errors of law.

****780** Appeal from the District Court for Scotts Bluff County: Randall L. Lippstreu, Judge. Affirmed.

Attorneys and Law Firms

Alan G. Stoler and Jerry M. Hug, of Alan G. Stoler, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, James D. Smith, and, on brief, J. Kirk Brown for appellee.

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Wright, Connolly, Stephan, McCormack, Miller–Lerman, and Cassel, JJ., and Inbody, Chief Judge.

Cassel, J.

***672** I. INTRODUCTION

Jeffrey A. Hessler appeals the order of the district court denying his second action for postconviction relief and a writ of error coram nobis. All of his claims—relating to mental competency, errors or misconduct at trial, and ineffective assistance of counsel—were or could have been litigated on direct appeal or in his first postconviction action. Thus, they were procedurally barred. And his reference to two recent decisions of the U.S. Supreme Court provides no basis to deviate from our procedural rules. Finally, he failed to raise any basis warranting coram nobis relief. We affirm.

II. BACKGROUND

Hessler was convicted of first degree murder, kidnapping, first degree sexual assault on a child, and use of firearm to commit a felony for the sexual assault and killing of 15–year–old Heather Guerrero. He was sentenced to death on the murder conviction and various terms of imprisonment on the other convictions. The circumstances which led to Hessler's convictions and sentences may be found in *State v. Hessler*.[1]

We affirmed Hessler's convictions and sentences on direct appeal.[2] We summarized the assignments of error raised in his appellate brief, in pertinent part, as follows:

> ***673** [T]he district court erred in ... (3) failing to excuse for cause potential jurors who had formed opinions regarding ****782** Hessler's guilt; (4) overruling his motion to change venue; [and] (7) granting his request to waive counsel and appear pro se at sentencing and failing to make a determination regarding his competency to waive counsel.[3]

After we affirmed his convictions and sentences, Hessler filed his first action for postconviction relief. In his first postconviction motion, Hessler asserted claims related to ineffective assistance of trial and appellate counsel, errors at trial, and prosecutorial misconduct. He claimed that his trial counsel was ineffective for failing to take various actions regarding his mental competency, juror bias, and venue. And he alleged that his appellate counsel was ineffective for failing to raise and argue those issues. Finally, he asserted that the trial court erred by failing to order a competency evaluation and that the State committed prosecutorial misconduct by failing to suggest such an evaluation.

The district court ordered an evidentiary hearing on the sole issue of whether Hessler's trial counsel was ineffective for failing to raise the issue of competency after Hessler's convictions but prior to the determination of any mitigating factors and sentencing. Before the mitigation portion of the sentencing phase began, Hessler moved the court to proceed pro se. He had been represented by counsel up until that point. The court ultimately rejected Hessler's ineffective assistance claim, finding that the record affirmatively showed that he was competent. It therefore denied postconviction relief. We affirmed the denial of postconviction relief on appeal.[4]

Hessler then filed the present, second motion for postconviction relief. As noted above, the claims asserted in the present motion related to mental competency, errors or misconduct at trial, and ineffective assistance of counsel. The district court summarized Hessler's 17 claims as follows:

> ***674** 1. Custodial statement made on February 11, 2003, and February 12, 2003[,] violated Hessler's constitutional rights. A mental disease prevented Hessler from knowingly and intelligently waiving his constitutional right to remain silent.

2. Hessler was denied a fair and impartial jury due to pretrial publicity and the trial court's denial of his motion to change venue.

3. Hessler's waiver of counsel violated his constitutional rights. Mental illness rendered Hessler incompetent to waive counsel.

4. Hessler's waiver of his right to be present in court was invalid. Hessler's mental illness rendered him incompetent to waive his presence during court proceedings.

5. Comments by the Court and prosecutor violated Hessler's right to a fair trial.

6. Trial counsel was ineffective during the guilt—innocence stage of Hessler's trial including, but not limited to, not aggressively pursuing suppression of Hessler's statements, not effectively pursuing a change of venue, not adequately investigating Hessler's competency, etc.

7. Trial counsel failed to adequately investigate and litigate Hessler's lack of mental capacity to waive his Fourth Amendment rights.

8. The trial court's "mental anguish" jury instruction was unconstitutional. ****783** Trial and appellate counsel were ineffective by not pursuing that issue.

9. Trial counsel was ineffective for failing to object to the State's use of testimonial hearsay evidence, specifically DNA reports and lab analysis.

10. Hessler was incompetent to stand trial due to debilitating mental disease or defect.

11. Trial counsel was ineffective because Hessler was innocent due to an incapacity to act with deliberate and premeditated malice.

12. Trial counsel was generally ineffective at the aggravation hearing.

***675** 13. Hessler was denied a fair trial due to juror bias and misconduct.

14. Appellate counsel and post conviction counsel were generally ineffective.

15. The prosecutor generally committed prosecutorial misconduct at all stages of the proceedings.

16. Witness [Mark] Bohaty was allowed to present "pseudo-scientific" evidence regarding firearms.

17. Cumulative error.

The district court found that Hessler's second postconviction motion failed to raise any ground for relief not previously available to him. It noted that the issues of mental competency and ineffective assistance of trial and appellate counsel were litigated on direct appeal or in his first postconviction action. And his various assertions of errors or misconduct at trial were previously litigated or were known and could have been raised in the prior proceedings. Finally, it observed that no constitutional basis existed for his claim of ineffective assistance of postconviction counsel. It therefore denied postconviction and coram nobis relief and dismissed the motion. Hessler timely appeals.

III. ASSIGNMENTS OF ERROR

We consolidate and restate Hessler's numerous assignments of error. Hessler assigns that the district court erred in failing to grant an evidentiary hearing on each of his 17 claims.

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IV. STANDARD OF REVIEW

[1] **[2]** **[3]** A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous.[5] An evidentiary hearing on a motion for postconviction relief must be granted when the motion contains factual allegations which, if proved, constitute an infringement of the movant's rights under the Nebraska or federal Constitution.[6] However, if the motion alleges only conclusions of fact or ***676** law, or the records and files in the case affirmatively show that the movant is entitled to no relief, no evidentiary hearing is required.[7]

[4] **[5]** Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law.[8] When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.[9]

V. ANALYSIS

[6] **[7]** We first dispose of a preliminary issue. Hessler assigned as error the district court's denial of an evidentiary hearing ****784** on the claims raised in his second motion for postconviction relief. In his brief, he assigned 17 errors and argued the merits of each of his 17 claims. But he omitted claims 8 and 10 from his assignments of error by duplicating other claims. We recognize our precedent that an appellate court does not consider errors which are argued but not assigned.[10] But we do not treat claims 8 and 10 as being waived. The sentences imposed in this case are grave, and the duplications of the other claims make it clear that he intended to assign error to the district court's disposition of each of his claims but committed a typographical error.

1. Denial of Postconviction Relief

[8] **[9]** This is Hessler's second motion for postconviction relief. A defendant is entitled to bring a second proceeding for postconviction relief only if the grounds relied upon did not exist at the time the first motion was filed.[11] The need for finality in the criminal process requires that a defendant bring all claims for relief at the first opportunity.[12]

[10] We have recognized two circumstances which provide a new ground for relief constituting an exception to ***677** the procedural bar in postconviction proceedings. First, if a defendant brings a motion for postconviction relief based on ineffective assistance of trial or direct appeal counsel which could not have been raised earlier, this is a basis for relief that did not exist at the time of the prior proceeding.[13] Second, if a defendant brings a successive motion for postconviction relief based on newly discovered evidence that was not available at the time the prior motion was filed, this is a basis for relief that did not exist at the time of the prior proceeding because it was not available to the defendant.[14]

None of the 17 claims asserted by Hessler raised a new ground for relief constituting an exception to the procedural bar. Thus, the district court correctly denied Hessler's motion. For the sake of brevity, we organize our analysis in accordance with the common themes shared among the 17 claims: mental competency, errors or misconduct at trial, and ineffective assistance of counsel.

(a) Mental Competency

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[11] Claims 1, 3, 4, and 10 pertain to Hessler's mental competency during the proceedings against him. Hessler asserted that due to mental illness, he was incompetent to stand trial and unable to waive his right to remain silent, his right to counsel, and his right to be present.

[12] But Hessler challenged his competency to waive the right to counsel on direct appeal.[15] He alleged that the trial court erred in granting his request to waive counsel and appear pro se at sentencing and in failing to make a determination regarding his competency to do so.[16] We rejected this claim because the trial court had no reason to doubt Hessler's competency to waive counsel.[17] Having already litigated this claim, Hessler was procedurally barred from raising it in the ****785** present motion. A motion for postconviction relief cannot be ***678** used to secure review of issues which were or could have been litigated on direct appeal.[18]

Hessler's three remaining claims regarding his mental competency were similarly barred. These claims were known and could have been litigated on direct appeal. Consequently, we find no error in the district court's denial of an evidentiary hearing on claims 1, 3, 4, and 10.

(b) Errors or Misconduct at Trial

Claims 2, 5, 13, 15, 16, and 17 relate to errors or misconduct at trial. Briefly, Hessler asserted that his convictions and sentences must be overturned because of a biased jury, comments made by the trial judge and prosecution that diminished the jury's role in sentencing, juror misconduct, prosecutorial misconduct, improperly admitted evidence, and cumulative error.

[13] Hessler asserted that his jury was biased on direct appeal.[19] He alleged that the trial court erred in failing to excuse potential jurors who had formed opinions of his guilt and in overruling his motion to change venue because he could not receive a fair trial in Scotts Bluff County, Nebraska.[20] As this claim was previously asserted and rejected, Hessler was barred from asserting it again.

[14] Hessler's remaining claims of errors or misconduct at trial were similarly barred. These claims were known to Hessler and could have been raised on direct appeal. But he did not do so. We therefore find no error in the district court's denial of an evidentiary hearing on claims 2, 5, 13, 15, 16, and 17.

(c) Ineffective Assistance of Counsel

Claims 6 through 9, 11, 12, and 14 pertain to ineffective assistance of counsel. Hessler asserted that his trial counsel was ineffective for failing to take various actions regarding competency, juror bias and misconduct, venue, cross-examination of witnesses, jury instructions, evidence, and prosecutorial ***679** misconduct. He further alleged that his counsel on direct appeal and in his first postconviction action were ineffective for failing to raise and argue all meritorious issues.

[15] As noted above, a new basis for relief may exist if a defend ant brings a motion for postconviction relief based on ineffective assistance of trial or direct appeal counsel which could not have been raised earlier.[21] But Hessler was able to assert ineffective assistance of trial and appellate counsel in his first postconviction action and did so.[22] He was not entitled to do so again. Consequently, his present claims of ineffective assistance of trial and appellate counsel were procedurally barred.

[16] **[17]** **[18]** But Hessler also claimed that he received ineffective assistance of counsel in his first postconviction action. He argued that the ineffectiveness of his first postconviction counsel constituted a new basis for relief and rendered any claims not raised in the prior proceedings unavailable to him until the present action. This argument has no merit. Postconviction

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relief cannot be obtained on the basis of ineffective assistance of postconviction counsel.[23] There is no constitutional guarantee **786 of effective assistance of counsel in a postconviction action and therefore no claim for ineffective assistance of postconviction counsel.[24]

In his brief, Hessler cites *Martinez v. Ryan*[25] as a basis for deviating from our procedural rules and granting an evidentiary hearing on his 17 claims. In *Martinez,* the U.S. Supreme Court held that a state procedural default does not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective. This holding was initially limited ***680** to state procedural systems in which ineffective assistance of trial counsel claims were required to be litigated in the initial-review collateral proceeding.[26] But the Court later expanded its holding to include state systems in which ineffective assistance of trial counsel claims were highly unlikely to be given a meaningful opportunity for review on direct appeal.[27] We assume, without deciding, that Nebraska's postconviction review procedures fall within the purview of the Court's expanded holding.

[19] *Martinez* did not recognize a constitutional right to effective assistance of postconviction counsel. Based upon principles of equity, it expanded only the types of cause permitting a federal habeas court to excuse a procedural default in a federal habeas proceeding.[28] Nothing in *Martinez* prevents state courts from enforcing procedural defaults in accordance with state law.

Other state courts have reached similar conclusions regarding the effect of *Martinez*.[29] The Supreme Court of Pennsylvania made several observations worthy of note.[30] First, it described the *Martinez* holding as creating a "federal safety valve to allow for a third level of review—exclusively federal—if the subject claim involved a trial default, and initial collateral ***681** review counsel did not recognize it."[31] Second, it recognized that the new federal habeas consequence jeopardizes both a state procedural default rule and the state's power and right to pass upon constitutional claims in the first instance. Third, it acknowledged that federal courts sitting in habeas corpus review of final Pennsylvania convictions may review claims of trial counsel ineffectiveness not raised by postconviction counsel on the merits, in the first instance, as an " 'equitable' " matter.[32]

****787** However, the Pennsylvania court declined to modify its framework for collateral review of criminal convictions. It recognized that the question of "whether to take measures to otherwise account for the concerns of *Martinez* " is one of policy.[33] It elected to await either the action of its state legislature or a case where the issue was properly joined.

Similarly, we conclude that such matters of policy should be addressed in the first instance to the Legislature. Our Legislature has enacted postconviction relief limited to a single proceeding. Neb.Rev.Stat. § 29–3001 (Cum.Supp.2012) permits a prisoner to file a verified motion asking the sentencing court to vacate or set aside the sentence and stating the grounds entitling him or her to relief. It expressly authorizes a court to reject a second or successive motion for similar relief.[34] Whether Nebraska should provide a second round of collateral review as of right to capture claims of ineffective assistance of trial counsel which have been defaulted in the initial postconviction proceeding is a matter for the Legislature. It should make that decision in light of the consequences that follow from *Martinez* as accurately summarized by the Pennsylvania court. But until that time, this court continues to enforce our procedural rules in accordance with our well-settled postconviction jurisprudence. Accordingly, we reject Hessler's argument regarding *Martinez* and affirm the district ***682** court's denial of an evidentiary hearing on claims 6 through 9, 11, 12, and 14.

2. Denial Of Coram Nobis Relief

[20] **[21]** **[22]** **[23]** Hessler also sought relief under the common-law writ of error coram nobis. The common-law writ of error coram nobis exists in this state under Neb.Rev.Stat. § 49–101 (Reissue 2010), which adopts English common law to the extent that it is not inconsistent with the Constitution of the United States, the organic law of this state, or any law passed by

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our Legislature.[35] The purpose of the writ of error coram nobis is to bring before the court rendering judgment matters of fact which, if known at the time the judgment was rendered, would have prevented its rendition.[36] It enables the court to recall some adjudication that was made while some fact existed which would have prevented rendition of the judgment but which, through no fault of the party, was not presented.[37] The burden of proof in a proceeding to obtain a writ of error coram nobis is upon the applicant claiming the error, and the alleged error of fact must be such as would have prevented a conviction.[38] It is not enough to show that it might have caused a different result.[39]

[24] But Hessler's second motion for postconviction relief failed to allege any fact not presented in the prior proceedings which would have prevented his convictions. As previously noted, the claims raised in the present motion shared three common themes: mental competency, errors or misconduct at trial, and ineffective assistance of counsel. As to his mental competency, Hessler alleged that the trial court was not presented with information regarding his various mental illnesses and ****788** the medications he was taking at the time of trial. But in his first postconviction action, this information was adduced at an evidentiary hearing, and we concluded that the record ***683** affirmatively showed that Hessler had met the legal standard of competency.[40]

As to his claims of errors or misconduct at trial and ineffective assistance of counsel, such claims were inappropriate for coram nobis relief. The writ of error coram nobis is not available to correct errors of law.[41] We find no error in the district court's denial of a writ of error coram nobis.

VI. CONCLUSION

Except for Hessler's argument citing to *Martinez,* the claims raised in Hessler's second motion for postconviction relief either were litigated in the prior proceedings or were known and could have been litigated. As such, they were procedurally barred. And Hessler's claim of ineffective assistance of postconviction counsel, relying upon *Martinez,* was without constitutional support. He similarly failed to raise any basis warranting coram nobis relief. We affirm the denial of Hessler's second motion for postconviction relief and writ of error coram nobis.

Affirmed.

Heavican, C.J., not participating.

All Citations

288 Neb. 670, 850 N.W.2d 777

Footnotes

1 *State v. Hessler,* 274 Neb. 478, 741 N.W.2d 406 (2007).
2 *Id.*
3 *Id.* at 488, 741 N.W.2d at 416.
4 *State v. Hessler,* 282 Neb. 935, 807 N.W.2d 504 (2011).
5 *State v. Golka,* 281 Neb. 360, 796 N.W.2d 198 (2011).
6 *Id.*
7 *Id.*
8 *State v. Ortiz,* 266 Neb. 959, 670 N.W.2d 788 (2003).
9 *Id.*
10 See, e.g., *State v. Duncan,* 278 Neb. 1006, 775 N.W.2d 922 (2009).

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11 *State v. Ryan,* 257 Neb. 635, 601 N.W.2d 473 (1999).
12 *Id.*
13 *Id.*
14 *Id.*
15 See *Hessler, supra* note 1.
16 See *id.*
17 See *id.*
18 *State v. Suggs,* 259 Neb. 733, 613 N.W.2d 8 (2000).
19 See *Hessler, supra* note 1.
20 *Id.*
21 See *Ryan, supra* note 11.
22 See *Hessler, supra* note 4.
23 See *State v. Becerra,* 263 Neb. 753, 642 N.W.2d 143 (2002).
24 *State v. Deckard,* 272 Neb. 410, 722 N.W.2d 55 (2006).
25 *Martinez v. Ryan,* —— U.S. ——, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012).
26 See *id.*
27 See *Trevino v. Thaler,* —— U.S. ——, 133 S.Ct. 1911, 185 L.Ed.2d 1044 (2013).
28 See *Martinez, supra* note 25.
29 See, *Gore v. State,* 91 So.3d 769 (Fla.2012) (*Martinez* directed toward federal habeas proceedings); *People v. Miller,* 2013 IL App (1st) 111147, 988 N.E.2d 1051, 370 Ill.Dec. 695 (2013) (*Martinez* applies to federal courts considering habeas petitions and expressly not constitutionally based decision); *Yarberry v. State,* 372 S.W.3d 568 (Mo.App.2012) (holding in *Martinez* limited to determination that procedural default will not bar federal habeas court from hearing ineffective assistance of trial counsel claims); *Com. v. Holmes,* 79 A.3d 562 (Pa.2013) (procedural default will not bar federal habeas court from hearing substantial claim of ineffective assistance at trial); *Kelly v. State,* 404 S.C. 365, 745 S.E.2d 377 (2013) (*Martinez* limited to federal habeas corpus review and not applicable to state postconviction relief actions).
30 See *Holmes, supra* note 29.
31 *Id*. at 583.
32 See *id*. at 584.
33 *Id.*
34 See § 29–3001(3).
35 *State v. Diaz,* 283 Neb. 414, 808 N.W.2d 891 (2012).
36 *Id.*
37 *Id.*
38 *Id.*
39 *Id.*
40 See *Hessler, supra* note 4.
41 *Diaz, supra* note 35.

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SEP 1 1 2013

IN THE DISTRICT COURT FOR SCOTTS BLUFF COUNTY, NEBRASKA

THE STATE OF NEBRASKA, **Plaintiff,** **vs.** **JEFFREY HESSLER,** **Defendant.**	**Case No. CR 03-39** **MEMORANDUM ORDER**

NATURE OF THE CASE

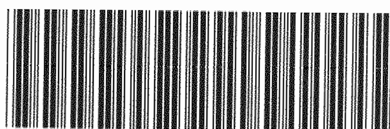
Now pending before the Court is Defendant Jeffrey Hessler's second motion for post conviction relief.

I. PROCEDURAL BACKGROUND

On December 7, 2004, Hessler was convicted by a jury of first degree murder, kidnapping, first degree sexual assault on a child, and use of a firearm to commit a felony. Following Hessler's conviction for first degree murder, the jury found three statutory aggravating circumstances. Prior to sentencing the trial court granted Hessler's request to waive counsel and represent himself. Counsel James R. Mowbray was appointed as stand by counsel for Hessler. Hessler appeared pro se at the mitigation/sentencing hearing before the three judge sentencing panel. Hessler was sentenced to death for first degree murder; life imprisonment for kidnapping; 40 to 50 years imprisonment for sexual assault of a child; and 20 to 25 years imprisonment for use of a firearm to commit a felony. All sentences were ordered to be served consecutively.

Hessler was represented at trial and the aggravation hearing by attorneys James R. Mowbray, Jeffery A. Pickens, and Gerald L. Soucie of the Nebraska Commission on Public Advocacy. Hessler represented himself at the mitigation/sentencing hearing. The Nebraska

FILED Sept 11 20 13
Ann Rosenberry
CLERK OF THE DIST COURT
BY Santos Casto DEPUTY



Supreme Court appointed Hessler's trial counsel to represent him on direct appeal. Hessler's conviction and sentence were affirmed on November 30, 2007. 274 Neb. 478 (2007) (Hessler I).

On or about February 27, 2008, Hessler filed a pro se action for post conviction relief and request for appointment of counsel. Scotts Bluff County Deputy Public Defender Brian J. Lockwood was appointed to represent Hessler. Thereafter, Lockwood filed an Amended Motion For Post Conviction Relief. Following a limited evidentiary hearing the trial court denied postconviction relief. The Nebraska Supreme Court affirmed. 282 Neb. 935 (2011) (Hessler II).

On August 24, 2012, Hessler, by and through counsel Alan G. Stoler filed a subsequent action for post conviction relief, i.e. the pending Verified Motion For Postconviction Relief And Petition For Writ of Error Coram Nobis.

II. ANALYSIS

Post conviction proceedings are treated as civil in nature. A defendant requesting post conviction relief must establish the basis for such relief. The defendant must allege facts which, if proved, constitute a denial or violation of his or her rights under the United States or Nebraska Constitution, causing the judgment against him or her to be void or voidable. An evidentiary hearing on a motion for post conviction relief may be denied when the record and files affirmatively show that the defendant is entitled to no relief. Moreover, a court is not required to grant an evidentiary hearing on a motion for post conviction relief which alleges only conclusions of law or fact; nor is an evidentiary hearing required when (1) the motion does not contain sufficient factual allegations concerning a denial or violation of constitutional rights affecting the judgment against the defendant, or (2) notwithstanding a proper pleading of facts, the files an records in the defendant's case do not show a denial or violation of constitutional rights affecting the judgment against the defendant. State v. Williams, 253 Neb. 111 (1997); State v. Schoonmaker, 249 Neb. 330 (1996); State v. Glover, 276 Neb. 662 (2008).

A motion for post conviction relief cannot be used to secure review of issues that were

known to the defendant and could have been litigated on direct review, no matter how those issues may be phrased or rephrased. State v. Ryan, 248 Neb. 405 (1995).

A writ of error coram nobis is used to correct a judgment in the same court in which it was rendered based on an error of fact, rather, than an error of law.

> The purpose of the writ of error coram nobis is to bring before the court rendering judgment matters of fact which, if known at the time the judgment was rendered, would have prevented its rendition. It enables the court to recall some adjudication that was made while some fact existed which would have prevented rendition of the judgment but which, through no fault of the party, was not presented. The burden of proof in a proceeding to obtain a writ of error coram nobis is upon the applicant claiming the error, and the alleged error of fact must be such as would have prevented a conviction. It is not enough to show that it might have caused a different result.
>
> We have stated that a writ of error coram nobis reaches only matters of fact unknown to the applicant at the time of judgment, not discoverable through reasonable diligence, and which are of a nature that, if known by the court, would have prevented entry of judgment. The writ of error coram nobis is not available to correct errors of law.

State v. Diaz, 283 Neb. 414 (2012).

A. Issues on Direct Appeal

It is a well accepted legal maxim that a motion for post conviction relief cannot be used to secure review of issues that were known to the defendant and could have been litigated on direct review, no matter how those issues may be phrased or rephrased. State v. Ryan, 248 Neb. 405 (1995). Hessler's assignments of error on direct appeal were summarized by the Nebraska Supreme Court, as follows (275 Neb. at 488) (Exhibit 164):

Hessler, through counsel, asserts that the district court erred in (1) denying his motions to plead guilty to felony murder; (2) violating the Double Jeopardy Clause by allowing the State to use the sexual assault of J.B. to prove an aggravating circumstance; (3) failing to excuse for cause potential jurors who had formed opinions regarding Hessler's guilt; (4) overruling his motion to change venue; (5) overruling his motion to declare Nebraska death penalty statutes unconstitutional on various bases, including (a) vagueness of aggravating circumstances described in § 29-2523(1)(a), (b), and (d); (b) failure to require or allow the jury to determine mitigating circumstances, to assign a weight to aggravating circumstances, and to determine the sentence; and (c) unconstitutionally penalizing a defendant's exercise of the right to a jury trial on aggravating circumstances; (6) denying his request for an instruction in the aggravation phase requiring the jury to make unanimous, written findings of fact to support each aggravating circumstance found to exist; (7) granting his request to waive counsel and appear pro se at sentencing and failing to make a determination regarding his competency to waive counsel; and (8) receiving into evidence at sentencing the records of the guilt and aggravation phases of the trial.

B. Issues Raised in the First Motion for Post Conviction Relief

Hessler's first action for post conviction relief raised the following allegations (Exhibits 165, 167):

1. Trial counsel were ineffective by:

   (a). Failing to investigate Hessler's mental competency.

   (b). Failing to raise concerns of Hessler's mental competency during the course of trial proceedings, and more specifically, failing to raise concerns of Hessler's mental competency at the time of the sentencing hearing.

(c). Failing to request a competency hearing prior to the sentencing hearing.

(d). Failing to appropriately pursue a motion to change venue.

(e). Failing to object to the Court's voir dire of prospective jurors.

(f). Failing to provide Hessler with all mitigating evidence in their possession following Hessler's decision to represent himself.

2. Appellate counsel were ineffective by:

(a). Failing to raise on appeal "issues of [Hessler's] competence, juror bias, [change of] venue, mitigation, and ineffective assistance of trial counsel" (Amended Petition, paragraph 36).

(b). Failing to seek a re-hearing before the Nebraska Supreme Court.

3. The trial court failed to, sua sponte, order a competency evaluation of Hessler (Amended Petition, paragraph 43).

4. The prosecuting attorney committed prosecutorial misconduct by failing "to suggest a competency evaluation of [Hessler]" (Amended Petition, paragraph 50).

Hessler was granted a limited post-conviction evidentiary hearing, primarily on the issue of his competency. The trial court concluded many of Hessler's post conviction assertions did not require an evidentiary hearing for various reasons, including (1) the existing record was adequate for review, (2) the existing record affirmatively showed that Hessler was not entitled to any relief, (3) the post conviction assertions alleged only conclusions of law or fact, (4) the factual allegations failed to show the violation of a constitutional right, and (5) the same issues were litigated on direct appeal.

C. Issues Raised in the Second Motion for Post Conviction Relief

Hessler's pending or subsequent motion for post conviction relief consists of 144 pages and 365 numbered paragraphs. Hessler claims he had a constitutional and statutory right to effective assistance of counsel at trial, on direct appeal, and on his previous post conviction proceedings. In general, Hessler claims prior counsel were ineffective in protecting his constitutional rights as follows:

1. Custodial statement made on February 11, 2003, and February 12, 2003 violated Hessler's constitutional rights. A mental disease prevented Hessler from knowingly and intelligently waiving his constitutional right to remain silent.

2. Hessler was denied a fair and impartial jury due to pretrial publicity and the trial court's denial of his motion to change venue.

3. Hessler's waiver of counsel violated his constitutional rights. Mental illness rendered Hessler incompetent to waive counsel.

4. Hessler's waiver of his right to be present in court was invalid. Hessler's mental illness rendered him incompetent to waive his presence during court proceedings.

5. Comments by the Court and prosecutor violated Hessler's right to a fair trial.

6. Trial counsel was ineffective during the guilt – innocence stage of Hessler's trial including, but not limited to, not aggressively pursuing suppression of Hessler's statements, not effectively pursuing a change of venue, not adequately investigating Hessler's competency, etc.

7. Trial counsel failed to adequately investigate and litigate Hessler's lack of mental capacity to waive his Fourth Amendment rights.

8. The trial court's "mental anguish" jury instruction was unconstitutional. Trial and appellate counsel were ineffective by not pursuing that issue.

9. Trial counsel was ineffective for failing to object to the State's use of testimonial hearsay evidence, specifically DNA reports and lab analysis.

10. Hessler was incompetent to stand trial due to debilitating mental disease or defect.

11. Trial counsel was ineffective because Hessler was innocent due to an incapacity to act with deliberate and premeditated malice.

12. Trial counsel was generally ineffective at the aggravation hearing.

13. Hessler was denied a fair trial due to juror bias and misconduct.

14. Appellate counsel and post conviction counsel were generally ineffective.

15. The prosecutor generally committed prosecutorial misconduct at all stages of the proceedings.

16. Witness Bohaty was allowed to present "pseudo-scientific" evidence regarding firearms.

17. Cumulative error.

D. Discussion

At trial and on direct appeal Hessler was represented by attorneys Mowbray and Pickens. At sentencing Hessler represented himself. During the first action for postconviction relief Hessler was represented by attorney Lockwood. On his second or subsequent action for post conviction relief Hessler is represented by attorney Stoler. Litigation to date can be summarized

as follows:

(a). The primary issues raised on direct appeal were Hessler's mental competency, juror bias, and change of venue.

(b). The primary issues raised in the first action for post conviction relief were Hessler's mental competency, juror bias, and change of venue.

(c). The primary issues raised in the pending action for post conviction relief are Hessler's mental competency, juror bias, and change of venue.

In Hessler I the Nebraska Supreme Court held "that Hessler has not shown that a change of venue was necessary, because an impartial jury was in fact selected, and that Hessler therefore did not show that he could not receive a fair trial in Scotts Bluff County." 274 Neb. at 498. The Court also held there was no indication in the record that Hessler was incompetent throughout pretrial proceedings and the trial itself or was incompetent to waive counsel prior to sentencing. Id. at 509, 511. The trial court did not err in failing to hold a competency hearing sua sponte.

During the first action for post conviction relief evidence of Hessler's mental competency was developed in greater detail. Prior to trial attorneys Mowbray and Pickens had Hessler undergo a mental health examination. A neuropsychological evaluation was conducted at defense counsel's request in March, 2003, by Dr. Robert G. Arias. A 16-page evaluation report followed. Dr. Arias concluded Hessler was attempting to "manipulate his presentation in a negative fashion" and attempting "to portray himself in an overly negative light, particularly with regard to psychotic symptoms to explain his behavior." 282 Neb. at 941-42. During that same time period Hessler was also seen by clinical psychologist Daniel Scharf, Ph.D. At the first post conviction hearing Hessler introduced in evidence approximately 450 pages of additional psychological and medical records from the time period 2003 to 2010. Post conviction relief was denied. The Nebraska Supreme Court held (282 Neb. at 956):

> . . . Counsel is not required to move for a competency hearing at every

alleged sign of mental illness. Counsel is not required "to undertake useless procedural challenges merely to create a record impregnable to assault for claimed inadequacy of counsel." Insofar as the failure to call into question the defendant's competency could conceivably be deemed prejudicial because of a lost moment in time, the defendant must still demonstrate specific prejudice resulting from not having the hearing. That showing is not made through mere speculation that a hearing *might* have revealed something more.

At Hessler's disposal was a large medical file, several witnesses to Hessler's behavior, numerous exemplars of Hessler's written communications, and several psychological assessments and reports. Yet, Hessler did not present any testimony or opinion which even attempted a retrospective evaluation of the probability that Hessler was incompetent at the time of the sentencing hearing. Perhaps most notably, Hessler did not present the testimony of the prison psychiatrist who was treating Hessler at the time of the sentencing hearing and who presumably would have some insight into his competency.

Hessler was granted an evidentiary hearing and was granted the appointment of counsel at the evidentiary hearing. He was given an opportunity to present evidence demonstrating that had counsel called for a competency hearing, he would have been found incompetent to stand trial and waive counsel. He failed to make such a showing. Accordingly, the district court properly denied postconviction relief.

E. Pending Claims

Hessler's pending motion raised seventeen "Claims For Relief." All or part of claims numbered I, III, IV, VI, VII, X and XI addressed Hessler's mental competency. Specifically, it is claimed that Hessler's mental illness/mental disease rendered him incompetent to stand trial; precluded him from making voluntary statements to law enforcement in February, 2003; rendered him incapable of waiving his right to be present during trial and his right to counsel; and

rendered him incapable of forming the requisite "deliberate and premeditated malice" mental-state element necessary for first degree murder. Hessler's mental competency was generally raised on direct appeal and in his first motion for postconviction relief. Prior to trial he was examined by Dr. Robert G. Arias and Dr. Daniel Scharf. Prior to his first postconviction action additional voluminous mental health documents were obtained from the Nebraska Department of Correctional Services. Those issues were previously known to the defendant and were litigated on direct review and during his first postconviction action.

"Claims for Relief" number II, V, VI, and XIII generally claimed comments by the Court and pretrial publicity prevented Hessler from having an unbiased jury and a fair trial. More specifically, Hessler claims trial counsel was ineffective for not aggressively pursuing a change of venue. Those issues were previously known to the defendant and were litigated on direct review and during his first postconviction action.

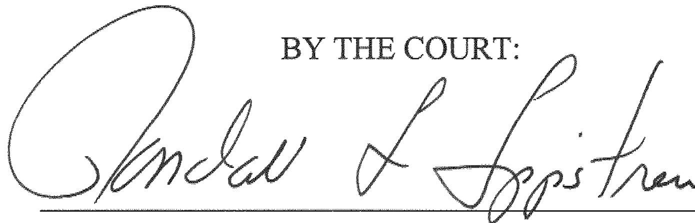
Finally, "Claims For Relief" number VIII addressed the trial court's "mental anguish" jury instruction; number IX addressed the admission of certain evidence at trial; number XII claimed counsel was generally ineffective at the aggravation hearing; number XIV claimed appellate and post conviction counsel were generally ineffective; number XV claimed "trial was marred by prosecutorial misconduct;" number XVI addressed the admission of witness Bohaty's testimony at trial; and number XVII claimed overall cumulative or aggregate error precluded Hessler from having a fair trial. All those claims, except the claim of ineffective post conviction counsel were previously known to the defendant and could have been litigated either on direct appeal or the first post conviction claim. The Nebraska Supreme Court has not recognized a constitutional guarantee of effective assistance of counsel in a postconviction action. Moreover, successive motions for postconviction relief will not be entertained unless the motion affirmatively shows on its face that the grounds for relief could not have been asserted at the time the movant filed the prior motion. State v. Dandridge, 264 Neb. 707 (2002). In the case at bar Hessler's claims for relief were either asserted on direct appeal, asserted in his first action for post conviction relief, or were known and could have been asserted in his first action for post conviction relief.

III. CONCLUSION

Having reviewed the record and considered the arguments of counsel the Court hereby concludes that Hessler is not entitled to an evidentiary hearing on any issue raised in his (Second) Verified Motion For Postconviction Relief and Petition For Writ of Error Coram Nobis. The requested relief is denied in its entirety and the motion is dismissed.

DATED: Sept. 10, 2013.

BY THE COURT:



District Judge

cc: Douglas L. Warner
Alan G. Stoler

282 Neb. 935
Supreme Court of Nebraska.

STATE of Nebraska, appellee,
v.
Jeffrey A. HESSLER, appellant.

No. S–11–379.
|
Dec. 23, 2011.

Synopsis
Background: After affirmance of defendant's conviction for first-degree murder and death sentence, 274 Neb. 478, 741 N.W.2d 406, defendant filed motion for postconviction relief. After an evidentiary hearing, the District Court, Scotts Bluff County, Randall L. Lippstreu, J., denied postconviction relief. Defendant appealed.

[Holding:] The Supreme Court, McCormack, J., held that defendant was not prejudiced, as element of ineffective assistance of counsel, by counsel's allegedly deficient performance in failing to seek a competency hearing before defendant waived counsel for penalty phase of capital murder trial.

Affirmed.

West Headnotes (22)

[1] **Criminal Law** Mixed questions of law and fact

A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact. U.S.C.A. Const.Amend. 6.

1 Cases that cite this headnote

[2] **Criminal Law** Post-conviction relief

On appeal from a proceeding for postconviction relief, the trial court's findings of fact will be upheld unless such findings are clearly erroneous.

2 Cases that cite this headnote

[3] **Criminal Law** Effective assistance

Determinations regarding whether counsel was deficient and whether the defendant was prejudiced, as elements of ineffective assistance of counsel, are questions of law that are reviewed independently of the lower court's decision. U.S.C.A. Const.Amend. 6.

[4] **Criminal Law** Matters which either were or could have been adjudicated previously, in general

A motion for postconviction relief cannot be used to secure review of issues that were known to the defendant and could have been litigated on direct review.

9 Cases that cite this headnote

[5] **Criminal Law** Same or different counsel in previous proceedings

When a defendant was represented both at trial and on direct appeal by lawyers employed by the same office, the defendant's first opportunity to assert ineffective assistance of trial counsel is in a motion for postconviction relief. U.S.C.A. Const.Amend. 6.

5 Cases that cite this headnote

[6] **Criminal Law** Counsel

In light of the unusual circumstances of defendant's direct appeal from his murder conviction and death sentence and the gravity of the issues alleged and sentences imposed, appellate court, on appeal from denial of defendant's postconviction relief motion alleging that counsel had been ineffective in failing to seek a competency hearing before defendant waived counsel for penalty phase, would treat the postconviction proceedings as defendant's first opportunity to raise his ineffective assistance claim, so that the claim was not procedurally barred, though defendant had filed a pro se brief on direct appeal. U.S.C.A. Const.Amend. 6.

4 Cases that cite this headnote

[7] **Criminal Law** Nature of Remedy

Criminal Law Constitutional or fundamental error

Postconviction relief is a very narrow category of relief available only to remedy prejudicial constitutional violations.

1 Cases that cite this headnote

[8] **Criminal Law** Burden of proof

Criminal Law Defense counsel

The defendant has the burden in postconviction proceedings of demonstrating ineffectiveness of counsel, and the record must affirmatively support that claim. U.S.C.A. Const.Amend. 6.

1 Cases that cite this headnote

[9] **Criminal Law** Deficient representation and prejudice in general

A defendant alleging ineffective assistance of counsel must show, in accordance with “Strickland v. Washington,” that counsel's performance was deficient, that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area, and that counsel's deficient performance prejudiced the defense in his or her case, that is, there was a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. U.S.C.A. Const.Amend. 6.

3 Cases that cite this headnote

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[10] **Criminal Law** Determination

The two prongs of the test for ineffective assistance of counsel, deficient performance and prejudice, may be addressed in either order. U.S.C.A. Const.Amend. 6.

[11] **Criminal Law** Competence to stand trial; sanity hearing

In order to demonstrate prejudice, as element of ineffective assistance of counsel, from counsel's failure to investigate competency and failure to seek a competency hearing, the defendant must demonstrate that there is a reasonable probability that he or she was, in fact, incompetent and that the trial court would have found the defendant incompetent had a competency hearing been conducted. U.S.C.A. Const.Amend. 6.

5 Cases that cite this headnote

[12] **Criminal Law** Particular Cases and Issues

Counsel is not ineffective for failing to undertake useless procedural challenges merely to create a record impregnable to assault for claimed inadequacy of counsel. U.S.C.A. Const.Amend. 6.

2 Cases that cite this headnote

[13] **Mental Health** Mental disorder at time of trial

Sentencing and Punishment Mental Illness or Disorder of Defendant

An individual has a constitutional right not to be put to trial when lacking mental competency, and this includes sentencing. West's Neb.Rev.St. § 29–1823(1).

2 Cases that cite this headnote

[14] **Mental Health** Mental disorder at time of trial

The test of competency to stand trial is whether the defendant has the capacity to understand the nature and object of the proceedings against him, to comprehend his own condition in reference to such proceedings, and to make a rational defense.

6 Cases that cite this headnote

[15] **Criminal Law** In general; right to appear pro se

A criminal defendant has a constitutional right to waive the assistance of counsel and conduct his or her own defense. U.S.C.A. Const.Amend. 6.

1 Cases that cite this headnote

[16] **Criminal Law** Capacity and requisites in general

A criminal defendant's ability to represent himself has no bearing upon his competence to choose self-representation. U.S.C.A. Const.Amend. 6.

[17] **Mental Health** Mental disorder at time of trial

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There are no fixed or immutable signs of a defendant's incompetence, so that the defendant cannot be put to trial.

1 Cases that cite this headnote

[18] **Mental Health** Mental disorder at time of trial

A defendant can meet the modest aim of legal competency to be put to trial, despite paranoia, emotional disorders, unstable mental conditions, and suicidal tendencies.

1 Cases that cite this headnote

[19] **Sentencing and Punishment** Counsel

The defendant's desire for capital punishment does not create a reasonable probability of incompetency, for purposes of waiver of counsel for capital sentencing. U.S.C.A. Const.Amend. 6.

[20] **Mental Health** Mental disorder at time of trial

Hearing voices representing messages from God does not, without evidence of how the messages affect the defendant's ability to comprehend the trial proceedings and make a rational defense, demonstrate incompetence to be put to trial.

1 Cases that cite this headnote

[21] **Criminal Law** Competence to stand trial; sanity hearing

Defendant was not prejudiced, as element of ineffective assistance of counsel, by counsel's allegedly deficient performance in failing to seek a competency hearing before defendant waived counsel for penalty phase of capital murder trial, in absence of a showing of a reasonable probability that defendant would have been found incompetent if a competency hearing had been held. U.S.C.A. Const.Amend. 6.

4 Cases that cite this headnote

[22] **Criminal Law** Competence to stand trial; sanity hearing

Counsel is not required to move for a competency hearing at every alleged sign of defendant's mental illness.

1 Cases that cite this headnote

****507** *Syllabus by the Court*

***935** 1. **Effectiveness of Counsel.** A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact.

2. **Postconviction: Appeal and Error.** On appeal from a proceeding for postconviction relief, the trial court's findings of fact will be upheld unless such findings are clearly erroneous.

3. **Effectiveness of Counsel: Appeal and Error.** Determinations regarding whether counsel was deficient and whether the defendant was prejudiced are questions of law that an appellate court reviews independently of the lower court's decision.

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4. **Effectiveness of Counsel: Appeal and Error.** A motion for postconviction relief cannot be used to secure review of issues that were known to the defendant and could have been litigated on direct review.

5. **Postconviction: Effectiveness of Counsel: Appeal and Error.** When a defendant was represented both at trial and on direct appeal by lawyers employed by the same office, the defendant's first opportunity to assert ineffective assistance of trial counsel is in a motion for postconviction relief.

6. **Postconviction: Constitutional Law.** Postconviction relief is a very narrow category of relief available only to remedy prejudicial constitutional violations.

***936** 7. **Postconviction: Effectiveness of Counsel: Proof.** The defendant has the burden in postconviction proceedings of demonstrating ineffectiveness of counsel, and the record must affirmatively support that claim.

8. **Postconviction: Mental Competency: Effectiveness of Counsel: Proof.** In order to demonstrate prejudice from counsel's failure to investigate competency and for failure to seek a competency hearing, the defendant must demonstrate that there is a reasonable probability that he or she was, in fact, incompetent and that the trial court would have found the defendant incompetent had a competency hearing been conducted.

9. **Effectiveness of Counsel: Records.** Counsel is not ineffective for failing to undertake useless procedural challenges merely to create a record impregnable to assault for claimed inadequacy of counsel.

10. **Constitutional Law: Trial: Mental Competency.** An individual has a constitutional right not to be put to trial when lacking mental competency.

11. **Constitutional Law: Right to Counsel: Waiver.** A criminal defendant has a constitutional right to waive the assistance of counsel and conduct his or her own defense.

12. **Mental Competency.** There are no fixed or immutable signs of incompetence.

Attorneys and Law Firms

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

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

CONNOLLY, GERRARD, STEPHAN, McCORMACK, and MILLER–LERMAN, JJ., and INBODY, Chief Judge, and PIRTLE, Judge.

McCORMACK, J.

I. NATURE OF CASE

Jeffrey A. Hessler filed a motion for postconviction relief from his current incarceration and sentence to death for crimes relating to the rape and murder of Heather Guerrero. The district court granted an evidentiary hearing on the limited issue of whether trial counsel was ****508** ineffective in failing to demand a competency hearing before the trial court allowed Hessler to waive counsel and represent himself at sentencing. The district court denied postconviction relief. Because Hessler failed to demonstrate a reasonable probability that he was incompetent at the sentencing hearing, we affirm.

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***937** II. BACKGROUND

Hessler was convicted for first degree murder, kidnapping, first degree sexual assault on a child, and use of a firearm to commit a felony in relation to the murder of 15–year-old Guerrero. The facts leading to the convictions are set forth in more detail in our opinion in *State v. Hessler* (*Hessler I*).[1]

After his convictions in December 2004, Hessler filed three pro se motions to waive his right to be present at the aggravation hearing. The court excused Hessler's presence, and trial counsel represented Hessler at the aggravation hearing. After the hearing, the jury found three statutory aggravating circumstances.[2] Accordingly, the case was set to proceed before the three-judge panel for consideration of the death penalty.

1. Motions to Remove Counsel and Proceed Pro Se

On March 31, 2005, Hessler sought to remove counsel, waive his right to counsel, and proceed pro se at the sentencing hearing. Hessler filed a pro se "Motion to Invoke My Sixth–Amendment Right and to Expurgate the Advocate of the State and to Delineate Myself." This motion is set forth in detail in *Hessler I.*[3] In summary, Hessler was unhappy with trial counsel because they told him they were dutybound to contest the imposition of the death penalty. Hessler wished to be put to death.

At the hearing on the motion, the court presented numerous questions to Hessler in order to determine if his waiver of counsel was made knowingly, voluntarily, and intelligently. Hessler's responses to the questions were generally appropriate. Hessler was asked to explain what " 'Expurgate the Advocate of the State' " in his pro se motion meant. He responded that it was "[t]o remove [his] advocate." He told the court that he wished to discharge counsel because they "refuse[d] to comply with my wishes." Hessler further explained to the court that given the change of strategy, a scheduled presentencing hearing ***938** challenging the constitutionality of the death penalty statute did not "need to happen."

Hessler informed the court he had been prescribed "antipsychotics" and "antihypnotic" drugs, but he had not taken them that day. When asked about his ability to represent himself, Hessler said he had God on his side, stating, "I just go by what God tells me." The court responded that while it would not dissuade Hessler from "following God," he would have to represent himself in a way that complied with court rules. Hessler indicated that he understood this and could do so. The trial court determined that Hessler had knowingly, intelligently, and voluntarily decided to represent himself. Given the gravity of the possible punishment, the court instructed counsel to prepare for the sentencing hearing and be there on standby.

****509** 2. Sentencing Hearing

At the sentencing hearing conducted on May 16, 2005, Hessler was again questioned about his desire to proceed pro se. Hessler responded to the questions appropriately, and the court again determined that Hessler knowingly, intelligently, and voluntarily waived his right to counsel.

Hessler declined to make any opening or closing statement at the sentencing hearing. As evidence, Hessler offered a 9–page "Interlocutory Statement of the Defendant." Because indicating each spelling mistake or grammatical error in Hessler's statement and other documentation would be distracting, we reproduce Hessler's written materials in their original form. Hessler began: "As God cicerones me through this ascription to show true face I, Jeffrey Alan Hessler, now brings to light my ascription now before all." Hessler then explained that he wished to be put to death, under the doctrine of " 'an Eye for an Eye.' " Hessler expressed remorse and noted that he suffered "from certain Mental Conditions that may or may not truelly explain My actions in this here Nightmare that I have caused."

Hessler explained why he had to discharge his counsel: “GOD has shown me to move into HIS LIGHT and that is why I had to finially expuregate my council of Attorney's from continuing from representing Me in this case. They refused to follow GOD's and My wishes.” More specifically, Hessler ***939** described a recent encounter with a “Brother of Christ” at the prison who was awoken from his sleep and led to Hessler's cell to “bring GOD back into My Life and understanding.” When he took this man's hand, he “felt this powerful Energy to start to flow through my whole body.... GOD was speaking through him to Me ... I saw a single tear ... and ... His eyes ... were flaming at me.”

Hessler wished for “nothing to be inveighed on Mybehalf that might change the mind set of the Judges or of the People of this society within this Matrix.” He asked that his “vermiculate tabernacle be sent to the Reaper's Nirvana and for My vermiculate tabernacle to be gibbeted as soon as possible and there should be no dialectic or extrospection towards or against GOD's Purpose and My destiny.”

Despite Hessler's failure to present evidence of mitigation, the three-judge sentencing panel considered possible statutory mitigators, particularly, the absence of Hessler's prior criminal history and his relative age. The panel found no nonstatutory mitigating circumstances. It found that the aggravating circumstances outweighed the mitigating circumstances. Accordingly, the panel sentenced Hessler to the death penalty.

3. Direct Appeal

For Hessler's automatic direct appeal, we appointed Hessler's trial counsel to represent him. Counsel assigned as error the trial court's grant of Hessler's request to proceed pro se at the sentencing hearing and the trial court's failure to conduct a competency hearing before allowing Hessler to proceed pro se. Hessler filed a pro se brief in which he expressed his continuing wish to be put to death.

We held that the trial court did not err when it failed to conduct a competency hearing.[4] Further, there was no error when the court did not make an explicit determination that Hessler was competent to waive counsel.[5] We explained that the trial court did not have reason to suspect Hessler's competence. We noted that ****510** when Hessler moved to waive counsel, ***940** he was still represented by counsel, and that counsel did not move for a determination of Hessler's competence at that time or at any previous time.[6] And there was “no indication ... that Hessler was unable to consult with counsel with a reasonable degree of rational understanding. To the contrary, the record contains references to consultations between Hessler and his counsel.”[7]

Furthermore, we stated that “the court had observed Hessler over many months prior to trial and at trial.”[8] There was no special significance to the fact that Hessler said he was not on his medications on the day the court considered his request to waive counsel, because “the court was in a position to be satisfied that any medication Hessler was or was not on did not compromise his present competence to waive counsel.”[9] Finally, we explained that although Hessler's pro se filings before the trial court “contain[ed] irrelevant matter,” they nevertheless indicated that “Hessler understood the factual nature of the proceedings against him and the potential consequences of such proceedings.”[10] Hessler demonstrated in the filings that he “had a rational and factual understanding that he was being prosecuted for the death of [Guerrero] and that the death penalty was a potential punishment for that crime.”[11]

4. Postconviction

After we affirmed Hessler's convictions and sentences on direct appeal, Hessler changed his mind about wanting to be put to death. He filed a motion for postconviction relief and obtained appointed counsel. In his amended postconviction motion,

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Hessler presented several allegations, including the allegation that trial counsel was ineffective in failing to investigate Hessler's mental state and failing to object to going forward with the sentencing hearing without a formal competency ***941** investigation and hearing. After a preliminary hearing to narrow the issues, the postconviction court concluded that Hessler was entitled to an evidentiary hearing on the limited issue of whether trial counsel was ineffective for failing to raise issues of competency after Hessler's convictions but prior to mitigation and sentencing. In addition to the entire trial record, the following evidence was accepted into evidence at the postconviction evidentiary hearing.

(a) Hessler's Deposition

Hessler explained in his deposition testimony that he had informed trial counsel of his intention to terminate their representation of him on the day they were going to argue a motion alleging electrocution was unconstitutional, March 31, 2005. Hessler explained that his motivation for terminating counsel was because he wanted the death penalty and counsel refused to advocate for the death penalty.

When asked about the unusual wording of his pro se motions before the trial court, Hessler said that he came up with the words used in those motions from his thoughts and "through certain books I came across." He no longer could recall the meaning of many of the words he used. When Hessler was asked, "Was there a point in your life where you were speaking like this?" Hessler answered, "Never."

****511** Hessler testified that from the beginning of the trial, he understood the charges against him, the potential consequences for those charges, the role of the jury and the judge, and the purpose of the trial. He testified he still understood all those things when he decided to terminate his attorneys' representation and proceed pro se at sentencing. Hessler did not specifically address whether he had ever heard voices.

(b) Arias' Report

A neuropsychological evaluation was conducted at counsel's request by Dr. Robert G. Arias in March 2003, and a 16–page report was made of this evaluation. Arias noted that Hessler claimed he "must have been chosen to pass on an evil message" and that killing Guerrero was completely out of his control. Hessler reported a history of heavy drug use and questioned whether his brain had been " 'fried' " by drugs. Hessler ***942** expressed some concern that he was a "Mafia target" because he had associated with local drug dealers.

Arias' "Diagnostic Impressions" of Hessler included "Hallucin[o]gen Persisting Perceptual Disorder" and "Depressive Disorder Not Otherwise Specified." However, Arias considered the results of the three principal psychological tests conducted on Hessler to be invalid due to "an organized attempt to portray himself in an overly negative light." Specifically: "[Hessler] clearly attempted to answer in a psychotic fashion, but validity scales revealed this to be an intentional attempt to manipulate his presentation in a negative fashion." Arias further stated that the results "reflected a broad tendency to magnify his level of experienced illness or a characterological inclination to complain or be self-pitying.... A similar pattern of overendorsement of depressive symptomatology was seen...."

In his conclusions, Arias stated that Hessler was an individual with "a longstanding antisocial, narcissistic personality disorder." He stated that Hessler was somewhat depressed, which would be expected under the circumstances, and at moderate to high risk for suicide during his incarceration. But again, "Valid assessment of his emotional functioning on objective measures was not obtained ... given the patient's clear and organized attempt to portray himself in an overly negative light, particularly with regard to psychotic symptoms to explain his behavior."

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(c) Scharf's Letter

In May 2003, trial counsel asked that a psychologist, Dr. Daniel L. Scharf, provide Hessler with treatment for depression. Scharf provided Hessler with treatment through the summer of 2003. In a letter written to trial counsel on September 3, 2003, Scharf explained that while he had not conducted a forensic examination, it was his impression that Hessler suffered from bipolar mood disorder. He also thought Hessler probably suffered from a "delusion disorder, persecutory type." Scharf was skeptical of whether Hessler had a mixed antisocial and narcissistic personality disorder and thought that he might instead experience "narcissism/grandiosity" as a component of the bipolar mood disorder.

***943** (d) Medical Records

Hessler introduced into evidence at the postconviction hearing approximately 450 pages of prison psychological and medical records and related correspondence from the time period of 2003 to 2010. The records contain numerous prescriptions at different points in time. Hessler did not present expert testimony regarding those records, nor did he otherwise attempt to explain their contents as the records pertained to his competency at sentencing.

****512** A psychological report from the prison medical records, written in September 2003, states that according to personality assessments performed on Hessler, he was "someone who seems to be either exaggerating his symptomologies or is perhaps making a cry or plea for help."

The records demonstrate that Hessler was engaged in a dispute with prison staff over his treatment and medications around the time of the sentencing hearing. Hessler made numerous written communications to prison staff on this point. Hessler was demanding a prescription or treatment plan. On April 8, 2005, Hessler wrote to the prison mental health staff "asking you if you would please advise me on what is being done to correct and restructure my treatment medication plan." On April 12, Hessler refused the treatment of a psychiatrist and refused one of his medications. On April 15, Hessler wrote to the mental health staff:

> Yes, I wrote you ... at the beginning of this week pretaining to your findings and so feedback to the conversation we had on the morning of the 8th of April of 2005. And as of to date I have yet to hear a response back from you and you stated to me at the end of that conversation that you would respond to an interview request form that I would send. Have you reached your findings so that you can advise back to me with those findings? I have also wrote to the medical director, since the pharmacy forwarded the information that ordered the restructure of my medication treatment plan to him, but I have yet to hear a response back from him. I would greatly appreciate your services in getting some type of information.... I thank you for ***944** all your help, time, and services in this important matter at hand.

Similarly worded inmate interview requests were made on April 21 and 29, and a letter to the leading psychiatrist was sent on April 21, asking that a treatment plan recommended previously by another doctor be implemented.

A segregation mental status review on April 8, 2005, stated that Hessler's thought patterns were appropriate, on track, relevant, and consistent with reality, although his mood was irritable. A psychiatric consultation note on May 6 described that Hessler was writing to the staff psychiatrist and others concerning disputes about what medication he should be on. The staff psychiatrist did not think Hessler's current medication was properly treating his anxiety. Accordingly, the psychiatrist discontinued certain medications and prescribed others. The psychiatrist did not note any other mental or emotional disturbances requiring treatment.

On May 10, 2005, 6 days before his sentencing hearing, Hessler requested authorization for a specific cold medication that he had used in the past and found effective. The cold medicine which was available without authorization was not working to relieve his symptoms. He stated: "I have used the cold tabs on the Unit and they are hard to get when you really need one and plus they do not help relieve fully My congestion and seasonial type allergies." Many similar minor complaints are found throughout the prison records.

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On May 18, 2005, Hessler filled out a health services request form to "please schedule myself for an appointment soon to fully discuss my medical/mental conditions and the treatment medications that I am currently prescribed by several doctors," and Hessler's disagreement with prison medical and psychiatric staff continued. An intake assessment dated May 19, 2005, stated that no mental health program involvement was recommended.

****513** (e) Trial Counsel

The deposition testimonies of Hessler's trial counsel, James Mowbray and Jeffrey Pickens, were introduced. Both testified that their decision not to bring the issue of competency to the ***945** trial court's attention was not a strategic one. Rather, they explained they had no doubt that Hessler met the legal test of competency. In light of this, Mowbray and Pickens were concerned that calling for a competency hearing would result in divulging confidential attorney-client communications and would violate their client's wishes.

(i) Pickens

Pickens testified that Hessler "seemed to me to be a bright person and he seemed to understand everything that ... I told him." On March 23, 2005, Pickens discussed with Hessler the upcoming hearing on a motion for new trial and challenging the constitutionality of electrocution, as well as the upcoming sentencing hearing. Hessler expressed that he wanted the death penalty. Hessler also told Pickens that Hessler felt he had "lost his mind over the case." He told Pickens he was "hearing voices," or "thoughts which resemble voices," which gave him messages relating to what he perceived as his destiny. Hessler conveyed that he thought these messages were coming from God. In particular, God was telling Hessler not to fight the death penalty. This was God's "command," and Hessler told Pickens he had no choice.

Pickens told Hessler they could not ethically pursue a strategy seeking the death penalty. Hessler informed Pickens that, accordingly, he was thinking about firing Mowbray and Pickens and representing himself.

When Pickens asked Hessler if he believed he was competent, Hessler refused to answer. Hessler also refused to be seen by another psychologist in order to evaluate his competency. Upon further questioning by Pickens, however, Hessler assured Pickens that he understood the nature of the upcoming sentencing proceedings and that he was able to help with the defense of his case. Pickens explained he was trying to determine Hessler's competency under the standard set forth in *State v. Guatney.*[12] Pickens testified that based on Hessler's answers to his questions, he believed Hessler was competent.

***946** *(ii) Mowbray*

Mowbray testified that from the beginning, Hessler went back and forth on whether he wanted to be put to death or sentenced to life imprisonment. Later, Hessler became more religious and ultimately insisted on the death penalty. Mowbray said that although they were not sure what was driving Hessler "in terms of his decision-making," "[t]here wasn't any question in our mind from a legal standpoint that he understood" the nature of the upcoming hearings and the penalties he was facing.

When asked whether he had noticed any change in Hessler's understanding of the proceedings from the beginning of their representation to the time they were discharged, Mowbray said, "No, I think he always understood what was going on. There was a change in at least what he was communicating as to who was making his decisions. But he certainly understood what we were telling him."

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(f) Disposition

The district court denied postconviction relief. The court concluded that the record affirmatively showed Hessler was competent at the time of the sentencing hearing; therefore, counsel could not have ****514** been ineffective in not raising the issue of competency. Hessler appeals.

III. ASSIGNMENTS OF ERROR

Hessler assigns that the postconviction court erred by failing to find that trial counsel was ineffective in failing to raise and preserve the issue of competence.

IV. STANDARD OF REVIEW

[1] A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact.[13]

[2] On appeal from a proceeding for postconviction relief, the trial court's findings of fact will be upheld unless such findings are clearly erroneous.[14]

[3] ***947** Determinations regarding whether counsel was deficient and whether the defendant was prejudiced are questions of law that we review independently of the lower court's decision.[15]

V. ANALYSIS

In this appeal from the denial of postconviction relief, the question is whether trial counsel was ineffective by failing to ask for a competency hearing before the court allowed Hessler to proceed pro se at sentencing. Hessler argues that an inquiry during a competency hearing might have revealed he was not competent to stand trial. Even if competent to stand trial, he argues he may not have been competent to represent himself. Hessler acknowledges that it is traditionally the burden of the petitioner to more affirmatively demonstrate prejudice, but he argues he was unable to do so in this case because counsel's failure to request a competency hearing left him with an insufficient record on which to prove a postconviction claim.

[4] **[5]** **[6]** We first address whether Hessler's postconviction motion is procedurally barred. A motion for postconviction relief cannot be used to secure review of issues that were known to the defendant and could have been litigated on direct review.[16] However, when a defendant was represented both at trial and on direct appeal by lawyers employed by the same office, the defendant's first opportunity to assert ineffective assistance of trial counsel is in a motion for postconviction relief.[17] Hessler was represented by the Nebraska Commission on Public Advocacy at trial and on direct appeal. While Hessler also filed a pro se brief on direct appeal, we will, given the unusual circumstances of the appeal and the gravity of the issues alleged and sentences imposed, treat these postconviction proceedings as Hessler's first opportunity to raise claims of ineffective assistance of counsel.[18] We also note that while we determined in *Hessler I* that the trial court did not err in ***948** failing to hold a competency hearing sua sponte,[19] this was a different legal question than ****515** whether defense counsel should have requested a competency hearing.[20]

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[7] [8] [9] [10] Postconviction relief is a very narrow category of relief available only to remedy prejudicial constitutional violations.[21] The defendant has the burden in postconviction proceedings of demonstrating ineffectiveness of counsel, and the record must affirmatively support that claim.[22] Specifically, the defendant must show, in accordance with *Strickland v. Washington,*[23] that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area.[24] Second, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case; that is, there was a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.[25] The two prongs of this test, deficient performance and prejudice, may be addressed in either order.[26]

[11] [12] In order to demonstrate prejudice from counsel's failure to investigate competency and for failure to seek a competency hearing, the defendant must demonstrate that there is a reasonable probability that he or she was, in fact, incompetent and that the trial court would have found the defendant incompetent had a competency hearing been conducted.[27] Other courts have said ***949** that in order to successfully advance a claim that counsel was ineffective for failing to obtain or have a transcribed record for review, a defendant must demonstrate specific prejudice resulting from not having that record.[28] Counsel is not ineffective for failing "to undertake useless procedural challenges merely to create a record impregnable to assault for claimed inadequacy of counsel."[29]

The issue of prejudice in this case is necessarily bound up in the law of competency, and we will turn to that now.[30] In doing so, we consider the state of the law at the time of the proceedings at issue.[31]

[13] [14] An individual has a constitutional right not to be put to trial when lacking "mental competency."[32] This includes sentencing.[33] In *Guatney,* we said ****516** that the test of competency to stand trial is whether the defendant has the capacity to understand the nature and object of the proceedings against him, to comprehend his own condition in reference to such proceedings, and to make a rational defense.[34] We held that the defendant in *Guatney* was clearly competent when expert witnesses agreed he could appreciate the proceedings in court; understand the nature of the roles that the judge, the prosecutor, and the defense attorney would play; and cooperate with his attorneys to provide for a defense.[35] The defendant's unstable emotional state, paranoid ideation, occasional outbursts in court and ***950** "desire for undeserved punishment rather than justice," did not render him incompetent.[36]

[15] A criminal defendant also has a constitutional right to waive the assistance of counsel and conduct his or her own defense.[37] In *Godinez v. Moran,*[38] the U.S. Supreme Court held that the competency standard for determining whether a defendant may waive the right to counsel and plead guilty is the same as the standard for determining whether a defendant is competent to stand trial.

The defendant in *Godinez* was evaluated by two psychiatrists prior to trial. Both concluded that despite a suicide attempt after the crimes, the defendant was able to understand the pending proceedings and assist counsel in his defense. Two months after pleading not guilty, the defendant sought to discharge his attorneys, plead guilty, and represent himself at sentencing so he could prevent the presentation of mitigating evidence and be sentenced to death. The court found the defendant to be competent and accepted his plea as freely and voluntarily given and his waiver of counsel as knowingly and intelligently made.[39]

After being sentenced to death, the defendant asked for post-conviction relief, asserting that the trial court erred in allowing him to represent himself and in accepting his plea. The Ninth Circuit Court of Appeals granted the motion, reasoning that competency to waive constitutional rights required a higher level of the "capacity for 'reasoned choice' "[40] than did the requirement to stand trial, which is that a defendant have a " 'rational and factual understanding of the proceedings and is capable of assisting his

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counsel.' "[41] The U.S. Supreme Court disagreed. It noted that the decision to plead guilty is no more ***951** complicated than the sum total of decisions a defendant must make during the course of a trial when represented by counsel, such as whether to take the witness stand, waive the right to a jury trial, and other strategic choices.[42]

[16] The Court reiterated that "a criminal defendant's ability to represent himself has no bearing upon his competence to *choose* self-representation."[43] "Requiring ****517** that a criminal defendant be competent," the Court said, "has a modest aim: It seeks to ensure that he has the capacity to understand the proceedings and to assist counsel."[44]

Subsequently, in *State v. Dunster* (*Dunster I*)[45] and *State v. Dunster* (*Dunster II*),[46] we upheld the defendant's decision to waive counsel, plead guilty, and proceed pro se at the sentencing hearing despite defendant's strategy of pursuing " 'suicide by state.' "[47] The defendant was on Prozac, Depakote, and Librium and was diagnosed with bipolar disorder. However, he had told the court that the medication and his disorder did not affect his ability to understand what was going on around him.[48] The trial court later conducted a competency hearing requested by counsel during a brief moment after pleading guilty when the defendant stated he wished to have counsel. A psychiatrist testified that the defendant was well oriented and understood the charges and the possible consequences. The defendant was subsequently allowed to again waive counsel and proceed to represent himself at sentencing.

After sentencing, the defendant filed a motion for new trial based on previously undisclosed medical records indicating an acute psychotic episode and undiagnosed depression. The trial court stated that the defendant's mental condition had " 'ebbed and flowed' " during the sentencing hearing, but that he was ***952** legally competent, and the motion for new trial was denied.[49] We affirmed, reasoning that the record and the trial court's specific findings of competency made it clear that had the newly discovered evidence been known, the trial court would have reached the same conclusion.[50]

Later, in the case of *State v. Gunther,*[51] we affirmed the trial court's implicit determination of competency as part of the waiver of counsel colloquy when there was no separate hearing on competency. Like the defendant in *Dunster I,* the defendant in *Gunther* wished to proceed pro se at trial and at sentencing in order to be put to death.[52] Although no notice of aggravating circumstances had been filed, and the death penalty was thus not a possibility, the defendant wished to discharge his attorneys because he thought they were colluding with the prosecution to deny him the death penalty.[53] We held that the record showed the defendant was sufficiently aware of his right to have counsel and to understand the charges against him, the possible sentences, and the possible consequences of foregoing counsel.[54] He was accordingly legally competent to stand trial and represent himself, despite paranoid thoughts and a desire for capital punishment.

[17] **[18]** **[19]** There are no fixed or immutable signs of incompetence.[55] As the above ****518** cases illustrate, a defendant can meet the "modest aim"[56] of legal competency, despite paranoia, emotional disorders, unstable mental conditions, and suicidal tendencies. The desire for capital punishment certainly does not create a reasonable probability of incompetency.[57] This is ***953** not an overly uncommon or inherently irrational trial strategy. Furthermore, a rule requiring reversal when a capital defendant chooses self-representation and insists on the death penalty "could easily be misused by a knowledgeable defendant who wished to embed his trial with reversible error."[58]

[20] Hearing voices representing messages from God does not, without evidence of how the messages affect the defendant's ability to comprehend the trial proceedings and make a rational defense, demonstrate incompetence.[59] And as one court noted, psychiatric clinicians are especially careful in characterizing religious beliefs or experiences as delusional.[60]

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The fundamental question is whether the defendant's mental disorder or condition prevents the defendant from having the capacity to understand the nature and object of the proceedings, to comprehend the defendant's own condition in reference to such proceedings, and to make a rational defense.[61]

[21] In the hundreds of pages of medical records, Hessler's correspondence, and psychological reports and evaluations, and in the testimony of Hessler's trial counsel and of Hessler himself, there is no indication that Hessler was incompetent to stand trial. Neither did Hessler's actions before the sentencing panel indicate he was unable to maneuver through those proceedings.

The "Interlocutory Statement of the Defendant" was unusually worded. It was thus difficult, but not impossible, to understand. The sentiment conveyed in the statement was reportedly guided by Hessler's religious experiences and beliefs. The vocabulary was apparently derived from religious books ***954** Hessler was reading. This does not demonstrate a reasonable probability that Hessler was incompetent at the time of sentencing. Hessler testified that he never spoke in such an unusual manner. Pickens did not observe any form of incoherent or unusual speech when he met with Hessler shortly before the sentencing hearing. Hessler's written communications on other matters to prison staff reflects a completely different tone and content which were appropriate to Hessler's age and education and the topic at hand.

The only other possible evidence presented by Hessler relating to incompetence ****519** was Pickens' report that Hessler said he heard voices relaying God's messages and that he had to obey God's commands. But Pickens also described these as "thoughts which resemble voices." And, at the evidentiary hearing, Hessler failed to acknowledge ever having heard voices. He also failed to present any evidence explaining in more detail the nature of these "voices" and how they might have affected his ability to understand the sentencing proceedings.

As already discussed, we will not assume that hearing messages from God and following God's perceived commands, without more, demonstrate incompetence. Hessler provided no evidence that the alleged "voices" made him incompetent. Similarly, the evidence that Hessler was prescribed psychiatric medications which he may or may not have been taking at the time of sentencing does not demonstrate incompetence, absent some expert testimony connecting the medications to his ability to understand the proceedings and assist in his defense.

Mowbray and Pickens testified that at the time of sentencing, there was no doubt Hessler was competent under the standards set forth in *Guatney.*[62] They knew their client. Hessler's general demeanor and his responses to questions specifically geared toward assessing competency demonstrated to Mowbray and Pickens that he understood the nature of the proceedings and was capable of assisting counsel (or himself).

Hessler's profession that he was under God's control was not new. Similar sentiments had been shared with Arias, who concluded that Hessler demonstrated a "clear and organized ***955** attempt to portray himself in an overly negative light, particularly with regard to psychotic symptoms to explain his behavior." Prison psychological records similarly report a tendency of "exaggerating" symptoms. A report near the time of sentencing stated that Hessler was displaying appropriate thought patterns consistent with reality and on track. As noted by the district court, rather than meeting his burden of affirmatively demonstrating incompetence, the record developed at the evidentiary hearing affirmatively shows that Hessler met the legal standard of competency required to waive counsel and proceed pro se at sentencing.

In fact, Hessler ultimately concedes he failed to demonstrate a reasonable probability that he would have been found incompetent had trial counsel demanded a competency hearing prior to the sentencing hearing. Thus, he failed to show prejudice in the traditional sense required at postconviction. Hessler instead argues the prejudice lies in the absence of a meaningful record with which he could prove such incompetency.

We have already discussed the substantial record developed at trial and during the evidentiary hearing on the issue of competency. What Hessler is truly arguing is that trial counsel's failure to call for a competency hearing resulted in the possible loss of vital additions to that evidence. Because competency changes over time, Hessler argues he can never obtain the evidence

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that trial counsel failed to obtain at the time of the sentencing hearing and he can never know what that evidence would or would not have been.

Recognizing that the law does not consider this to be proof of prejudice, Hessler suggests we adopt a special prejudice rule for death penalty cases. Under the proposed rule, counsel is put on "inquiry notice" ****520** [63] when a defendant reports hearing voices. Once put on notice, counsel is per se ineffective for failing to call for a competency hearing, unless there is a strategic reason not to do so.

[22] We decline to adopt such a rule. Counsel is not required to move for a competency hearing at every alleged sign of mental illness. Counsel is not required "to undertake useless ***956** procedural challenges merely to create a record impregnable to assault for claimed inadequacy of counsel."[64] Insofar as the failure to call into question the defendant's competency could conceivably be deemed prejudicial because of a lost moment in time, the defendant must still demonstrate specific prejudice resulting from not having the hearing.[65] That showing is not made through mere speculation that a hearing *might* have revealed something more.

At Hessler's disposal was a large medical file, several witnesses to Hessler's behavior, numerous exemplars of Hessler's written communications, and several psychological assessments and reports. Yet, Hessler did not present any testimony or opinion which even attempted a retrospective evaluation of the probability that Hessler was incompetent at the time of the sentencing hearing. Perhaps most notably, Hessler did not present the testimony of the prison psychiatrist who was treating Hessler at the time of the sentencing hearing and who presumably would have some insight into his competency.

Hessler was granted an evidentiary hearing and was granted the appointment of counsel at the evidentiary hearing. He was given an opportunity to present evidence demonstrating that had counsel called for a competency hearing, he would have been found incompetent to stand trial and waive counsel. He failed to make such a showing. Accordingly, the district court properly denied postconviction relief.

VI. CONCLUSION

Hessler failed to demonstrate that a constitutional violation occurred when trial counsel did not move for a competency hearing before the sentencing hearing. We affirm the judgment of the district court denying postconviction relief.

Affirmed.

HEAVICAN, C.J., and WRIGHT, J., not participating.

All Citations

282 Neb. 935, 807 N.W.2d 504

Footnotes

1 *State v. Hessler,* 274 Neb. 478, 741 N.W.2d 406 (2007).
2 See Neb.Rev.Stat. § 29–2523 (Reissue 2008).
3 *Hessler I, supra* note 1.
4 *Id.*
5 *Id.*
6 *Id.*

7 *Id.* at 509, 741 N.W.2d at 429.
8 *Id.*
9 *Id.*
10 *Id.* at 509–10, 741 N.W.2d at 429.
11 *Id.* at 510, 741 N.W.2d at 429–30.
12 *State v. Guatney,* 207 Neb. 501, 299 N.W.2d 538 (1980).
13 *State v. McGhee,* 280 Neb. 558, 787 N.W.2d 700 (2010).
14 *State v. Poindexter,* 277 Neb. 936, 766 N.W.2d 391 (2009).
15 *State v. Yos–Chiguil,* 281 Neb. 618, 798 N.W.2d 832 (2011).
16 *State v. Ryan,* 248 Neb. 405, 534 N.W.2d 766 (1995), *abrogated on other grounds, State v. Mata,* 275 Neb. 1, 745 N.W.2d 229 (2008).
17 *State v. Dunster,* 278 Neb. 268, 769 N.W.2d 401 (2009).
18 See *State v. Johnson,* 4 Neb.App. 776, 551 N.W.2d 742 (1996).
19 *State v. Hessler, supra* note 1.
20 *Lawrence v. State,* 969 So.2d 294 (Fla.2007).
21 See *State v. Boppre,* 280 Neb. 774, 790 N.W.2d 417 (2010).
22 *State v. Ray,* 266 Neb. 659, 668 N.W.2d 52 (2003).
23 *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).
24 See *State v. Watkins,* 277 Neb. 428, 762 N.W.2d 589 (2009).
25 See *id.*
26 *State v. Amaya,* 276 Neb. 818, 758 N.W.2d 22 (2008).
27 See, *Matheney v. Anderson,* 377 F.3d 740 (7th Cir.2004); *Hull v. Kyler,* 190 F.3d 88 (3d Cir.1999); *Williamson v. Ward,* 110 F.3d 1508 (10th Cir.1997); *Futch v. Dugger,* 874 F.2d 1483 (11th Cir.1989); *Felde v. Butler,* 817 F.2d 281 (5th Cir.1987); *Nelson v. State,* 43 So.3d 20 (Fla.2010); *Ridgley v. State,* 148 Idaho 671, 227 P.3d 925 (2010).
28 See, e.g., *Bates v. State,* 3 So.3d 1091 (Fla.2009).
29 *People v. Shelburne,* 104 Cal.App.3d 737, 744, 163 Cal.Rptr. 767, 772 (1980).
30 See *Hull v. Kyler,* supra note 27.
31 See, *State v. Iromuanya,* 272 Neb. 178, 719 N.W.2d 263 (2006); *State v. Billups,* 263 Neb. 511, 641 N.W.2d 71 (2002).
32 See *Indiana v. Edwards,* 554 U.S. 164, 128 S.Ct. 2379, 171 L.Ed.2d 345 (2008).
33 See, e.g., *State v. Hittle,* 257 Neb. 344, 598 N.W.2d 20 (1999); *State v. Johnson, supra* note 18; Neb.Rev.Stat. § 29–1823(1) (Reissue 2008).
34 *State v. Guatney, supra* note 12.
35 *Id.*
36 *Id.* at 505, 299 N.W.2d at 541.
37 See *State v. Lewis,* 280 Neb. 246, 785 N.W.2d 834 (2010).
38 *Godinez v. Moran,* 509 U.S. 389, 113 S.Ct. 2680, 125 L.Ed.2d 321 (1993).
39 *Id.*
40 See 509 U.S. at 397, 113 S.Ct. 2680.
41 See 509 U.S. at 394, 113 S.Ct. 2680.
42 *Godinez v. Moran, supra* note 38.
43 509 U.S. at 400, 113 S.Ct. 2680 (emphasis in original).
44 509 U.S. at 402, 113 S.Ct. 2680.
45 *State v. Dunster,* 262 Neb. 329, 631 N.W.2d 879 (2001).
46 *State v. Dunster,* 270 Neb. 773, 707 N.W.2d 412 (2005).
47 *Id.* at 779, 707 N.W.2d at 417.
48 *Dunster II, supra* note 46. See, also, *Dunster I, supra* note 45.
49 *Dunster II, supra* note 46, 270 Neb. at 783, 707 N.W.2d at 420.
50 *Id.*
51 *State v. Gunther,* 271 Neb. 874, 716 N.W.2d 691 (2006).
52 *Id.*
53 *Id.*

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54 *Id.*

55 *Drope v. Missouri,* 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975).

56 *Godinez v. Moran, supra* note 38, 509 U.S. at 402, 113 S.Ct. 2680.

57 See, also, e.g., *State v. Cowans,* 87 Ohio St.3d 68, 717 N.E.2d 298 (1999).

58 *People v. Taylor,* 47 Cal.4th 850, 865, 220 P.3d 872, 882, 102 Cal.Rptr.3d 852, 865 (2009). See, also, e.g., *State v. Cowans, supra* note 57.

59 See, *Crawley v. Dinwiddie,* 584 F.3d 916 (10th Cir.2009); *Ford v. Bowersox,* 256 F.3d 783 (8th Cir.2001); *State v. Paulino,* 127 Conn.App. 51, 12 A.3d 628 (2011); *State v. Young,* 623 So.2d 689 (La.App.1993); *State v. Hope,* 96 N.C.App. 498, 386 S.E.2d 224 (1989). See, also, e.g., *Williams v. State,* 396 So.2d 267 (Fla.App.1981); *Calambro v. District Court,* 114 Nev. 961, 964 P.2d 794 (1998).

60 See *Bottoson v. Moore,* 234 F.3d 526 (11th Cir.2000).

61 *State v. Guatney, supra* note 12.

62 See *State v. Guatney, supra* note 12.

63 Brief for appellant at 14.

64 *People v. Shelburne, supra* note 29, 104 Cal.App.3d at 744, 163 Cal.Rptr. at 772.

65 See, e.g., *Bates v. State, supra* note 28.

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APR 1 1 2011

IN THE DISTRICT COURT FOR SCOTTS BLUFF COUNTY, NEBRASKA

THE STATE OF NEBRASKA, Plaintiff, vs. JEFFREY HESSLER, Defendant.	Case No. CR 03-39 MEMORANDUM ORDER

APR - 8 2011

NATURE OF THE CASE

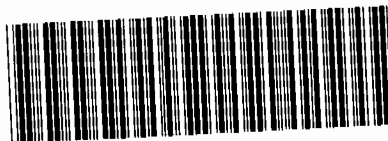
Now pending before the Court is Defendant Jeffrey Hessler's action for post conviction relief.

PROCEDURAL BACKGROUND

On December 7, 2004, Hessler was convicted by a jury of first degree murder, kidnapping, first degree sexual assault on a child, and use of a firearm to commit a felony. Following Hessler's conviction for first degree murder, the jury found three statutory aggravating circumstances. Prior to sentencing the trial court granted Hessler's request to waive counsel and represent himself. Hessler appeared pro se at the mitigation/sentencing hearing before the three judge sentencing panel. Hessler was sentenced to death for first degree murder; life imprisonment for kidnapping; 40 to 50 years imprisonment for sexual assault of a child; and 20 to 25 years imprisonment for use of a firearm to commit a felony. All sentences were ordered to be served consecutively.

Hessler's conviction and sentence were affirmed on direct appeal. 274 Neb. 478 (2007). Hessler was represented at trial and the aggravation hearing by attorneys James R. Mowbray, Jeffery A. Pickens, and Gerald L. Soucie of the Nebraska Commission on Public Advocacy.

FILED Apr 11 2011
Ann Rosenberry
CLERK OF THE DIST COURT



Hessler represented himself at the mitigation/sentencing hearing. The Nebraska Supreme Court appointed Hessler's trial counsel to represent him on direct appeal. Hessler's conviction and sentence was affirmed on November 30, 2007.

On or about February 27, 2008, Hessler filed a pro se action for post conviction relief and a request for appointment of counsel. Scotts Bluff County Deputy Public Defender Brian J. Lockwood was appointed. Now pending before the Court is Hessler's Amended Motion For Post Conviction Relief.

Earlier the Court determined Hessler was entitled to a limited evidentiary hearing whether trial counsel was ineffective for failing to raise issues of Hessler's competency following his conviction but prior to the three judge mitigation/sentencing hearing. All other issues were resolvable without an evidentiary hearing, or had been resolved on direct appeal. A motion for post conviction relief cannot be used to secure review of issues that were known to the defendant and could have been litigated on direct review, no matter how those issues may be phrased or rephrased. State v. Ryan, 248 Neb. 405 (1995). The evidentiary hearing was held on September 28, 2010. Due to the voluminous record both parties requested extended briefing deadlines. The case was deemed submitted on January 24, 2011.

Hessler's amended motion for post conviction relief included the following claims:

1. Trial counsel were ineffective by:

    (a). Failing to investigate Hessler's mental competency.

    (b). Failing to raise concerns of Hessler's mental competency during the course of trial proceedings, and more specifically, failing to raise concerns of his mental competency after conviction but prior to the mitigation/sentencing hearing.

2. Appellate counsel was ineffective by failing to raise on appeal issues of Hessler's

competency.

3. The trial court failed to, sua sponte, order a competency evaluation of Hessler.

4. The prosecuting attorney committed prosecutorial misconduct by failing to suggest a competency evaluation of Hessler.

During deposition testimony Hessler acknowledged his claim for post conviction relief dealt primarily with his mental competency following his conviction but prior to the mitigation/sentencing hearing. It was during that time period that Hessler waived counsel and elected to represent himself (Exhibit 155;46:1 - 47:12).

ANALYSIS

To establish a right to post conviction relief based on a claim of ineffective counsel, a defendant must first show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case. The defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. State v. Williams, 259 Neb. 234, 239 (2000). In determining whether a trial counsel's performance was deficient there is a strong presumption that counsel acted reasonably. When reviewing a claim of ineffective assistance of counsel the court will not second-guess reasonable strategic decisions by counsel. State v. Benzel, 269 Neb. 1, 9 (2004).

(a).

The two prong test for an ineffective assistance of counsel claim, deficient performance and prejudice, may be addressed in any order. The court will first address the issue of prejudice. Hessler claims that trial counsel was ineffective for failing to investigate and raise competency issues following conviction but prior to sentencing; and that appellate counsel was ineffective in

failing to raise those same competency issues on appeal. Hessler must demonstrate a reasonable probability that if counsel had raised competency issues, the result of the proceedings would have been different. A person is competent to plead or stand trial if he or she has the capacity to understand the nature and object of the proceedings against him or her, to comprehend his or her own condition in reference to such proceedings, and to make a rational defense. A court is not required to make a competency determination in every case in which a defendant seeks to plead guilty or to waive his or her right to counsel; a competency determination is necessary only when a court has reason to doubt the defendant's competence. State v. Vo, 279 Neb. 964 (2010).

Between time of conviction and the sentencing hearing, philosophical differences developed between Hessler and trial counsel regarding the death penalty. On or about January 3, 2005, counsel filed on Hessler's behalf a lengthy post-trial motion challenging the constitutionality of Nebraska's death penalty statutes. A hearing on that motion was scheduled for March 31, 2005. Thereafter, Hessler expressed to counsel his desire to be executed; and that he did not want counsel to advocate against the death penalty. Trial counsel Jeffery Pickens informed Hessler that he and James Mowbray would argue against the death penalty contrary to Hessler's wishes. Pickens told Hessler that counsel was duty bound to fight the death penalty; and that if Hessler disapproved he should fire them (Exhibit 154; 8:7 - 24; 25:14 - 26:6). On or about March 25, 2005, Pickens also advised Hessler of his 6th Amendment right to the assistance of counsel as well as the right to represent himself. Hessler fully understood his options (Exhibit 154; 81:11 - 86:17). That was the precipitating event leading to Hessler's decision to represent himself. It was not an issue of competency, but rather Hessler's dispute with counsel regarding the death penalty.

On March 31, 2005, just prior to defendant's motion challenging Nebraska's death penalty being heard, Hessler filed a written waiver of counsel with notice he would represent himself at all future proceedings. On that same date the trial court questioned Hessler at length regarding his decision. The trial court determined Hessler freely, voluntarily, and intelligently waived his right to counsel. Hessler was allowed to proceed pro se. At the May 16, 2005, mitigation/sentencing hearing the trial court again questioned Hessler regarding his decision to waive counsel and represent himself. Hessler again indicated his desire to waive counsel and

represent himself. The trial court again determined Hessler had knowingly, intelligently, and voluntarily waived his right to counsel and had elected to represent himself. At the mitigation/sentencing hearing Hessler presented evidence consisting of a nine page typed statement dated May 11, 2005 (Trial Exhibit 151A). Hessler testified by deposition that at time of sentencing he was feeling guilt and sorrow for having killed Heather; and that he wanted the death penalty (Exhibit 155; 22:2 - 6; 23:15; 48:10; 49:21 - 50:4; 69:1 - 70:3). No where in Hessler's deposition testimony did he claim to have heard voices.

(b).

Defense counsel initially had Hessler evaluated by Clinical Psychologist / Neuropsychologist Robert G. Arias, Ph.D. That evaluation took place on March 22 - 23, 2003. Dr. Arias authored a sixteen page neuropsychological report (Exhibit 153, attachment 3). Defense counsel also hired Clinical Psychologist Daniel L. Scharf, Ph.D. to see Hessler in the Scotts Bluff County Jail. Dr. Scharf authored a two page report dated September 3, 2003 (Exhibit 153, attachment 4). Mowbray determined neither the Arias nor Scharf report were helpful to the defense regarding issues of insanity or mitigation (Exhibit 153; 52:20 - 54:3). Dr. Arias' report included the following conclusion:

> These results revealed an individual with a longstanding antisocial, narcissistic personality disorder. The cognitive portion of this evaluation was considered valid and revealed only a mild difficulty in concentration, which would be expected in his current state, which appears to be somewhat depressed. This depression appears to be a reaction to his current circumstances. Valid assessment of his emotional functioning on objective measures was not obtained, however, given the patient's clear and organized attempt to portray himself in an overly negative light, particularly with regard to psychotic symptoms to explain his behavior. Given his long history of impulsivity, anger, and antisocial and narcissistic behaviors, he is considered to be a high risk for repeating such behaviors, as well as a moderate to high risk for suicide during his incarceration.

In support of his motion for post conviction relief, Hessler offered in evidence his medical/mental health records from the Lincoln Regional Center and the Nebraska Department of Correctional Services (Exhibits 156, 157). The more relevant records are those from January, 2005, (following conviction in December, 2004) through May, 2005 (following sentencing on May 16, 2005). Although the records were somewhat unorganized and difficult to read, they included the following:

(1) M.S. Kamal, M.D., psychiatric consultation note dated 1-7-05 (emphasis added):

"Since Mr. Hessler thinks that all of his problems would be solved by the medications which he was taking before coming to the prison, I have agreed to put him back on:

1. Seroquel 100 mg p.o.q. a.m. and 200 mg p.o.q. h.s.
2. Ativan 1 mg p.o.q. noon and 1 mg p.o.q. h.s.

I hope that this helps him and he feels better. I have explained to him once again that we are here to help him and we would be happy to work with him but he needs to take out [sic] medical advise if we are to be able to help him. He is not considered immanently psychotic, suicidal or homicidal at this point in time.

(2) M.S. Kamal, M.D., psychiatric consultation note dated 5-6-05: Readjusting medication which specifically treats anxiety such as Zoloft. Hessler wanted to follow medical directions given by a nurse practitioner in Scottsbluff.

(3) NDCS handwritten Health Record dated 5-18-05. "In note seen on intake. Cooperative, Manipulative. Argues about the meds."

(4) NDCS record dated 5-19-05: "New arrival . . . on 5-18-05. Initial assessment completed. Based on current information no mental health program involvement is recommended."

The relevant medical/mental health records show that between 1-1-05 and 5-31-05, Hessler was treated primarily for anxiety, stress, and headaches. None of Hessler's pertinent medical/mental health records support an ongoing psychosis or lack of competency. The Court found no references to hearing voices in Hessler's pertinent medical/mental health records. None of Hessler's medical or mental health providers were called to testify.

(c).

James Mowbray testified that following his conviction Hessler "had gotten quite religious" and talked about a sentence of death consistent with Old Testament biblical teachings (Exhibit 153; 64:22 - 25). During that same time period, i.e. preceding sentencing, Mowbray did not perceive Hessler to be delusional. Hessler understood what was happening. He was cognizant. He responded appropriately to counsel's questions. Mowbray was confident that Hessler understood the nature of the proceedings, and understood what counsel was saying to him (Exhibit 153; 67: 3 - 69:13; 80:15 - 81:7). Jeffery Pickens concurred there was no evidence to support an insanity defense (Exhibit 154; 11:9).

(d).

While incarcerated Hessler prepared and submitted several pro se documents to the Court, including the nine page "Interlocutory Statement of This Defendant" presented at the May 16, 2005, sentencing hearing. Hessler drafted the aforementioned document while at the Nebraska State Penitentiary using many words and phrases obtained from resource books (Exhibit 155; 19:15 - 20:14). Hessler's statement was drafted in a grandiose style. By the time he was deposed on November 12, 2009, he had forgotten the meaning of many of the flamboyant, showy words chosen for his public statement (Exhibit 155; 20:2 - 22:25). Hessler's choice of words and writing style may be consistent with Dr. Arias' diagnosis of narcissistic personality disorder, but it was not evidence of incompetency or deranged thought process. During that same time period Hessler wrote numerous Kites and Inmate Requests (see medical/mental health records). These were written in a straight-forward, lucid style consistent with Hessler's age and educational background. (Hessler had received a GED; 54:33) A copy of Hessler's request

forms dated May 20, 2005; May 10, 2005; April 29, 2005; April 21, 2005; April 21, 2005; April 6, 2005; February 22, 2005; February 21, 2005; February 20, 2005; and February 9, 2005, are attached to this order as exemplars.

Hessler testified his "Interlocutory Statement" was prepared to express his sorrow to the Guerrero family and his sense of guilt, "to, you know, basically say, you know, kill me." (Exhibit 155; 69:1 - 15). At that point in time he wanted the death penalty. That was his motivation in dismissing trial counsel (Exhibit 155; 49:19 - 50:4). In approximately 2007, Hessler started thinking he did not want the death penalty (Exhibit 155; 50:5 - 51:2). On February 27, 2008, Hessler filed his pro se verified motion for post conviction relief. Hessler's change of heart regarding the death penalty is insufficient grounds to warrant post conviction relief.

(e).

At some point in time Hessler self reported listening to or hearing voices. Jeffery Pickens' notes from his March 23, 2005, meeting with Hessler stated:

> Jeff said he has "lost his mind" over this case. I asked if he believes he is competent. He refused to answer the question. I asked if I could send Dr. Cole or another psychologist to see him to evaluate for competency. He said he will not allow an evaluation. However, Jeff said he understands the nature of the proceedings and is able to help with the defense of his case.
>
> Jeff said he hears voices or has thoughts which resemble voices. The messages relate to Jeff's destiny – that there is no purpose in him continuing to live. He said his destiny is to be judged and to be executed. He believes the messages are from God.
>
> Jeff want the public to know that he wants a death sentence, "a life for a life." He said he will not allow us to say or do anything to attempt to prevent a death

sentence. And if there is a death sentence, he does not want us to seek a reversal on appeal.

According to Pickens, during that same time period Hessler understood he had a right to represent himself; and that he understood his attorneys would advocate against the death penalty if they continued to represent him (Exhibit 154; 83:1 - 84:9). [Neither Hessler's own deposition testimony nor his medical/mental health records made reference to hearing voices or thoughts resembling voices.]

What is the significance of Pickens' March 23, 2005, conversation with Hessler? Hessler must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceedings would have been different. Stated differently, had trial counsel raised issues of Hessler's competency in March, 2005, was there a reasonable probability that the result of the proceedings would have been different. That was the second prong of Hessler's burden of proof, i.e. to establish prejudice. Hessler presented no evidence as to the significance, if any, of his comments to Pickens. Hessler presented no expert testimony that he was not competent from March - May, 2005. His claim of hearing voices was inconsistent with his medical/mental health record.

Because the record affirmatively reflects Hessler was competent, his counsel could not have been ineffective in not raising an issue of competency, either in the trial court or on direct appeal. "Defense counsel is not ineffective for failing to raise arguments that have no merit." State v. Vo, 279 Neb. 964, 972 (2010).

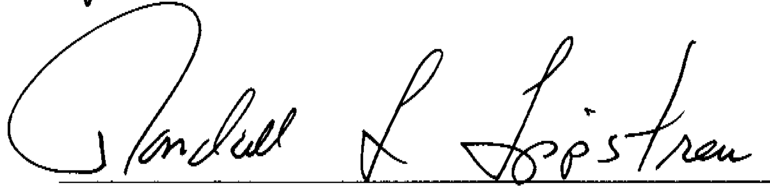
(f).

In his written brief Hessler claimed that during the summer of 2005 he was taking multiple psychotropic drugs; and that was evidence of his incompetency. Hessler attached a copy of several prescriptions to his brief. No specific evidence was presented regarding those drugs, including but not limited to, their affect on Hessler's mind, emotions, and behavior.

CONCLUSION

Having considered the evidence and written submissions of counsel, and for all the above reasons the Court finds that Hessler failed to establish the second prong of his burden, i.e. prejudice; and that his Amended Motion For Post Conviction Relief should be denied.

DATED: April 8, 2011.

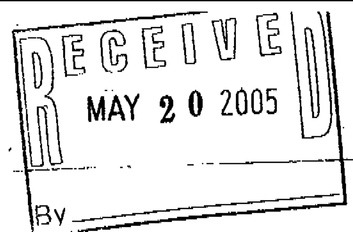


District Judge

cc: Douglas L. Warner
Brian J. Lockwood

ATTN: DR. WILIOM / TSCI MEDICAL UNIT

Health Services Request Form



Date: 2005/18/MAY

Name: MR JEFFREY A. HESSLER #: 59078 HU: SMU/A-28

What is your health concern?

REQUESTING IF YOU WOULD PLEASE SCHEDULE MYSELF FOR AN APPOINTMENT SOON TO FULLY DISCUSS MY MEDICAL/MENTAL CONDITIONS AND THE TREATMENT MEDICATIONS THAT I AM CURRENTLY PRESCRIBED BY SEVERAL DOCTORS. I WOULD GREATLY APPRICIATE THIS REQUEST OF YOUR SERVICES AND I THANK YOU FOR ALL YOUR TIME AND SERVICES IN HANDLING THIS MATTER AT HAND. THANK YOU.

Medication Refill (TO DISCUSS)

What medication needs refilled: (TO DISCUSS)

Signature [signature] No. 59078

↓ For Medical Response Only

Seen by DR Williams on 5/19/05

Date 5/20/05 Signature KNolte

Follow Up Appointment with

Appendix I

NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES

INMATE INTERVIEW REQUEST

TO: DR. ELLIOTT / BAGLEY

DATE: 2005/10/MAY

FROM: MR.JEFFREY A. HESSLER No.59078 (NAME / NUMBER) N.S.P (FACILITY) 4D--05 (LOCATION)

WORK LOCATION: ______ UNIT STAFF: ______

MESSAGE: Yes, would You please Authorize Myself an RX of GUAIF/PSEUDO TABS to help relieve My congestion? I have used this before. NOTE: I have used the cold tabs on the Unit and they are hard to get when you really need one and plus they do not help relieve fully My congestion and seasonial type allergies. I would greatly appriciate this request and I thank you for all your time and services in handling this matter at hand.

* T H A N K * Y O U . *

Signature No.59078

ORIGINAL – DCS Employee
YELLOW – Inmate
Both copies need to be submitted for response.

REPLY: Ordered

Date 9/11/05 Signature

Appendix I

NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES

INMATE INTERVIEW REQUEST

TO: DR. KAMAL / LEADING PSYCHIATRIST DATE: 2005/29/APRIL

FROM: MR.JEFFREY A. HESSLER No.59078 (NAME / NUMBER) N.S.P. (FACILITY) 4D---05 (LOCATION)

WORK LOCATION: UNIT STAFF:

MESSAGE: YES, WOULD YOU PLEASE RESPOND BACK TO THE INTERVIEW REQUEST THAT I HAD SUBMITTED TO YOU A WEEK AGO, WHICH PRETAINED INFORMATION OF MY PRESENT SITU-RATION AND CONDITION? I WOULD RESPECTFULLY APPRICIATE THIS REQUEST AND THE ONE I HAD ALL READY SUBMITTED TO YOU AND I THANK YOU FOR YOUR UNDERSTANDING(HOPEFULLY) AND FOR ALL YOUR TIME AND SERVICES AS AN PROFESSIONIAL PSYCHIATRIST.

THANK YOU.

ORIGINAL – DCS Employee
YELLOW – Inmate
Both copies need to be submitted for response.

[signature] No.59078
Signature

REPLY: Pt. Seen today

5/6/05
Date

[signature]
Signature

DCS-A-adm-013 (rev 2/97)

Appendix I

NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES

INMATE INTERVIEW REQUEST

TO: DR. KAMAL / LEADING PSYCHIATRIST DATE: 2005/21/APR

FROM: MR. JEFFREY A. HESSLER No. 59078 (NAME / NUMBER) N.S.P. (FACILITY) 4D---05 (LOCATION)

WORK LOCATION: UNIT STAFF:

MESSAGE: YES, AN ENVENLOPE IS ATTACHED TO THIS INTERVIEW REQUEST FORM WHICH IS FOR YOUR EYES. I WOULD APPRICIATE IF YOU WOULD PLEASE RESPOND BACK TO ME SO THAT I CAN UNDERSTAND YOUR FINDINGS AND STATEMENT, SO THAT I ALSO HAVE DOCUMENTATION TO SHOW IN ANY FUTURE PROCEDDINGS. I THANK YOU FOR "HOPFULLY" YOUR UNDERSTANDING AND ALL YOUR TIME AND SERVICES IN THIS IMPORTANT MATTER AT HAND.

*** T H A N K * Y O U . ***

Signature [signed] No. 59078

ORIGINAL – DCS Employee
YELLOW – Inmate
Both copies need to be submitted for response.

REPLY: MS. GINGE BRASWELL does not work for Dept of corrections and the department has no obligation to follow her recomendations blindly. You are provided with good medical care by trained and qualified medical Professional and I would recommend you work with them

Date: 4/22/05 Signature: Kamal

DCS-A-adm-013 (rev 2/97)

Appendix I

2005/21/APRIL

TO: DR. KAMAL
LEADING PSYCHIATRIST
NEBRASKA STATE PENITENTIARY

FROM: MR. JEFFREY A. HESSLER
No.59078 / INMATE
HOUSING UNIT-FOUR (D-05)
NEBRASKA STATE PENITENTIARY

YES, ON THE 31ST OF MARCH OF 2005, I HAD A FOLLOW-UP WITH GINGER BRASUELL, APRN-C OF THE PANHANDLE MENTAL HEALTH CENTER. MY NEXT FOLLOW-UP WITH GINGER BRASUELL, APRN-C WILL OCCUR ON THE 16TH OF MAY OF 2005. DURING MY FOLLOW-UP WITH HER, WHICH LASTED AROUND AN HOURS TIME, SHE AGAIN RESTRUCTURED MY MEDICATION TREATMENT PLAN. THOSE ORDERS BY HER ARE IN THE POSSESSION OF DR. KOHL THE MEDICAL DIRECTOR. I HAVE YET TO HEAR FROM DR. KOHL. I HAVE YET TO RECIEVE THE CHANGE IN MY MEDICATION TREATMENT PLAN. SO, I BRING THIS TO YOUR ATTENTION SO THAT I CAN SEE IF YOU WILL ORDER THIS RESTRUCTURE OF MY MEDICATION TREATMENT PLAN? GINGER BRASUELL, APRN-C ORDERED THAT MY LORAZEPAM BE CHANGED TO XANAX, DUE TO LORAZEPAM BRINGS A PRESURE FEELING TO MY HEAD. SHE LEFT THE DOSAGE THE SAME, BUT ADVISED ME TO SEE YOU AND TO GET THAT DOSAGE LEVEL CHANGED TO BETTER HELP ME WITH MY ANXIETY AND PANICS. I WAS TO REQUEST THIS OF YOU AF-TER I HAD STARTED THIS NEW TREATMENT PLAN. CURRENTLY THE DOSAGE LEVEL IS 1MG AT NOON AND 2 MG AT BEDTIME. HOWEVER THIS MEDICATION ONLY RELIEVES MY MIND ONLY A LITTLE BUT THIS ONLY LASTS FOR ABOUT 2 HOURS. I WAS TOLD THAT THIS MED-ICATION ONLY HAS ABOUT AN 4 TO 6 HALF-LIFE AND THAT IS WHY IT ONLY HELPS ME FOR ABOUT 2 HOURS. THEN SECONDLY, SHE INCREASED MY SEROQUEL FROM 100 MG IN THE MORNING TO 200 MG. THEN SHE INCREASED MY SEROQUEL FROM 200 MG AT BEDTIME TO 400 MG. YOU CAN FIND THIS ORDER BY SPEAKING TO DR. KOHL, THE MEDICAL DIRECTOR. I WOULD GREATLY APPRICIATE IF THIS NEW TREATMENT PLAN CAN BE PUT INTO EFFECT AS SOON AS POSSIBLE, AND IF YOU WOULD PLEASE UNDRSTAND AND ACCEPT THE HELP THAT I AM RECIEVING FROM GINGER BRASUELL, APRN-C OF THE PANHANDLE MENTAL HEALTH CENTER. SHE HAS WORKED WITH ME FOR OVER TWO YEARS, AND HAS PUT IN A GREAT DEAL OF TIME AND EFFORT INTO TREATING ME. I KNOW IN THE PAST YOU HAVE REFUSED TO TREAT ME FOR MY CONDITION THAT WAS DIAGNOISED BY A COUPLE DIFFERENT DOCTORS. SO WITHOUT HAVING TO GO THROUGH THOSE WARS WITH YOU, I WOULD GREATLY RESPECT OF YOU TO ALLOW THE NEW RESTRUCTURE, WHICH WAS ORDERED BY GINGER BRASUELL, APRN-C OF THE PANHANDLE MENTAL HEALTH CENTER. I GIVE YOU PERMISSION TO CONTACT HER TO VERIFY THE RESTRUSTURE. HER INFORMATION IS INCLUDED WITH THIS LETTER. I THANK YOU FOR ALL YOUR TIME AND SERVICES SINCERELY,

Appendix I

NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES

INMATE INTERVIEW REQUEST

TO: DR. ELLIOTT / BAGLEY — MEDICAL UNIT DATE: 2005/06/APR

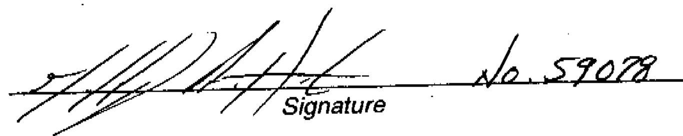
FROM: MR. JEFFREY A. HESSLER No. 59078 (NAME / NUMBER) N.S.P. (FACILITY) 4D-05 (LOCATION)

WORK LOCATION: UNIT STAFF:

MESSAGE: YES, WOULD YOU PLEASE AUTHORIZE ME ANOTHER BOTTLE / REFILLS OF MY RX FOR TREATMENT FOR MY HEADACHES: ALL INFORMATION BELOW. I WOULD GREATLY APPRICIATE THIS REQUEST AND I THANK YOU FOR ALL YOUR TIME AND SERVICES IN HANDLING THIS MATTER.

RX #: 877154
- GENACED TABLETS
- DR. ELLIOTT / BAGLEY

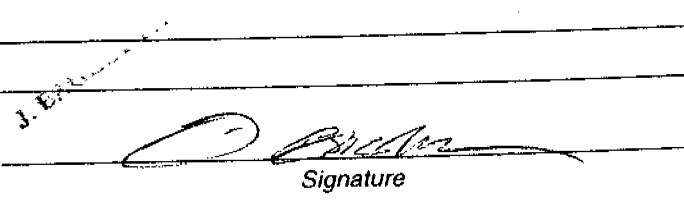
— THANK-YOU. —


Signature No. 59078

ORIGINAL – DCS Employee
YELLOW – Inmate
Both copies need to be submitted for response.

REPLY:

4/7 - ordered.



4/7/05 — Date — Signature

DCS-A-adm-013 (rev. 2/97)

Appendix I

NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES

INMATE INTERVIEW REQUEST

TO: DR. ELLIOTT / BAGLEY — MEDICAL UNIT DATE: 2005/06/APR

FROM: MR. JEFFREY A. HESSLER No. 59078 N.S.P. 4D-05
NAME / NUMBER FACILITY LOCATION

WORK LOCATION: UNIT STAFF:

MESSAGE: YES, WOULD YOU PLEASE AUTHORIZE ME ANOTHER BOTTLE / REFILLS OF MY RX FOR TREATMENT FOR MY HEADACHES: ALL INFORMATION BELOW. I WOULD GREATLY APPRICIATE THIS REQUEST AND I THANK YOU FOR ALL YOUR TIME AND SERVICES IN HANDLING THIS MATTER.

RX #: 877154
- GENACED TABLETS
- DR. ELLIOTT / BAGLEY

— THANK-YOU. —

[signature] No. 59078
Signature

ORIGINAL – DCS Employee
YELLOW – Inmate
Both copies need to be submitted for response.

REPLY:

4/7 - ordered.

4/7/05 [signature]
Date Signature

DCS-A-adm-013 (rev. 2/97) Appendix I

NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES

INMATE INTERVIEW REQUEST

TO: DR. ELLIOTT/ BAGLEY

DATE: 2005/22/FEB

FROM: MR.JEFFREY A. HESSLER No. 59078 — NAME / NUMBER

N.S.P. — FACILITY

4D-05 — LOCATION

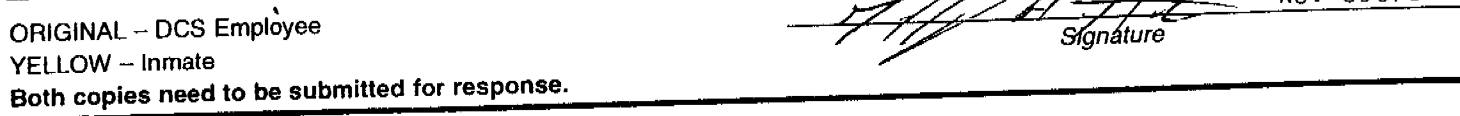
WORK LOCATION: ______ UNIT STAFF: ______

MESSAGE: YES, ON 2005/20/FEB I SENT A REQUEST FORM TO YOU ASKING FOR YOUR ASSISTANCE IN HELPING ME OBTAIN AGAIN ANOTHER BOTTLE OF THE FOLLOWING RX. FOR SOME REASON YOU FAILED TO READ MY FULL STATEMENT. I HAD TOLD YOU MY REASONS FOR THE RX. WHICH INCLUDED AS FOLLOWS. I GREATLY REQUEST THIS REQUEST FOR THIS RX. DUE TO I SUFFER FROM SEVERE CONGESTION BROUGHT ON BY THE TIME OF SEASON AND FROM MY TREATMENT MEDICATION "SEROQUEL". I ALSO SUFFER FROM TIME TO TIME DRYNESS OF MY EYES AND ITCHINESS. I ALSO ADVISED YOU ON A FEW POINTS ON HOW THIS TREATMENT MEDICATION HELPS ME GREATLY.TO GET TO MY POINT OF THIS KITE IS THAT YOU RESPONDED TO MY REQUEST BY STATING AS FOLLOWS."THIS MEDICATION-ACTIFEED IS NOW AVAILABLE ON MY UNIT WITHOUT A PRESCRIPTION. HOWEVER, I STATED IN THAT REQUEST AND I AM STATING IT AGAIN. I UNDERSTAND THAT WE ARE ABLE TO OBTAIN COLD PILLS ON THE UNIT, HOWEVER WE ARE ONLY ABLE TO GET "ONE TABLET" OFF OF THE "SUPPLY CART". THE SUPPLY CART ONLY COMES AROUND "ONCE A DAY". SO I AM "NOT" ABLE TO OBTAIN A TABLET WHEN THE ONSETS COME ABOUT. SO THE POINT IS I AM ONLY ABLE TO GET "ONE" COLD PILL A DAY, DUE TO THE STAFF ONLY GIVES IT OUT DURING SUPPLY CART TIME WHICH IS "ONLY" ONCE A DAY. SO I WOULD GREATLY APPRICIATE YOUR HELP IN PRESCRIBING THIS TREATMENT MEDICATION TO ME AGAIN? I THANK YOU FOR YOUR FULL UNDERSTANDING IN THIS REQUEST AND ALL YOUR HELP, TIME, AND SERVICES. THANK YOU. (RX: TRIPOL/PSEUDO 2.5MG/60MG TABS)

[signature] No. 59078

Signature

ORIGINAL – DCS Employee
YELLOW – Inmate



Both copies need to be submitted for response.

REPLY: You may take Actifed every 4 hours as needed. Contacted H.U & they stated you may ask for pills at other times such as 0600 HRS – 1200 HRS – + 1600 HRS – when cart does not come around. You will receive the pills after a request when staff can accomodate request. Rekite if continues to be problem – but this RX is not available by prescription anylonger

Signature [signature]

Date 2/23/05

DCS-A-adm-013 (rev. 2/97)

Appendix I

NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES

INMATE INTERVIEW REQUEST

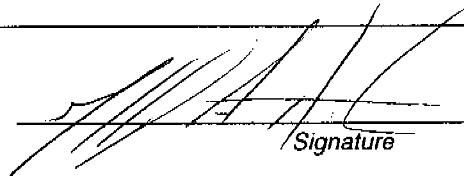
TO: DR. ELLIOTT / BAGLEY -[MEDICAL UNIT]- DATE: 2005/21/FEB

FROM: MR. JEFFREY A. HESSLER No. 59078 | N.S.P. | 4D-05
NAME / NUMBER | FACILITY | LOCATION

WORK LOCATION: UNIT STAFF:

MESSAGE: YES, WOULD YOU PLEASE PRESCRIBE ME SOMETHING TO HELP ME WITH SEVERE HEART-BURN AND ACID REFLUX? I HAVE TRIED THE ANTACIDS ON THE UNIT, HOWEVER MOST OF THE TIME THEY DON'T FULLY RELIEVE MY SEVERE HEARTBURN, LET ALONE THE ACID REFLUX. ALSO I AM ONLY ALLOWED TO GET ONE PACKAGE OFF THE SUPPLY CART, WHICH ONLY COMES AROUND ONCE IN A DAYS TIME. I HAVE ALSO TRIED ROLAIDS FROM THE CANTEEN, WHICH WORK AS WELL AS THE ANT-ACIDS FROM THE UNIT, BUT MOST OF THE TIME THE CANTEEN IS OUT OF STOCK. I REALLY NEED TO HAVE SOMETHING ON HAND TO HELP ME TO RELIEVE WHEN THESE ATTACKS OCCUR. THIS HAPPENS A FEW TIMES A DAY, AND AT TIMES PREVENTS ME FROM GETTING ANY SLEEP. I ALSO WAKE WITH SEVERE HEARTBURN FROM TIME TO TIME. I RESPECTFULLY WOULD APRICIATE YOUR HELP IN THIS MATTER AND I THANK YOU FOR ALL YOUR HELP, TIME, AND SERVICES.

THANK YOU.



Signature No. 59078

ORIGINAL – DCS Employee
YELLOW – Inmate
Both copies need to be submitted for response.

REPLY:

Ordered

Date Signature

DCS-A-adm-013 (rev. 2/97)

Appendix I

NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES

INMATE INTERVIEW REQUEST

TO: DR. ELLIOTT / BAGLEY -[MEDICAL UNIT]- DATE: 2005/20/FEB

FROM: MR. JEFFREY A. HESSLER No. 59078 (NAME / NUMBER) N.S.P. (FACILITY) 4D-05 (LOCATION)

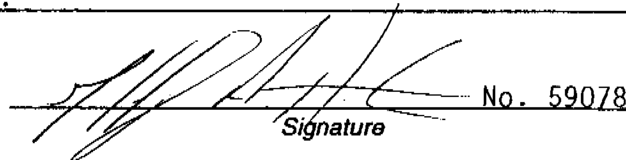
WORK LOCATION: UNIT STAFF:

MESSAGE: YES, WOULD YOU PLEASE AUTHORIZE ME ANOTHER BOTTLE OF THE FOLLOWING RX? THE REASON I GREATLY REQUEST THIS RX, IS DUE TO I SUFFER FROM SEVERE CONGESTION BROUGHT ON BY THE TIME OF SEASON AND FROM MY TREATMENT MEDICATION "SEROQUEL". I ALSO SUFFER FROM TIME TO TIME DRYNESS OF MY EYES AND ITCHINESS. I HAVE USED USED THIS TREATMENT MEDICATION AND IT WORKS WELL TO RELIEVE MY SYMPTOMS AND SINCE I WILL HAVE IT ON HAND, HELPS ME TO GAIN THE RELIEVE AT ANY TIME WHEN THINGS START UP. THIS TREATMENT MEDICATION HELPS ME TO SLEEP BETTER, DUE TO I WAKE ALOT FROM SUFFERING FROM SEVERE CONGESTION AND IF I TAKE A ½ TO ONE TABLET BEFORE GOING TO BED, I SEEM TO SLEEP BETTER. I UNDERSTAND THAT WE ARE ABLE TO OBTAIN COLD PILLS ON THE UNIT, HOWEVER WE ARE ONLY ABLE TO GET ONE TABLET OFF OF SUPPLY CART. THE SUPPLY CART ONLY COMES AROUND ONCE A DAY. SO I AM NOT ABLE TO OBTAIN A TABLET WHEN THE ONSETS COME ABOUT. SO I WOULD GREATLY APPRICIATE YOUR FULL HELP IN THIS REQUEST AND I THANK YOU FOR ALL YOUR HELP, UNDERSTANDING, TIME, AND SERVICES.

**** RX : TRIPROL/PSEUDO 2.5MG/60MG TABLETS.

THANK YOU.

ORIGINAL – DCS Employee
YELLOW – Inmate
Both copies need to be submitted for response.



Signature No. 59078

REPLY: This medication - Actifed - is now available on your unit without a prescription.

2/22/05

Date

Signature

DCS-A-adm-013 (rev. 2/97)

Appendix I

NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES

INMATE INTERVIEW REQUEST

TO: DR. ELLIOTT / BAGLEY — MEDICAL UNIT DATE: 2005/09/FEB

FROM: MR. JEFFREY A. HESSLER No. 59078 (NAME / NUMBER) N.S.P. (FACILITY) 40-05 (LOCATION)

WORK LOCATION: UNIT STAFF:

MESSAGE: YES, DR. KAMAL TRIED ME ON A TREATMENT MEDICATION FOR MY PANIC ATTACKS & ANXIETY & STRESS. BUT UNFORTUNELY IT DIDN'T HELP ME IN THOSE AREAS, SO DR. KAMAL TOOK ME OFF OF THIS MEDICATION. HOWEVER, THIS MEDICATION KINDA HELPED MY HEADACHES THAT I AM SUFFERING FROM, WHICH I HAVE ADDRESSED MANY TIMES TO MEDICAL AND ALSO THIS TREATMENT MEDICATION HAS SHOWN TO KEEP MY BLOOD PRESSURE DOWN, AND WORKS BETTER THAN THE LINSONPRIL THAT I WAS PUT ON FOR BLOOD PRESSURE. I HAVE STOPPED USEING LINSONPRIL A FEW MONTHS AGO. SINCE DR. KAMAL IS ONLY A PSYCHRIATRIST, HE HAS STATED TO ME TO KITE YOU TO GET YOUR AUTHORIZATION FOR ME TO CONTINUE ON THE FOLLOWING TREATMENT MEDICATION. I WOULD GREATLY APPRICATE THIS REQUEST AND I THANKYOU FOR YOUR HELP, TIME, AND SERVICES.

RX #: 863691
PROPANOLOL 40 MG TABS.

THANKYOU.

[signature] 59078
Signature

ORIGINAL – DCS Employee
YELLOW – Inmate
Both copies need to be submitted for response.

REPLY:

Sick Call to evaluate BP

2/10 – [illegible]

J. BAGLEY PA-C

[signature]

Date 2/10/05 Signature [signature]

DCS-A-adm-013 (rev. 2/97)

Appendix I

274 Neb. 478

Supreme Court of Nebraska.

STATE of Nebraska, Appellee

v.

Jeffrey HESSLER, Appellant.

No. S–05–629.

|

Nov. 30, 2007.

Synopsis

Background: Defendant was convicted by a jury in the District Court, Scotts Bluff County, Randall L. Lippstreu, J., of first degree murder, kidnapping, first degree sexual assault on a child, and use of a firearm to commit a felony and was sentenced to death. Defendant appealed.

Holdings: The Supreme Court, Miller-Lerman, J., held that:

[1] denial of defendant's motion to plead guilty to felony murder was not an abuse of discretion;

[2] use of defendant's prior sexual assault of different victim to prove the aggravating circumstance that defendant had a prior history of serious assaultive criminal activity was not an abuse of discretion;

[3] trial court's failure to excuse four jurors for cause did not constitute reversible error;

[4] denial of defendant's motion to change venue was not an abuse of discretion;

[5] trial court was not required to conduct competency hearing to determine whether defendant was competent to waive counsel during sentencing hearing; and

[6] waiver of counsel during sentencing hearing was knowing, voluntary, and intelligent.

Affirmed.

West Headnotes (30)

[1] **Criminal Law** Plea of Guilty

Criminal Law Amendments and rulings as to indictment or pleas

A trial court is given discretion as to whether to accept a guilty plea; an appellate court will overturn that decision only where there is an abuse of discretion.

1 Cases that cite this headnote

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[2] **Criminal Law** Selection and impaneling
Jury Discretion of court
The retention or rejection of a venireperson as a juror is a matter of discretion with the trial court and is subject to reversal only when clearly wrong.

1 Cases that cite this headnote

[3] **Criminal Law** Discretion of court
Criminal Law Change of venue
A motion for change of venue is addressed to the discretion of the trial judge, whose ruling will not be disturbed absent an abuse of discretion.

1 Cases that cite this headnote

[4] **Criminal Law** Constitutional issues in general
The constitutionality of a statute is a question of law, regarding which the Nebraska Supreme Court is obligated to reach a conclusion independent of the determination reached by the trial court.

[5] **Criminal Law** Failure or Refusal to Give Instructions
To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.

3 Cases that cite this headnote

[6] **Criminal Law** Counsel
In determining whether a defendant's waiver of counsel was voluntary, knowing, and intelligent, an appellate court applies a clearly erroneous standard of review.

2 Cases that cite this headnote

[7] **Criminal Law** Requisites and Proceedings for Entry
Trial court denial of defendant's motion to plead guilty to felony murder was not an abuse of discretion; the State originally charged defendant with premeditated murder and felony murder, and the trial court determined that if the guilty plea to felony murder was accepted there would be confusion as to whether defendant should thereafter be tried for premeditated murder.

[8] **Criminal Law** Right to plead guilty; mental competence
Criminal Law Plea of No Contest or Nolo Contendere
A criminal defendant has no absolute right to have his or her plea of guilty or nolo contendere accepted even if the plea is voluntarily and intelligently made.

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[9] **Criminal Law** Amendments and rulings as to indictment or pleas

The Supreme Court will overturn a decision on whether to accept a plea of guilty only where there is an abuse of discretion.

1 Cases that cite this headnote

[10] **Criminal Law** Discretion of Lower Court

A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition.

1 Cases that cite this headnote

[11] **Sentencing and Punishment** Nature, degree, or seriousness of other offense

The trial court's use of defendant's prior sexual assault of different victim to prove the aggravating circumstance that defendant had a prior history of serious assaultive criminal activity was not an abuse of discretion, in prosecution for first degree murder and other crimes; the use of the prior offense to prove an aggravating circumstance did not increase the penalty for the prior offense and did not expose defendant to new jeopardy for the offense. Neb.Rev.St. § 29–2523(1)(a).

2 Cases that cite this headnote

[12] **Double Jeopardy** Enhanced offense or punishment

The use of a prior offense to prove an aggravating circumstance did not increase the penalty for the prior offense and did not expose the defendant to new jeopardy for such offense. U.S.C.A. Const.Amend. 5; Neb.Rev.St. § 29–2523(1)(a).

[13] **Criminal Law** Overruling challenges to jurors

The trial court's failure to excuse four jurors for cause did not constitute reversible error, in first degree murder prosecution, where the four jurors were removed by defendant and the State's use of peremptory challenges and did not actually sit on the jury.

1 Cases that cite this headnote

[14] **Criminal Law** Overruling challenges to jurors

The erroneous overruling of a challenge for cause will not warrant reversal unless it is shown on appeal that an objectionable juror was forced upon the challenging party and sat upon the jury after the party exhausted his or her peremptory challenges.

2 Cases that cite this headnote

[15] **Jury** Belief of juror that opinion will not affect verdict in general

The trial court's failure to excuse juror for cause was not clearly erroneous, in prosecution for first degree murder, even though juror initially stated that he had formed an opinion regarding defendant's guilt; juror stated that his opinion was not so strong that he could not set it aside and take an oath to render a fair and impartial verdict, and juror indicated that he understood that the State had the burden of proving defendant guilty. Neb.Rev.St. § 29–2006(2).

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1 Cases that cite this headnote

[16] **Criminal Law** Selection and impaneling

In decisions regarding challenges to potential jurors, deference to the trial court is appropriate because it is in a position to assess the demeanor of the venire, and of the individuals who compose it, a factor of critical importance in assessing the attitude and qualifications of potential jurors.

[17] **Criminal Law** Particular offenses

Trial court denial of defendant's motion to change venue was not an abuse of discretion, in prosecution for first degree murder and other crimes; defendant did not offer evidence regarding newspaper stories or other publicity regarding the case, and an impartial jury as selected to hear case.

1 Cases that cite this headnote

[18] **Sentencing and Punishment** Procedure

The state death penalty statutes were not rendered unconstitutional due to the limited role the statutes gave the jury in capital sentencing; no authority required that a jury find aggravating circumstances, find mitigating circumstances, weigh aggravating and mitigating circumstances, or have further input into determining the sentence. Neb.Rev.St. §§ 29–2520, 29–2521.

3 Cases that cite this headnote

[19] **Sentencing and Punishment** Instructions

The trial court's failure to provide defendant's requested jury instruction in the aggravation phase of the trial that would have required the jury to unanimously find facts supporting each alleged aggravating circumstance and to set forth such findings in writing did not prejudice defendant, in prosecution for first degree murder and other crimes; the court instructed the jury that in order to find that an aggravating circumstance existed, it needed to "unanimously agree beyond a reasonable doubt that an aggravating circumstance is true" and "unanimously decide that the state proved each essential element of an aggravating circumstance beyond a reasonable doubt," and no statute required the jury to make written findings of facts or to be unanimous regarding the specific facts that supported its verdict. Neb.Rev.St. §§ 29–2520(4)(f),29–2521(2).

2 Cases that cite this headnote

[20] **Sentencing and Punishment** Hearing

Trial court was not required to conduct competency hearing to determine whether defendant was competent to waive counsel during first degree murder sentencing hearing; the proceedings did not provide reason to doubt defendant's competence to waive counsel, defense counsel never challenged defendant's competence to stand trial, and pleadings filed by defendant indicated that he understood the factual nature of the proceedings against him, and the potential consequences of such proceedings.

2 Cases that cite this headnote

[21] **Criminal Law** Capacity and requisites in general

Criminal Law Waiver of right to counsel

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The two-part inquiry into whether a court should accept a defendant's waiver of counsel is, first, a determination that the defendant is competent to waive counsel and, second, a determination that the waiver is knowing, intelligent, and voluntary. U.S.C.A. Const.Amend. 6.

3 Cases that cite this headnote

[22] **Criminal Law** Right to plead guilty; mental competence

Criminal Law Waiver of right to counsel

A court is not required to make a competency determination in every case in which a defendant seeks to plead guilty or to waive his or her right to counsel; a competency determination is necessary only when the court has reason to doubt the defendant's competence. U.S.C.A. Const.Amend. 6.

2 Cases that cite this headnote

[23] **Sentencing and Punishment** Counsel

Defendant's waiver of counsel during the sentencing hearing of first degree murder trial was knowing, voluntary, and intelligent; defendant was represented by counsel throughout the guilt and aggravation phases of trial, the court questioned defendant extensively regarding his knowledge of his right to counsel and the consequences of waiving counsel, and defendant informed the court that he was not being coerced into waiving counsel. U.S.C.A. Const.Amend. 6.

[24] **Criminal Law** Capacity and requisites in general

When a criminal defendant has waived the right to counsel, the Supreme Court reviews the record to determine whether under the totality of the circumstances, the defendant was sufficiently aware of his or her right to counsel and the possible consequences of his or her decision to forgo the aid of counsel. U.S.C.A. Const.Amend. 6.

2 Cases that cite this headnote

[25] **Sentencing and Punishment** Admissibility

Sentencing panel had the authority to consider the records of the guilt and aggravation phases of trial and to use such evidence to determine defendant's sentences, in prosecution for first degree murder and other offenses; statute provided that evidence could be presented as to any matter that the judge deemed relevant to mitigation and sentence excessiveness. Neb.Rev.St. § 29–2521(2, 3).

2 Cases that cite this headnote

[26] **Sentencing and Punishment** Applicability of rules of evidence in general

The sentencing phase is separate and apart from the trial phase, and the traditional rules of evidence may be relaxed following conviction so that the sentencing authority can receive all information pertinent to the imposition of sentence.

1 Cases that cite this headnote

[27] **Sentencing and Punishment** Discretion of court

A sentencing court has broad discretion as to the source and type of evidence and information which may be used in determining the kind and extent of the punishment to be imposed, and evidence may be presented as to any matter that the court deems relevant to the sentence.

2 Cases that cite this headnote

[28] **Sentencing and Punishment** Admissibility

The sentencing court, in imposing the death penalty, has the statutory authority to consider the trial record.

[29] **Sentencing and Punishment** Proportionality

Sentence of death for first degree murder was proportionate to sentences imposed in similar cases. Neb.Rev.St. § 29–2523(1)(a, b, d).

3 Cases that cite this headnote

[30] **Sentencing and Punishment** Proportionality

Proportionality review looks only to other cases in which the death penalty has been imposed and requires the Nebraska Supreme Court to compare the aggravating and mitigating circumstances of a case with those present in other cases in which the death penalty was imposed, and ensure that the sentence imposed in a case is no greater than those imposed in other cases with the same or similar circumstances. Neb.Rev.St. § 29–2521.03.

5 Cases that cite this headnote

****409** *Syllabus by the Court*

***478** 1. **Pleas: Appeal and Error.** A trial court is given discretion as to whether to accept a guilty plea; an appellate court will overturn that decision only where there is an abuse of discretion.

2. **Trial: Juries: Appeal and Error.** The retention or rejection of a venireperson as a juror is a matter of discretion with the trial court and is subject to reversal only when clearly wrong.

3. **Venue: Appeal and Error.** A motion for change of venue is addressed to the discretion of the trial judge, whose ruling will not be disturbed absent an abuse of discretion.

4. **Constitutional Law: Statutes:** Appeal and Error. The constitutionality of a statute is a question of law, regarding which the Nebraska Supreme Court is obligated to reach a conclusion independent of the determination reached by the trial court.

****410** 5. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.

6. **Right to Counsel: Waiver: Appeal and Error.** In determining whether a defendant's waiver of counsel was voluntary, knowing, and intelligent, an appellate court applies a “clearly erroneous” standard of review.

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7. **Criminal Law: Pleas.** A criminal defendant has no absolute right to have his or her plea of guilty or nolo contendere accepted even if the plea is voluntarily and intelligently made.

8. **Judges: Words and Phrases.** A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving ***479** a litigant of a substantial right and denying a just result in matters submitted for disposition.

9. **Double Jeopardy: Prior Convictions.** The use of a prior offense to prove an aggravating circumstance under Neb.Rev.Stat. § 29–2523(1)(a) (Cum.Supp.2006) does not increase the penalty for the prior offense and does not expose the defendant to new jeopardy for such offense. Because the use of evidence of a prior offense to prove an aggravating circumstance under § 29–2523(1)(a) does not expose the defendant to new jeopardy for the prior offense, such use does not violate the Double Jeopardy Clause.

10. **Jurors: Appeal and Error.** The erroneous overruling of a challenge for cause will not warrant reversal unless it is shown on appeal that an objectionable juror was forced upon the challenging party and sat upon the jury after the party exhausted his or her peremptory challenges.

11. **Trial: Juries.** In decisions regarding challenges to potential jurors, deference to the trial court is appropriate because it is in a position to assess the demeanor of the venire, and of the individuals who compose it, a factor of critical importance in assessing the attitude and qualifications of potential jurors.

12. **Right to Counsel: Waiver.** The two-part inquiry into whether a court should accept a defendant's waiver of counsel is, first, a determination that the defendant is competent to waive counsel and, second, a determination that the waiver is knowing, intelligent, and voluntary.

13. **Trial: Mental Competency: Pleas: Right to Counsel: Waiver.** A court is not required to make a competency determination in every case in which a defendant seeks to plead guilty or to waive his or her right to counsel. As in any criminal case, a competency determination is necessary only when the court has reason to doubt the defendant's competence.

14. **Sentences: Rules of Evidence.** The sentencing phase is separate and apart from the trial phase, and the traditional rules of evidence may be relaxed following conviction so that the sentencing authority can receive all information pertinent to the imposition of sentence.

15. **Courts: Sentences: Rules of Evidence.** A sentencing court has broad discretion as to the source and type of evidence and information which may be used in determining the kind and extent of the punishment to be imposed, and evidence may be presented as to any matter that the court deems relevant to the sentence.

16. **Death Penalty: Records.** The sentencing court, in imposing the death ****411** penalty, has the statutory authority to consider the trial record.

17. **Sentences: Death Penalty: Aggravating and Mitigating Circumstances: Appeal and Error.** Proportionality review under Neb.Rev.Stat. § 29–2521.03 (Cum.Supp.2006) looks only to other cases in which the death penalty has been imposed and requires the Nebraska Supreme Court to compare the aggravating and mitigating circumstances of a case with those present in other cases in which the death penalty was imposed, and ensure that the sentence imposed in a case is no greater than those imposed in other cases with the same or similar circumstances.

Attorneys and Law Firms

James R. Mowbray and Jeffery A. Pickens, of Nebraska Commission on Public Advocacy, for appellant.

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

WRIGHT, CONNOLLY, GERRARD, STEPHAN, McCORMACK, and MILLER–LERMAN, JJ., and HANNON, Judge, Retired.

MILLER–LERMAN, J.

***480** I. NATURE OF CASE

Jeffrey Hessler was convicted in the district court for Scotts Bluff County of first degree murder, kidnapping, first degree sexual assault on a child, and use of a firearm to commit a felony. Following Hessler's conviction for first degree murder, the jury found that three statutory aggravating circumstances existed. After the convictions and findings of aggravating circumstances but prior to sentencing, the court granted Hessler's pro se request to waive counsel for the remainder of the case. Hessler appeared pro se at the sentencing proceeding. In its sentencing order, the sentencing panel accepted the jury's verdicts finding that three statutory aggravating circumstances existed. The panel further concluded that no statutory or nonstatutory mitigating factors were established, that mitigating factors did not approach or exceed the weight of the aggravating circumstances, and that a death sentence would not be excessive or disproportionate to sentences previously imposed in similar circumstances. The panel therefore sentenced Hessler to death for first degree murder; to life imprisonment without parole for kidnapping; to 40 to 50 years' imprisonment for sexual assault; and to 20 to 25 years' imprisonment for the firearms conviction, with each sentence to be served consecutively to the others.

This automatic appeal followed. After Hessler filed a pro se brief assigning no error, we appointed counsel to represent Hessler on appeal. Appointed counsel filed a brief assigning various errors with respect to the guilt, aggravation, and sentencing phases of the trial. We affirm Hessler's convictions and sentences.

***481** II. STATEMENT OF FACTS

On the morning of February 11, 2003, 15–year–old Heather Guerrero left her home in Gering, Nebraska, to make deliveries on her newspaper route. Heather never returned home. A search was conducted, and on the morning of February 12, Heather's body was found in the basement of an abandoned house near Lake Minatare, Nebraska.

During the investigation of Heather's disappearance, a witness who was walking his dog on the morning of February 11, 2003, reported that he had heard a scream and had seen a silver or tan Nissan Altima drive by at a high rate of speed. A car matching that description belonged to a friend of Hessler's who had allowed Hessler to drive the car. A search of the car revealed three boxes of live ammunition, ****412** some spent casings, and Hessler's wallet. After police questioned Hessler, Hessler gave police his semiautomatic handgun. In response to interrogation, Hessler admitted to having sex with Heather but asserted that it was consensual. Hessler said that after Heather indicated she would not keep the encounter secret, he "freaked out," took her to the basement of the abandoned house, and shot her.

On February 26, 2003, the State filed an information charging Hessler with five counts in connection with the death of Heather: count I, premeditated murder; count II, felony murder; count III, kidnapping; count IV, first degree sexual assault; and count V, use of a firearm to commit a felony. In connection with counts I and II, the State gave notice of aggravating circumstances and alleged that under Neb.Rev.Stat. § 29–2523 (Cum.Supp.2006), (1) Hessler had a substantial prior history of serious assaultive or terrorizing criminal activity (§ 29–2523(1)(a)); (2) the murder was committed in an effort to conceal the commission of the crimes of the kidnapping and sexual assault of Heather and the sexual assault of another girl, J.B. (§ 29–2523(1)(b)); and (3) the murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence (§ 29–2523(1)(d)).

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***482** On May 19, 2003, Hessler made an oral motion to plead guilty to count II, felony murder, and to count IV, first degree sexual assault. The court responded that it would deny the motion until it had time to research the issue. Hessler filed a written motion to plead guilty on June 4, and a hearing was held June 18. The court denied the motion in an order dated July 25. The court stated that Hessler did not have an absolute right to have his plea accepted and that accepting the plea would cause more uncertainty than finality because both counts I and II charged Hessler with first degree murder and accepting a plea on one of the counts would create confusion as to whether trial was necessary or permitted on the other count. Hessler attempted to appeal the July 25 order, but this court dismissed the appeal for lack of jurisdiction. *State v. Hessler,* 267 Neb. xxii (No. S–03–967, Feb. 11, 2004).

On April 9, 2004, Hessler filed a motion to plead guilty to the count of felony murder and to all remaining counts other than premeditated murder. A hearing on the motion was scheduled for April 14. On that day, the State filed a motion to dismiss the count of felony murder. At the hearing, the court first considered the State's motion to dismiss. The court sustained the motion to dismiss the count of felony murder and then denied Hessler's motion to plead guilty to that count. Hessler declined to plead guilty to the remaining counts. Hessler attempted to appeal the April 14 order, but this court again dismissed the appeal. *State v. Hessler,* 268 Neb. xxiv (No. S–04–497, Sept. 1, 2004), *cert. denied* 543 U.S. 1161, 125 S.Ct. 1320, 161 L.Ed.2d 131 (2005).

On October 6, 2004, Hessler filed a plea in bar in which he asserted that he had previously been convicted and sentenced for an offense relating to another victim which he claimed was an element of the capital murder charge set forth in this case. During the investigation of the death of Heather, police linked Hessler to the August 20, 2002, sexual assault of J.B., who, like Heather, was a teenage girl who was delivering newspapers at the time she was assaulted. The State charged Hessler in connection with the sexual assault of J.B. After the crimes were committed and the charges filed in the instant case, on July 14, 2003, Hessler pled no contest to first degree sexual assault of ***483** J.B. Hessler ****413** was sentenced on August 21 to imprisonment for 30 to 42 years for the sexual assault of J.B. He did not appeal the conviction or sentence. In the plea in bar filed in this case, Hessler asserted that the Double Jeopardy Clause barred use of the sexual assault of J.B. to prove an aggravating circumstance in the present case because such use would subject him to a second prosecution and punishment for the sexual assault of J.B. On November 17, 2004, the court overruled Hessler's plea in bar. Hessler attempted to appeal the denial, but on November 24, we dismissed the appeal for lack of jurisdiction. *State v. Hessler,* 268 Neb. xxv (No. S–04–1304, Nov. 24, 2004).

Jury selection in Hessler's trial began November 29, 2004. Jury summonses had been sent to 250 people, and potential jurors were sent a supplemental questionnaire which asked, inter alia, whether the potential juror had formed an opinion about Hessler's guilt or innocence and the basis for such opinion. The venire included 107 potential jurors. The court excused 65 potential jurors, leaving 42 potential jurors upon whom the parties could exercise peremptory challenges. Hessler made motions to excuse six potential jurors for cause. The court overruled the motions after questioning the potential jurors regarding, inter alia, whether they could set aside their opinions and render impartial verdicts. Hessler later used peremptory challenges to remove four of the potential jurors he had sought to excuse, and the State used a peremptory challenge to remove one.

Only one of the six potential jurors that Hessler moved to excuse became a member of the jury. That juror was R.C.F. In response to questioning by the court and by Hessler, R.C.F. stated that he had formed the opinion that Hessler was guilty based on newspaper reports. R.C.F. initially stated, “I do not presume that he's innocent, no, sir.” However, R.C.F. stated in response to questioning from the court that his opinion was not so strong that he could not set it aside and take an oath to render a fair and impartial verdict based solely upon the evidence presented at trial and the instructions given by the court. In reply to a question from Hessler's counsel, R.C.F. responded that Hessler did not need to prove his innocence and stated: “If I felt without a shadow of a doubt that he was guilty I would ***484** say so but I would not ... Hessler does not prove that he's innocent or guilty, I realize that comes from the State, not from [the defense].” R.C.F. also stated:

> I believe in the death penalty but I also believe in a fair and impartial trial and I can set aside those feelings and those opinions and listen to the facts.
>
> ....

... [I]f the facts are such that the death penalty is not warranted, then I could be very fair and impartial.

Following examination of the venire but before the exercise of peremptory challenges, Hessler made an oral motion to change venue. Hessler asserted that he could not receive a fair trial in Scotts Bluff County and argued that his assertion was supported by responses to questionnaires indicating that a large number of potential jurors had formed the opinion that he was guilty. The court overruled the motion to change venue.

At trial, a videotape of the February 12, 2003, interrogation of Hessler was played to the jury. Other evidence at trial included, inter alia, testimony of a firearms examiner who opined that Hessler's gun fired the cartridge found near Heather's body, testimony of a medical technologist who testified that DNA testing could not exclude Heather as a contributor to DNA found on Hessler's clothing and in the car ****414** Hessler was using, and testimony of a doctor who performed an autopsy on Heather's body and who testified that a gunshot wound to the head caused her death and that injuries to her vaginal area could be consistent with either forcible penetration or consensual sex. On December 7, 2004, the jury returned verdicts of guilty on the counts of first degree murder, kidnapping, first degree sexual assault, and use of a firearm to commit a felony.

Following the verdicts, and prior to and during the aggravation hearing, Hessler filed various motions, including, inter alia, motions to declare the Nebraska death penalty statutes unconstitutional on various bases, a motion based on double jeopardy grounds to prohibit the State from presenting evidence at the aggravation hearing regarding the sexual assault of J.B. and from seeking a verdict on the aggravating circumstance found in § 29–2523(1)(a) based on such evidence, and a motion for a jury instruction at the aggravation hearing requiring the jury ***485** to make unanimous, written findings of fact in support of any aggravating circumstances the jury found to exist. Although Hessler later waived counsel, Hessler was represented by counsel in connection with the court's consideration of his various motions, including his constitutional challenge to the death penalty statutes, his Double Jeopardy challenge involving J.B., and his jury instruction request. The court overruled the motions. At the aggravation hearing, the State presented, inter alia, evidence of the sexual assault of J.B. On December 9, 2004, the jury found that all three aggravating circumstances alleged by the State existed.

On March 31, 2005, Hessler filed a pro se motion titled "Motion to Invoke My Sixth–Amendment Right and to Expurgate the Advocate of the State and to Delineate Myself." The court had a hearing scheduled to consider various motions filed by counsel on the day Hessler filed his pro se motion. At the hearing, the court first considered Hessler's pro se motion. After questioning Hessler, the court determined that by the motion, Hessler sought to remove his counsel, waive his right to counsel, and appear pro se at sentencing. The court then questioned Hessler about his "current status and mental abilities" which included questions regarding his age, his education, and his understanding of the proceedings. In response to the questions, Hessler indicated that he had been prescribed unspecified "antipsychotics" and "antihypnotic" drugs but that he had not taken his medications that particular day. The court further questioned Hessler regarding his understanding of his right to counsel, of what he would forgo if he waived his right to counsel, and of what would be required of him in order to represent himself in further proceedings. In response to questions regarding his ability to represent himself against the State, which would be represented by attorneys, Hessler said, "I've got God on my side, God's guiding me.... I just go by what God tells me." He also indicated that he was not concerned "because [his] wishes are the same as the State." Hessler further indicated that although he was not generally dissatisfied with his counsel's performance, he wanted to represent himself because counsel "refuse [d] to comply with [his] wishes." Following such questioning, the court found that Hessler had "knowingly, ***486** intelligently, [and] voluntarily decided to represent himself in this case." The court nevertheless instructed counsel to prepare for the sentencing hearing and to be on standby at sentencing in the event that Hessler changed his mind and wished to consult with counsel. Although Hessler indicated his intent to withdraw various motions made by counsel, ****415** including a motion challenging electrocution as a method of execution, the court allowed counsel to present evidence in support of such motions in order to make a complete record.

On May 16, 2005, the sentencing proceeding was held before a sentencing panel that included the trial judge and two other judges. Hessler appeared pro se but his former counsel was present on standby. At the beginning of the hearing, the presiding judge again questioned Hessler regarding his decision to appear pro se. Hessler indicated that he still wanted to appear pro

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se, that he understood his right to counsel and the consequences of proceeding without counsel, and that no one had made promises or threats or done anything to get him to waive counsel. The court again stated its finding that Hessler knowingly, intelligently, and voluntarily waived his right to counsel but told Hessler that he could inform the court if at any time he wished to be assisted by standby counsel.

At the sentencing hearing, Hessler offered into evidence, and the court received, a document signed by Hessler titled "Interlocutory Statement of the Defendant." In the document, Hessler requested the sentencing panel "to bring the Justice and Wrath of GOD onto myself." He further requested that "the True Intentions of This Court follows GOD'S COMMANDS and My Wishes and that is to ONLY to be the following.... I, JEFFREY ALAN HESSLER, MUST BE PUT TO DEATH WITHOUT DIALECTIC."

The document continued for several more pages in which Hessler discussed his remorse for the death of Heather, his opinion that death was the proper punishment, his feelings regarding the progress of the trial, and his life in general. Hessler offered no other evidence which would bear on mitigating circumstances or other factors to be considered in connection with sentencing.

The State asked the court "to take judicial notice of all the exhibits that were received at trial and the aggravation hearing ***487** as well." The court had previously received into evidence "a two volume transcript of the proceedings of both the trial and the aggravation hearing," and the court stated that it would "make all the exhibits from the two proceedings available for the three-judge panel for their consideration and deliberations." The State offered no further evidence. Hessler declined to make a closing statement in his own behalf. The State made a closing statement in which it urged the panel to impose a death sentence for first degree murder and to impose the maximum sentences on the other counts. Hessler declined to rebut the State's closing statement. The court informed Hessler that he had a "final opportunity to make a statement to the court" regarding anything he wanted the court to consider. Hessler declined to make a statement.

Later that day, the sentencing panel announced its decision and entered its sentencing order. The panel recited the relevant facts and, finding the facts true beyond a reasonable doubt, unanimously accepted the jury's verdicts. The panel next found that the three asserted aggravating circumstances existed beyond a reasonable doubt and unanimously accepted the jury's findings regarding aggravating circumstances. The panel then considered mitigating circumstances but unanimously concluded that no statutory and no nonstatutory mitigating factors were established in this case. The panel further unanimously concluded beyond a reasonable doubt that an imposition of death would not be excessive or disproportionate to sentences previously imposed in similar circumstances. The panel finally ****416** unanimously concluded that (1) aggravating circumstances justified imposition of a death sentence; (2) mitigating circumstances did not approach or exceed the weight given to aggravating circumstances; and (3) a death sentence would not be excessive or disproportionate to penalties imposed in similar cases, considering both the crime and the defendant. The panel imposed sentences of death for first degree murder, life imprisonment without parole for kidnapping, imprisonment for 40 to 50 years for first degree sexual assault on a child, and imprisonment of 20 to 25 years for use of a firearm to commit a felony. The panel ordered that each sentence be served consecutively to the others.

***488** This automatic appeal followed.

III. ASSIGNMENTS OF ERROR

On August 9, 2005, Hessler filed a pro se appellant's brief in which he assigned no error. Instead, in the brief, Hessler repeated much of the content of the document he entered into evidence at the sentencing hearing. A replacement brief order was issued by the Clerk of the Supreme Court, and in response, Hessler informed this court that he did not want nor did he file this appeal and that he would not file any more briefs or other statements. This court on September 28, 2005, appointed counsel to represent Hessler in this automatic appeal. Counsel subsequently filed an appellant's brief on Hessler's behalf.

Hessler, through counsel, asserts that the district court erred in (1) denying his motions to plead guilty to felony murder; (2) violating the Double Jeopardy Clause by allowing the State to use the sexual assault of J.B. to prove an aggravating circumstance; (3) failing to excuse for cause potential jurors who had formed opinions regarding Hessler's guilt; (4) overruling his motion to change venue; (5) overruling his motion to declare Nebraska death penalty statutes unconstitutional on various bases, including (a) vagueness of aggravating circumstances described in § 29–2523(1)(a), (b), and (d); (b) failure to require or allow the jury to determine mitigating circumstances, to assign a weight to aggravating circumstances, and to determine the sentence; and (c) unconstitutionally penalizing a defendant's exercise of the right to a jury trial on aggravating circumstances; (6) denying his request for an instruction in the aggravation phase requiring the jury to make unanimous, written findings of fact to support each aggravating circumstance found to exist; (7) granting his request to waive counsel and appear pro se at sentencing and failing to make a determination regarding his competency to waive counsel; and (8) receiving into evidence at sentencing the records of the guilt and aggravation phases of the trial.

IV. STANDARDS OF REVIEW

[1] A trial court is given discretion as to whether to accept a guilty plea; this court will overturn that decision only where ***489** there is an abuse of discretion. *State v. Brown,* 268 Neb. 943, 689 N.W.2d 347 (2004).

[2] The retention or rejection of a venireperson as a juror is a matter of discretion with the trial court and is subject to reversal only when clearly wrong. *State v. Quintana,* 261 Neb. 38, 621 N.W.2d 121 (2001).

[3] A motion for change of venue is addressed to the discretion of the trial judge, whose ruling will not be disturbed absent an abuse of discretion. *State v. Rodriguez,* 272 Neb. 930, 726 N.W.2d 157 (2007).

****417** **[4]** The constitutionality of a statute is a question of law, regarding which the Nebraska Supreme Court is obligated to reach a conclusion independent of the determination reached by the trial court. *State v. Marrs,* 272 Neb. 573, 723 N.W.2d 499 (2006).

[5] To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction. *State v. Blair,* 272 Neb. 951, 726 N.W.2d 185 (2007).

[6] In determining whether a defendant's waiver of counsel was voluntary, knowing, and intelligent, an appellate court applies a “clearly erroneous” standard of review. *State v. Gunther,* 271 Neb. 874, 716 N.W.2d 691 (2006).

V. ANALYSIS

1. No Abuse of Discretion in Denial of Motions to Plead Guilty to Felony Murder

[7] In his first assignment of error, Hessler asserts that the district court erred when it denied his motions to plead guilty to the felony murder count. Although the assignment of error mentions the granting of the State's motion to dismiss the felony murder count, Hessler makes no specific argument regarding the dismissal. We therefore treat the assignment of error as limited to the denial of Hessler's motions to plead guilty to felony murder. See *In re Interest of Michael U.,* 273 Neb. 198, 728 N.W.2d 116 (2007) (errors assigned but not argued will not be ***490** addressed by appellate court). A trial court is given discretion as to whether to accept a guilty plea; this court will overturn that decision only where there is an abuse of discretion. *Brown, supra.* We conclude that the court did not abuse its discretion when it denied Hessler's motions to plead guilty to felony murder.

As noted above, the State originally charged Hessler with both premeditated murder and felony murder and denominated the two as separate counts in the information. Hessler twice moved the court to allow him to plead guilty to felony murder, and the court denied both motions. In its order denying Hessler's first motion to plead guilty, the court noted that if the plea to felony murder were accepted, there would be confusion as to whether Hessler should thereafter also be tried for premeditated murder. The court determined that accepting the plea "would create more uncertainty than finality, would not eliminate the need for a full trial of the facts either at the evidentiary phase or the sentencing phase, and would not significantly save costs or court time."

Hessler asserts that the court's reasons are clearly untenable. He argues that the State assumed the risk of his pleading to one count when it charged premeditated murder and felony murder as separate counts and that the court acted as a safety net and unfairly assisted the prosecution by saving it from this tactical error. Hessler asserts that he had valid reasons to plead guilty to felony murder, including a strategy to avoid the death penalty, his feelings of remorse and desire to accept responsibility for the crime, and a desire to spare his family and the victim's family the emotional trauma of a trial.

[8] **[9]** **[10]** With regard to whether courts must accept a defendant's plea of guilty, we have stated:

> It is well established that a criminal defendant has no absolute right to have ****418** his or her plea of guilty or nolo contendere accepted even if the plea is voluntarily and intelligently made.... Our cases recognize that a trial court has a large measure of discretion in deciding whether to accept a guilty plea.

State v. Brown, 268 Neb. 943, 947, 689 N.W.2d 347, 351 (2004) (citations omitted). We stated in *Brown* that our jurisprudence ***491** grants trial courts "wide discretion in rejecting plea agreements for substantive reasons." 268 Neb. at 950, 689 N.W.2d at 352. This court will overturn a decision on whether to accept a plea of guilty only where there is an abuse of discretion. *Id.* A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition. *State v. Davlin,* 272 Neb. 139, 719 N.W.2d 243 (2006).

Although we do not necessarily agree with each substantive reason recited by the court, we find no abuse of discretion in the decision to deny the motions to plead guilty to felony murder. Hessler had no absolute right to plead guilty, see *Brown, supra,* and therefore, the ruling did not deprive him of a substantial right. Nor did the ruling deny Hessler a just result. Hessler argues that his desire to plead guilty to felony murder was part of a strategy to avoid the death penalty. However, felony murder and premeditated murder are both theories of first degree murder subject to the death penalty. See *State v. Nesbitt,* 264 Neb. 612, 633, 650 N.W.2d 766, 785 (2002) ("premeditated murder and felony murder are simply alternate methods of committing first degree murder"). Had Hessler pled guilty to felony murder, he still would have stood convicted of first degree murder and the death penalty still would have been a possible sentence. Also, a plea to felony murder would not necessarily have spared Hessler's family and the victim's family the emotional trauma of a trial on other counts. With the death penalty still a possible sentence, trial still would have been required on the aggravating circumstances, and the sentencing panel still would have been required to consider the circumstances of the crime. The State likely would have presented much of the evidence it presented in the guilt phase of the trial at the aggravation and sentencing phases if Hessler had been allowed to plead.

Because the denial did not deprive Hessler of a substantial right or a just result, we conclude that the court's denial of Hessler's motions to plead guilty to felony murder was within the court's "wide discretion." See *Brown, supra.* We reject Hessler's first assignment of error.

***492** 2. No Double Jeopardy Violation in Use of Prior Sexual Assault of Another Victim to Prove Aggravating Circumstance

[11] In his second assignment of error, Hessler asserts that the district court erred in various rulings. As Hessler argues this assignment of error, his general claim is that the court erred in allowing the State to use his prior sexual assault of J.B. to prove the aggravating circumstance of § 29–2533(1)(a), prior history of serious assaultive criminal activity, and that such use

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subjected him to a second punishment for that crime in violation of the Double Jeopardy Clause. We conclude that use of the prior sexual assault of J.B. to prove an aggravating circumstance did not violate the Double Jeopardy Clause.

Hessler argues that as the crime in the present case was charged, the sexual assault of J.B. was an element of the offense of capital murder, and that it violated the Double Jeopardy Clause to use the prior ****419** assault, for which he had already been tried and punished, as an element of another crime. In support of his argument, Hessler cites two U.S. Supreme Court cases, *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), and *Sattazahn v. Pennsylvania,* 537 U.S. 101, 123 S.Ct. 732, 154 L.Ed.2d 588 (2003). In *Ring,* the U.S. Supreme Court, in holding that the Sixth Amendment requires that aggravating circumstances be found by a jury, stated that "aggravating factors operate as 'the functional equivalent of an element of a greater offense.' " 536 U.S. at 609, 122 S.Ct. 2428 (quoting *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)). In *Sattazahn,* three justices of the Court cited and quoted *Ring* and stated that "for purposes of the Sixth Amendment's jury-trial guarantee, the underlying offense of 'murder' is a distinct, lesser included offense of 'murder plus one or more aggravating circumstances.' " 537 U.S. at 111, 123 S.Ct. 732. In determining whether the Double Jeopardy Clause applied to capital sentencing proceedings to determine the existence of aggravating circumstances, the three justices found no reason to distinguish between what constitutes an offense for Sixth Amendment jury purposes and what constitutes an offense for Fifth Amendment double jeopardy purposes. *Id.* Hessler argues ***493** that these statements in *Ring* and *Sattazahn* mean that aggravating circumstances are elements of the offense of capital murder and that therefore, the sexual assault of J.B., which was alleged as an aggravating circumstance, was a lesser-included offense of the capital murder of Heather.

We note initially that the Nebraska Legislature has provided that "the aggravating circumstances are not intended to constitute elements of the crime generally unless subsequently so required by the state or federal constitution." Neb.Rev.Stat. § 29–2519(2)(d) (Cum.Supp.2006). We do not believe that the explanatory comments in *Ring* and *Sattazahn* lead to the conclusion that an aggravating circumstance should be treated as an element of capital murder, and we reject Hessler's suggestion that we treat an aggravating circumstance as an element of capital murder. In *Ring,* the Court referred to aggravating circumstances as the "functional equivalents" of elements only for the purpose of resolving the question of whether a jury was required to find aggravating circumstances. In *Schriro v. Summerlin,* 542 U.S. 348, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004), the Court stated that the holding in *Ring* did not alter the range of conduct that the statutes at issue subjected to the death penalty, but instead altered the method for determining whether conduct was punishable by death by requiring a jury determination of aggravating circumstances. These statements in *Schriro* indicate that the Court did not consider aggravating circumstances to be substantive elements of the crime of capital murder. Instead, the Court considered aggravating circumstances as functional equivalents of elements for the limited purpose of determining whether Sixth Amendment jury guarantees extended to findings of aggravating circumstances.

Sattazahn v. Pennsylvania, 537 U.S. 101, 123 S.Ct. 732, 154 L.Ed.2d 588 (2003), also does not support Hessler's argument. The issue in *Sattazahn* was whether the Double Jeopardy Clause prohibited a second capital sentencing for the same crime. Three justices of the Court in *Sattazahn* stated, "If a jury unanimously concludes that a State has failed to meet its burden of proving the existence of one or more aggravating circumstances, double-jeopardy protections attach to that 'acquittal' on the offense of 'murder plus aggravating circumstance(s).' " ***494** ****420** 537 U.S. at 112, 123 S.Ct. 732. The three justices determined that double jeopardy protections would attach once a jury concluded that no aggravating circumstances existed and that therefore, a second capital sentencing would be prohibited. The Court in *Sattazahn* did not state that double jeopardy protections prohibited the use of evidence of prior crimes to establish an aggravating circumstance in a subsequent case involving a different crime. Furthermore, the portions of *Sattazahn* on which Hessler relies were from a section of the opinion that was joined by only three justices, and the views expressed by the three were not endorsed by a majority of the Court. See *State v. Mata,* 266 Neb. 668, 668 N.W.2d 448 (2003) (rejecting similar argument based on *Sattazahn*).

The issue in the present case is different from those in *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), and *Sattazahn, supra.* The issue here is whether evidence of a prior offense can be used to prove prior history as an aggravating circumstance in a capital trial involving a later offense. This question is more similar to the question of whether the sentence for a subsequent crime may be enhanced based on prior crimes. In *Witte v. United States,* 515 U.S. 389, 115 S.Ct. 2199, 132 L.Ed.2d

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351 (1995), the Court stated that the consideration of prior conduct in connection with sentencing for a subsequent offense does not result in additional punishment for such prior conduct. The Court stated that enhancement or recidivism statutes do not change the penalty imposed for the earlier offense and stated:

> In repeatedly upholding such recidivism statutes, we have rejected double jeopardy challenges because the enhanced punishment imposed for the later offense "is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes," but instead as "a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one."

515 U.S. at 400, 115 S.Ct. 2199.

[12] Under this reasoning, we determine that the use of a prior offense to prove an aggravating circumstance under § 29–2523(1)(a) does not increase the penalty for the prior offense and does not expose the defendant to new jeopardy for ***495** such offense. Instead, the finding of an aggravating circumstance is used to increase the potential punishment for the latest crime which in the present case is first degree murder. We therefore conclude that because the use of evidence of a prior offense to prove an aggravating circumstance under § 29–2523(1)(a) does not expose the defendant to new jeopardy for the prior offense, such use does not violate the Double Jeopardy Clause.

In sum, in the present case, evidence regarding the sexual assault of J.B. was used to prove that an aggravating circumstance existed and to enhance the potential punishment for Hessler's conviction for the first degree murder of Heather. Such evidence was not used to prove a substantive element of the crime of first degree murder, and the use of such evidence did not subject Hessler to additional punishment for the sexual assault of J.B. We conclude that the use of evidence of Hessler's sexual assault of J.B. did not violate the Double Jeopardy Clause and that Hessler's second assignment of error is without merit.

3. No Reversible Error in Overruling of Motions to Excuse Jurors for Cause

[13] In his third assignment of error, Hessler asserts that the district court erred when it overruled his motions to excuse various potential jurors for cause. The retention or rejection of a venireperson as a juror is a matter of discretion ****421** with the trial court and is subject to reversal only when clearly wrong. *State v. Quintana,* 261 Neb. 38, 621 N.W.2d 121 (2001). The court overruled Hessler's challenges with respect to six potential jurors, but in his brief, Hessler makes arguments with respect to only five of the six. Hessler argues that the five should have been excused for cause because each person had formed the opinion that Hessler was guilty and did not adequately demonstrate that he or she could act as an impartial juror despite such opinion. Only one of the five, R.C.F., actually became a member of the jury. Three were removed by Hessler's use of peremptory challenges, and one was removed by the State's use of a peremptory challenge. We conclude that reversal is not warranted based on those challenged individuals who did not become members of the jury and that the court did not err in overruling Hessler's motion to excuse R.C.F.

***496** Hessler argues that each potential juror should have been struck for cause pursuant to Neb.Rev.Stat. § 29–2006(2) (Reissue 1995), which states that good cause to challenge a juror includes that "he has formed or expressed an opinion as to the guilt or innocence of the accused." Section 29–2006(2) further provides that if a potential juror has formed an opinion, the court should examine him or her regarding the grounds for such opinion. If the opinion was formed based upon "conversations with witnesses of the transactions or reading reports of their testimony or hearing them testify," dismissal is mandatory. *Id.* See, also, *State v. Myers,* 190 Neb. 466, 209 N.W.2d 345 (1973). However, if the opinion was formed based on "reading newspaper statements, communications, comments or reports, or upon rumor or hearsay" then the person may still serve if (1) the potential juror "shall say on oath that he feels able, notwithstanding such opinion, to render an impartial verdict upon the law and the evidence" and (2) the court is satisfied that the potential juror "is impartial and will render such verdict." § 29–2006(2).

[14] We have stated that "the erroneous overruling of a challenge for cause will not warrant reversal unless it is shown on appeal that an objectionable juror was forced upon the challenging party and sat upon the jury after the party exhausted his

or her peremptory challenges." *State v. Quintana,* 261 Neb. at 52, 621 N.W.2d at 134. In this case, four of the five potential jurors that Hessler complains of on appeal were struck by the use of peremptory challenges. Under *Quintana,* there can be no reversal based on a challenge to a potential juror if that person was not ultimately included on the jury, even if the defendant was required to use a peremptory challenge to remove the person. Therefore, reversal is not warranted in this case based on the overruling of Hessler's challenges to those persons who did not become members of the jury.

[15] **[16]** The only challenged individual who became a member of the jury was R.C.F. Although R.C.F. initially stated that he had formed an opinion regarding Hessler's guilt, R.C.F. also stated that such opinion was based on newspaper reports and that his opinion was not so strong that he could not set it aside and take an oath to render a fair and impartial verdict. Although during questioning by defense counsel, R.C.F. stated that "I do ***497** not presume that he's innocent, no, sir," R.C.F. also said, inter alia, that "Hessler does not prove that he's innocent or guilty, I realize that comes from the State, not from [the defense]." Viewed in context, we believe that despite R.C.F.'s initial statements that he had formed an opinion and that he did not presume Hessler to be innocent, other later statements made by ****422** R.C.F. indicate he understood that as a juror, he needed to be and could be impartial, and that the State had the burden to prove Hessler guilty rather than Hessler's having the burden to prove himself innocent. We believe the court reasonably could have assessed R.C.F.'s statements and his demeanor and concluded that R.C.F. could render an impartial verdict. In this respect, we note that deference is given to a trial court's determinations in these matters. The U.S. Supreme Court recently stated that in decisions regarding challenges to potential jurors, "[d]eference to the trial court is appropriate because it is in a position to assess the demeanor of the venire, and of the individuals who compose it, a factor of critical importance in assessing the attitude and qualifications of potential jurors." *Uttecht v. Brown,* 551 U.S. 1, 127 S.Ct. 2218, 2224, 167 L.Ed.2d 1014 (2007). Based on our review of the questioning of R.C.F., and taking R.C.F.'s responses as a whole and giving proper deference to the court's assessment of R.C.F.'s demeanor, we conclude that the court was not clearly erroneous in overruling Hessler's motion to excuse R.C.F.

Reversal cannot be based on challenges to potential jurors who did not become members of the jury, and the court was not clearly wrong when it overruled the motion to excuse R.C.F. We therefore reject Hessler's third assignment of error.

4. No Error in Denial of Motion to Change Venue

[17] In his fourth assignment of error, Hessler asserts that the district court erred in denying his request to change venue on the basis that he could not receive a fair trial in Scotts Bluff County. A motion for change of venue is addressed to the discretion of the trial judge, whose ruling will not be disturbed absent an abuse of discretion. *State v. Rodriguez,* 272 Neb. 930, 726 N.W.2d 157 (2007). We conclude that the court did not abuse its discretion when it denied Hessler's request to change venue.

***498** Hessler did not move to change venue prior to jury selection, and he did not offer evidence regarding newspaper stories or other publicity regarding the crime. Instead, his arguments in favor of changing venue were based on voir dire examinations of potential jurors. Hessler noted that a large number of potential jurors had seen or heard reports of the crime and had formed opinions regarding Hessler's guilt. He argues on appeal that the court did not exercise sufficient care during jury selection because the court did not strike various persons for cause and because R.C.F. became a member of the jury. Hessler asserts that jury selection was complicated by the large number of persons who had formed opinions based on news reports, and he notes that many had to be excused based on such opinions. Hessler argues that the jury selection process demonstrated that "local conditions and pretrial publicity made it impossible for [him] to secure a fair and impartial jury in Scotts Bluff County," brief for appellant at 62, and that therefore, he was denied his right to an impartial jury.

In *State v. Quintana,* 261 Neb. 38, 54, 621 N.W.2d 121, 135 (2001), we noted that jurors who had heard publicity about the case "agreed that they could set aside any information that they knew about the case and that they would make decisions solely from what they heard in court." Because the record in *Quintana* showed that an impartial jury had been chosen, we concluded that the defendant had not shown that he could not receive a fair trial in the county at issue and that the court did not abuse its discretion in denying the defendant's motion to change venue.

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Similar to *Quintana,* we determine that Hessler has not shown that a change of ****423** venue was necessary, because an impartial jury was in fact selected, and that Hessler therefore did not show that he could not receive a fair trial in Scotts Bluff County. As noted above, R.C.F. was the only person actually on the jury of whom Hessler complains on appeal. As we determined above, the record shows that in response to questioning, R.C.F. indicated that he could render an impartial verdict. Hessler makes no other argument that the jury was not impartial; he argues only that it was difficult to select a jury because of alleged partiality in the venire.

***499** Because Hessler has not shown that his actual jury was partial, he has not shown that it was impossible to seat an impartial jury or that he could not receive a fair trial in Scotts Bluff County. We therefore conclude that the court did not abuse its discretion when it denied Hessler's motion for change of venue, and we reject his fourth assignment of error.

5. Death Penalty Statutes Not Shown to Be Unconstitutional

In his fifth assignment of error, Hessler asserts that the district court erred when it denied his motions to declare the Nebraska death penalty statutes unconstitutional. The constitutionality of a statute is a question of law, regarding which the Nebraska Supreme Court is obligated to reach a conclusion independent of the determination reached by the trial court. *State v. Marrs,* 272 Neb. 573, 723 N.W.2d 499 (2006). Hessler argues that the death penalty statutes are unconstitutional in various respects. He asserts first that the three statutory aggravating circumstances alleged in this case are unconstitutionally vague and indefinite. The aggravating circumstances alleged in this case were § 29–2523(1)(a), “substantial prior history of serious assaultive or terrorizing criminal activity”; § 29–2523(1)(b), “murder was committed in an effort to conceal the commission of a crime”; and § 29–2523(1)(d), murder that is “especially heinous, atrocious, [and] cruel.” Hessler also asserts that the death penalty statutes are unconstitutional with respect to the limited role the statutes give the jury in capital sentencing. He specifically argues that the statutes are unconstitutional in that they fail to allow the jury to consider mitigating circumstances, to assign a weight to aggravating circumstances, and to suggest, recommend, or determine whether a death sentence or a life sentence should be given. Hessler also argues that the statutory requirement that a sentencing panel determines the sentence even when a jury determines aggravating circumstances is an unconstitutional penalty on the defendant's exercise of his or her right to a jury trial in the aggravation phase. As a matter of law, we reject each of Hessler's assertions that the Nebraska death penalty statutes are unconstitutional.

***500** (a) Aggravating Circumstances

With respect to § 29–2523(1)(a), (b), and (d), Hessler asserts that each of these aggravating circumstances is unconstitutionally vague. We note that this court has previously rejected similar challenges regarding each of the aggravating circumstances. Challenges to § 29–2523(1)(a) were rejected in *State v. Bjorklund,* 258 Neb. 432, 604 N.W.2d 169 (2000); *State v. Ryan,* 248 Neb. 405, 534 N.W.2d 766 (1995); and *State v. Holtan,* 197 Neb. 544, 250 N.W.2d 876 (1977), *disapproved on other grounds, State v. Palmer,* 224 Neb. 282, 399 N.W.2d 706 (1986). Challenges to § 29–2523(1)(b) were rejected in *Bjorklund, supra; State v. Lotter,* 255 Neb. 456, 586 N.W.2d 591 (1998), modified 255 Neb. 889, 587 N.W.2d 673 (1999); and *State v. Moore,* 250 Neb. 805, 553 N.W.2d 120 (1996), disapproved on other grounds, *State v. Reeves,* 258 Neb. 511, 604 N.W.2d 151 (2000). And challenges to ****424** § 29–2523(1)(d) were rejected in *State v. Gales,* 269 Neb. 443, 694 N.W.2d 124 (2005); *Bjorklund, supra;* and *State v. Ryan,* 233 Neb. 74, 444 N.W.2d 610 (1989). Hessler has cited no subsequent federal or state authority that would call such rulings into question, and Hessler has not articulated any persuasive arguments why our prior reasoning is faulty or any other reason why this court should overrule such precedent. We therefore reject Hessler's arguments that the aggravating circumstances set forth in § 29–2523(1)(a), (b), and (d) are unconstitutionally vague and indefinite.

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(b) Jury's Role in Capital Sentencing

[18] Hessler's remaining arguments generally deal with the jury's role in capital sentencing. Under Nebraska death penalty sentencing statutes, after the guilt phase of the trial, the jury's only role in sentencing is to find whether aggravating circumstances exist. Pursuant to Neb.Rev.Stat. § 29–2520 (Cum.Supp.2006), a jury determines whether aggravating circumstances exist unless the defendant waives his or her right to such a jury determination. Pursuant to Neb.Rev.Stat. § 29–2521 (Cum.Supp.2006), after a jury has found aggravating circumstances or the defendant has waived the right to such jury determination, a panel of three judges determines the sentence, which ***501** determination includes finding mitigating circumstances, balancing aggravating and mitigating circumstances, and conducting a proportionality review.

Hessler asserts that the death penalty statutes are unconstitutional because they do not require the jury to (1) find mitigating circumstances; (2) weigh aggravating and mitigating circumstances; or (3) suggest, recommend, or determine whether a sentence of life or a sentence of death should be imposed. Hessler argues that the statutory scheme is "irrational, unworkable, incoherent, and incapable of rendering a fair and just determination of life and death" brief for appellant at 68, because the sentencing panel, which was not the fact finder during the aggravation phase, is not in as good a position as the jury to assign a weight to the aggravating circumstances, to weigh aggravating circumstances against mitigating circumstances, and to determine the sentence.

In *State v. Gales,* 265 Neb. 598, 658 N.W.2d 604 (2003) (*Gales I*), we noted that the U.S. Supreme Court in *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), held that there is a Sixth Amendment right to have a jury determine the existence of any aggravating circumstance upon which a capital sentence is based. However, we determined in *Gales I* that the holding in *Ring* was not so broad as to require that a jury make additional determinations with regard to capital sentencing. We stated that we did not read *Ring* or other authority "to require that the determination of mitigating circumstances, the balancing function, or proportionality review be undertaken by a jury." 265 Neb. at 628–29, 658 N.W.2d at 627. In *State v. Gales,* 269 Neb. 443, 694 N.W.2d 124 (2005) (*Gales II*), we again rejected an argument that a jury is required to determine mitigating circumstances and to have input into the appropriate sentence in capital cases. We determined that the defendant in *Gales II* presented no basis to reconsider our decision in *Gales I,* and we noted that later holdings in the U.S. Supreme Court, see *United States v. Booker,* 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), only reinforced our prior decision.

Similarly, in the present case, Hessler has cited no authority that would require us to reconsider our decisions in *Gales I* and *Gales II.* While *Ring* requires that a jury find aggravating ***502** circumstances, neither *Ring* nor other authority requires ****425** that a jury find mitigating circumstances, weigh aggravating and mitigating circumstances, or have further input into determining the sentence. We are not persuaded by Hessler's arguments, and in the absence of authority, we reject his assertions that a jury must make such determinations.

(c) Exercise of Right to Jury in Aggravation Phase

As a final challenge to the constitutionality of the death penalty statutes, Hessler asserts that the statutory scheme improperly penalizes a defendant's exercise of the right to have a jury find aggravating circumstances. Hessler argues that if a defendant prefers to have the same fact finder determine both the aggravating circumstances and the sentence, the defendant must waive the right to have a jury find aggravating circumstances and instead must allow the sentencing panel to find aggravating circumstances because the statutory scheme does not allow a jury to determine the sentence. Hessler argues that being forced to make such a choice unconstitutionally burdens the defendant's assertion of the right to a jury determination of aggravating circumstances.

Hessler relies on *United States v. Jackson,* 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968), to support this argument. In *Jackson,* the U.S. Supreme Court found unconstitutional a federal statutory provision that authorized the imposition of a death

sentence only when a jury recommended the death sentence. Under the statute, if the defendant waived jury trial or pled guilty, the maximum possible sentence the court could impose was a life sentence. The Court determined that the statutory provision was unconstitutional because it improperly coerced or encouraged the defendant to waive his or her Sixth Amendment right to a jury or his or her Fifth Amendment right to plead not guilty and because it needlessly penalized the defendant who asserted such rights.

We do not find Hessler's reliance on Jackson applicable or persuasive. Unlike *Jackson,* under the Nebraska death penalty statutes, a defendant cannot avoid the risk of a death penalty by waiving the right to a jury determination of aggravating circumstances; even if the defendant waived such right, the ***503** sentencing panel could still impose a death penalty. Under the statutory provision in *Jackson,* the defendant could completely avoid the death penalty by waiving a jury trial or by pleading guilty. Under the Nebraska statutes, there is no such direct benefit achieved at the expense of waiving the right to a jury as there was in *Jackson.* By waiving the right to a jury under the Nebraska statutes, the sole benefit is that the defendant avoids the circumstance wherein the jury as fact finder finds aggravating circumstances and the judicial panel as fact finder determines the sentence. While the sentencing panel might be more thoroughly versed about the case if it had also found aggravating circumstances, this does not mean that the sentencing panel would necessarily make a sentencing decision that was more favorable to the defendant. Unlike *Jackson,* in which the benefit to waiving the right to a jury was the elimination of exposure to the death penalty, the Nebraska statutory scheme does not provide a clear advantage to a defendant who waives his or her right to have a jury determine aggravating circumstances. The Nebraska statutory scheme does not improperly coerce or encourage a defendant to waive his or her right to a jury and does not penalize a defendant who asserts such right. We reject Hessler's argument that the statutory scheme is unconstitutional pursuant to *Jackson.*

****426** (d) Conclusion

Having concluded that each of Hessler's challenges to the constitutionality of Nebraska death penalty statutes is without merit, as a matter of law, we reject Hessler's fifth assignment of error.

6. No Error in Refusal of Instruction Requiring Jury to Make Unanimous, Written Findings of Fact in Aggravation Phase

[19] In his sixth assignment of error, Hessler asserts that the court erred when it refused his requested instruction in the aggravation phase of the trial that would have required the jury to unanimously find facts supporting each alleged aggravating circumstance and to set forth such findings in writing. To establish reversible error from a court's refusal to give a requested ***504** instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction. *State v. Blair,* 272 Neb. 951, 726 N.W.2d 185 (2007). We conclude that the court did not err in refusing the instruction, because the instruction did not accurately state the law and Hessler has not shown that he was prejudiced by the refusal to give the instruction.

Hessler requested an instruction to the jury in the aggravation phase which read:

> You, the jury, shall make written findings of fact based upon the trial of guilt and the aggravation hearing, identifying which, if any, of the alleged aggravating circumstances have been proven to exist beyond a reasonable doubt. Each finding of fact with respect to each alleged aggravating circumstance shall be unanimous. If you are unable to reach a unanimous finding of fact with respect to an aggravating circumstance, you must find that the State did not prove the alleged aggravating circumstance.

Hessler argues that the instruction was necessary to avoid the burden on the right to a jury trial found to be unconstitutional in *United States v. Jackson,* 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968). Hessler asserts that if the instruction were given, it could ameliorate the negative effects wherein the jury finds aggravating circumstances and the sentencing panel determines the sentences. He argues that when the jury finds aggravating circumstances, the sentencing panel is not adequately familiar with the

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facts underlying the aggravating circumstances to properly weigh such circumstances. Hessler also notes that if the sentencing panel made findings on aggravating circumstances, the panel would be statutorily required to be unanimous regarding the facts supporting an aggravating circumstance and to set forth such facts in a written order. Hessler argues that the jury should also be required to be unanimous regarding the specific facts that support an aggravating circumstance and that the jury should be required to set forth such facts in writing in order to better inform the sentencing panel's decision.

***505** We note that in the aggravation phase in this case, the court instructed the jury that in order to find that an aggravating circumstance existed, it needed to "unanimously agree beyond a reasonable doubt that an aggravating circumstance is true" and "unanimously decide that the state proved each essential element of an aggravating circumstance beyond a reasonable doubt." Because the court properly instructed the jury that it needed to be unanimous in finding that the State proved the existence of an aggravating circumstance and each element of such circumstance and that the Nebraska death penalty statutes require no more, Hessler ****427** has failed to demonstrate any error of law in the instruction given or prejudice from the failure to give the instruction he requested.

Nebraska statutes require that when the right to a jury determination of aggravating circumstances has been waived and the sentencing panel finds aggravating circumstances, the "panel shall make written findings of fact ... identifying which, if any, of the alleged aggravating circumstances have been proven" and that "[e]ach finding of fact with respect to each alleged aggravating circumstance shall be unanimous." § 29–2521(2). However, when the jury determines aggravating circumstances, the statutes provide only that the jury "shall deliberate and return a verdict as to the existence or nonexistence of each alleged aggravating circumstance," that "[e]ach aggravating circumstance shall be proved beyond a reasonable doubt," and that "[e]ach verdict with respect to each alleged aggravating circumstance shall be unanimous." § 29–2520(4)(f). The statutes do not require a jury to make written findings of fact or to be unanimous regarding the specific facts that support its verdict. The statutes require only that the jury return a verdict as to each alleged aggravating circumstance and that each such verdict be unanimous. The instructions given by the court in this case accurately stated the law, and the instruction requested by Hessler did not accurately state the law.

Hessler's reliance on *United States v. Jackson,* 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968), in connection with this assignment of error is not persuasive. As noted in connection with the previous assignment of error, Hessler asserts that there are inherent disadvantages in the situation where the jury finds ***506** aggravating circumstances and the sentencing panel determines the sentence and that such disadvantages coerce or encourage a defendant to waive his or her right to a jury determination of aggravating circumstances and needlessly penalize defendants who assert such right. Hessler asserts that if the jury were required to make unanimous written findings of fact, it would lessen these perceived disadvantages. As we concluded in connection with the previous assignment of error, the Nebraska statutes are not unconstitutional under *Jackson.* The statutes do not require unanimous written findings of fact, and no such requirement need be imposed in order to save the statutes from being unconstitutional.

Neither *Jackson* nor other authority requires that the jury make unanimous written findings of fact. Because the tendered instruction was not a correct statement of law and because Hessler has shown no prejudice, the court's refusal to give Hessler's requested instruction was not reversible error. We reject Hessler's sixth assignment of error.

7. District Court Did Not Err in Granting Hessler's Waiver of Right to Counsel and Allowing Him to Appear Pro Se at Sentencing

[20] Hessler, through appellate counsel, asserts that the district court erred when it granted his pro se motion to waive counsel and allowed him to appear pro se at the sentencing proceeding. He specifically claims that the court erred when it failed to conduct a hearing to determine his competency to waive counsel and when it found that he knowingly, voluntarily, and intelligently waived his right to counsel. On the record before us, we conclude that the court did not err in granting Hessler's motion to waive counsel.

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(a) Standards for Determining Whether Defendant May Waive Counsel

Hessler cites ****428** *Godinez v. Moran,* 509 U.S. 389, 113 S.Ct. 2680, 125 L.Ed.2d 321 (1993), and asserts that the inquiry into whether a defendant should be allowed to waive counsel is a two-step process in which the court considers, first, whether the defendant is competent to waive counsel and, second, whether ***507** the defendant has knowingly and voluntarily waived counsel. Hessler argues that the court failed to follow *Godinez* because the court did not sua sponte conduct a competency hearing and did not make an explicit finding that he was competent to waive counsel. He also claims that the Court erred when it determined that his waiver of counsel was made knowingly, voluntarily, and intelligently.

[21] In *Godinez,* the U.S. Supreme Court referred to what it described as a "two-part inquiry," 509 U.S. at 401, 113 S.Ct. 2680, into whether a court should accept a defendant's waiver of counsel. The Court indicated that where a defendant seeks to waive counsel, the trial court must be assured that the defendant is competent to do so and that "[i]n addition to determining that a defendant who seeks to plead guilty or waive counsel is competent, a trial court must satisfy itself that the waiver of his constitutional rights is knowing and voluntary." 509 U.S. at 400, 113 S.Ct. 2680. The two-part inquiry set forth in *Godinez* is therefore, first, a determination that the defendant is competent to waive counsel and, second, a determination that the waiver is knowing and voluntary.

[22] The Court in *Godinez* also stated that the standard for determining whether a defendant is competent to waive counsel is the same as the standard for determining whether a defendant is competent to stand trial. In this regard, the Court stated that the standard for competence is "whether the defendant has 'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding' and has 'a rational as well as factual understanding of the proceedings against him.' " 509 U.S. at 396, 113 S.Ct. 2680. See *People v. Halvorsen,* 42 Cal.4th 379, 165 P.3d 512, 64 Cal.Rptr.3d 721 (2007) (recognizing *Godinez'* holding that standard for competency to waive trial is same as standard for competency to stand trial where defendant argued that court should have had doubt regarding his competency to stand trial after court concluded he was incapable of representing himself). Finally, in a footnote in *Godinez,* the Court noted:

> We do not mean to suggest, of course, that a court is required to make a competency determination in every case in which a defendant seeks to plead guilty or to waive ***508** his right to counsel. As in any criminal case, a competency determination is necessary only when a court has reason to doubt the defendant's competence.

509 U.S. at 401 n. 13, 113 S.Ct. 2680.

In response to Hessler's arguments, the State asserts that the court's inquiry in this case met the requirements set forth in *State v. Dunster,* 262 Neb. 329, 631 N.W.2d 879 (2001), and that the record supported a finding that Hessler's waiver of counsel was made knowingly, voluntarily, and intelligently. In *Dunster,* we stated, "A defendant may waive the constitutional right to counsel, so long as the waiver is made knowingly, voluntarily, and intelligently." 262 Neb. at 349, 631 N.W.2d at 898. However, we also noted in *Dunster* that before granting the defendant's request to discharge counsel, defense counsel had questioned the defendant's competence to waive counsel and the trial court received evidence relative to the defendant's competence and determined that the defendant was competent. In concluding that the trial court in *Dunster* did not err in granting the request to ****429** discharge counsel, we determined that "[t]he record shows that [the defendant] was competent and his request to discharge counsel was made knowingly, intelligently, and voluntarily." 262 Neb. at 355, 631 N.W.2d at 902. Thus, as is apparent in *Dunster,* our jurisprudence is consistent with the two-part inquiry in *Godinez v. Moran,* 509 U.S. 389, 113 S.Ct. 2680, 125 L.Ed.2d 321 (1993), which requires both that the trial court be assured that the defendant is competent to waive counsel and that the waiver is made knowingly, voluntarily, and intelligently.

(b) On the Record Before Us, the District Court Did Not Have Reason to Doubt Hessler's Competence and No Competency Hearing Was Required

Although the analysis of whether a defendant may waive counsel is a two-part inquiry involving competence and waiver, a formal competency determination is not necessary in every case in which a defendant seeks to waive counsel. As noted above, pursuant to footnote 13 in *Godinez,* an explicit competency determination is necessary only when the court has reason to doubt the defendant's competence. Unlike *Dunster,* ***509** *supra,* trial counsel in this case did not move for a competency hearing as a predicate to the court's consideration of Hessler's motion to waive counsel. Limiting our consideration only to the record on appeal, as we must, we determine that the proceedings did not provide reason to doubt Hessler's competence to waive counsel and that the court did not err when a competency hearing was not conducted, nor did it err when it did not make an explicit determination that Hessler was competent to waive counsel.

As noted above, the standard for determining competence is "whether the defendant has 'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding' and has 'a rational as well as factual understanding of the proceedings against him.' " *Godinez,* 509 U.S. at 396, 113 S.Ct. 2680. When Hessler filed his motion to waive counsel, he was still represented by counsel, and counsel did not move for a determination of Hessler's competence at that time, compare *Dunster, supra,* and there is no indication in the record on appeal that counsel had earlier challenged Hessler's competence to stand trial. There was no indication throughout pretrial proceedings and the trial itself that Hessler was unable to consult with counsel with a reasonable degree of rational understanding. To the contrary, the record contains references to consultations between Hessler and his counsel, both prior to and during the trial.

With respect to whether Hessler had a rational and factual understanding of the proceedings, we note that the court had observed Hessler over many months prior to trial and at trial, and that although Hessler indicated he was not on medications on the day the court considered his request to waive counsel, the court was in a position to be satisfied that any medication Hessler was or was not on did not compromise his present competence to waive counsel. See *LaHood v. State,* 171 S.W.3d 613 (Tex.App.2005) (stating, generally, that although defendant was on medication, competency inquiry not mandated where there was no indication of present inability to communicate or understand proceeding). See, also, *U.S. v. Dalman,* 994 F.2d 537 (8th Cir.1993). We also note that although Hessler's pro se filings, including his motion to waive counsel, contain irrelevant matter, they nevertheless indicate that Hessler understood the ***510** factual nature of the proceedings against him and the potential consequences of such proceedings. Such filings indicate that he had a rational and factual ****430** understanding that he was being prosecuted for the death of Heather and that the death penalty was a potential punishment for that crime. See *People v. Halvorsen,* 42 Cal.4th 379, 403, 165 P.3d 512, 529, 64 Cal.Rptr.3d 721, 741 (2007) (concluding that although defendant's " 'rambling, marginally relevant speeches' " might evidence some form of mental illness, record did not show that defendant lacked understanding of nature of proceedings and that more than " 'bizarre actions' " or " 'bizarre statements' " were required to raise doubt about competence). On the record before us and under the standard set forth in *Godinez v. Moran,* 509 U.S. 389, 113 S.Ct. 2680, 125 L.Ed.2d 321 (1993), we believe that the trial court could reasonably determine that Hessler appeared to have an understanding of the proceedings and that therefore, the court did not have reason to doubt Hessler's competence to waive counsel. Thus, on this record, the court did not err when it did not declare a doubt regarding Hessler's competence and did not conduct a competency hearing, nor did it err when it did not make an explicit competency determination in connection with Hessler's motion to waive counsel.

(c) District Court Did Not Err in Finding Hessler's Waiver of Counsel Was Knowing, Voluntary, and Intelligent

[23] **[24]** Hessler claims that even if he was competent, his waiver of counsel was not knowing, voluntary, and intelligent. We determine that the court was not clearly erroneous in finding that his waiver of counsel was knowing, voluntary, and intelligent. When a criminal defendant has waived the right to counsel, this court reviews the record to determine whether under the totality of the circumstances, the defendant was sufficiently aware of his or her right to counsel and the possible consequences of his or her decision to forgo the aid of counsel. *State v. Gunther,* 271 Neb. 874, 716 N.W.2d 691 (2006).

We note that Hessler was represented by counsel throughout pretrial proceedings and during the guilt and aggravation phases of his trial. In other cases, we have found that the fact that a defendant has had the advice of counsel throughout the ***511**

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prosecution is an indication that the defendant's waiver of counsel and election to proceed pro se was knowing and voluntary. *Gunther, supra; State v. Wilson,* 252 Neb. 637, 564 N.W.2d 241 (1997). The fact that Hessler was represented at earlier stages indicates that he was aware of his right to counsel and that he knew what he would forgo if he waived counsel.

We also note that the court questioned Hessler extensively regarding his knowledge of his right to counsel and the consequences of waiving counsel. Hessler's answers indicated that he was aware of his right to counsel and that he knew the consequences of waiving such right. The court also questioned Hessler regarding whether his waiver was voluntary, and Hessler's answers indicated that he was not being forced or coerced into waiving counsel. Based on our review of the record, we conclude that under the totality of the circumstances, Hessler was aware of his right to counsel and the consequences of waiving such right and that the court was not clearly erroneous in its determination that Hessler's waiver of counsel was knowing, voluntary, and intelligent.

(d) Conclusion

On the record before us, we cannot say that the court erred when it did not sua sponte conduct a competency hearing, and there was no error when the court did not make an explicit determination that Hessler was competent to waive counsel. Further, the court was not clearly erroneous in its determination that Hessler's waiver was knowing, voluntary, and intelligent. We therefore conclude that on this record, ****431** the district court did not err in granting Hessler's motion to waive counsel and appear pro se at sentencing. Accordingly, we reject Hessler's seventh assignment of error.

8. No Error in Receipt of Records of Guilt and Aggravation Phases of Trial at Sentencing Proceeding

[25] In his final assignment of error, Hessler asserts that the district court erred in the sentencing phase by receiving into evidence the records of the guilt and aggravation phases of the trial and in using such evidence to determine his sentences. Hessler ***512** argues that the sentencing panel's receipt of such evidence was erroneous because it was not authorized by statute. We conclude that the court was authorized to consider such evidence and did not err in admitting it.

[26] **[27]** **[28]** We have stated that the sentencing phase is separate and apart from the trial phase and that the traditional rules of evidence may be relaxed following conviction so that the sentencing authority can receive all information pertinent to the imposition of sentence. *State v. Bjorklund,* 258 Neb. 432, 604 N.W.2d 169 (2000). We have also stated that a sentencing court has broad discretion as to the source and type of evidence and information which may be used in determining the kind and extent of the punishment to be imposed, and evidence may be presented as to any matter that the court deems relevant to the sentence. *Id.* We have also stated that “the sentencing court, in imposing the death penalty, has ... the statutory *authority* to consider the trial record.” *State v. Ryan,* 248 Neb. 405, 442, 534 N.W.2d 766, 790 (1995). We cited § 29–2521 (Reissue 1995) as the statutory basis for these statements in *Ryan* and *Bjorklund.* The version of § 29–2521 in effect at the time of *Ryan* and *Bjorklund* provided that in the sentencing proceeding, “evidence may be presented as to any matter that the court deems relevant to sentence,” including matters relating to aggravating and mitigating circumstances, and that “[a]ny such evidence which the court deems to have probative value may be received.” As indicated below, we believe the principles referred to in *Ryan* and *Bjorklund* apply under the current version of Nebraska's death penalty statutes.

In the current version, § 29–2521(2) (Cum.Supp.2006) addresses sentencing determination proceedings wherein the defendant has waived the right to a jury determination of aggravating circumstances and the sentencing panel decides aggravating circumstances. Section 29–2521(2) contains provisions similar to those quoted above from the prior version. Section 29–2521(3) of the current version addresses sentencing determination proceedings wherein, as in the present case, a jury has found aggravating circumstances and a sentencing ***513** panel determines the sentence. Section 29–2521(3) provides that evidence may be presented as to “any matter that the presiding judge deems relevant to ... mitigation ... and ... sentence excessiveness or disproportionality.” The statute further provides that “[a]ny such evidence which the presiding judge deems to have probative

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value may be received." We determine that the current version of § 29–2521(2) and (3) gives the sentencing panel statutory authority to consider the trial record.

Section 29–2521 gives broad discretion to the presiding judge of the sentencing panel to determine the type of evidence relevant to the sentencing determination. In addition, the death penalty statutes read as a whole make clear that the sentencing panel needs to consider evidence of the crime and of aggravating circumstances in order to properly perform its ****432** balancing and proportionality sentencing functions. Under Neb.Rev.Stat. § 29–2522 (Cum.Supp.2006), the sentencing panel is required to determine whether aggravating circumstances justify imposition of a death sentence, whether mitigating circumstances exceed or approach the weight of aggravating circumstances, and whether a death sentence is excessive or disproportionate to the penalty imposed in similar cases "considering both the crime and the defendant." The records of the guilt and aggravation phases of the trial clearly have probative value regarding these issues. The sentencing panel needs to understand the circumstances of the crime to "consider ... both the crime and the defendant." *Id.* The record of the guilt phase provides information regarding the circumstances of the crime which aids the sentencing panel in determining whether a death sentence would be excessive or disproportionate, and the record of the aggravation phase assists the sentencing panel in the conduct of its balancing duty. Receipt of the records of the guilt and aggravation phases is authorized under the discretion given the presiding judge under § 29–2521.

We conclude that the court in this case did not err by receiving evidence of the guilt and aggravation phases of the trial in the sentencing hearing. We reject Hessler's final assignment of error.

***514** 9. Hessler's Sentence Is Proportional to Those in Similar Cases

[29] **[30]** Finally, we are required to determine whether the death sentence imposed on Hessler is proportional to sentences imposed in similar cases. Pursuant to Neb.Rev.Stat. § 29–2521.03 (Reissue 1995), this court is required, upon appeal, to determine the propriety of a death sentence by conducting a proportionality review. Proportionality review under § 29–2521.03 looks only to other cases in which the death penalty has been imposed, *State v. Bjorklund,* 258 Neb. 432, 604 N.W.2d 169 (2000), and requires us to compare the aggravating and mitigating circumstances of this case with those present in other cases in which the death penalty was imposed, and ensure that the sentence imposed in this case is no greater than those imposed in other cases with the same or similar circumstances, *State v. Gales,* 269 Neb. 443, 694 N.W.2d 124 (2005). See, *State v. Dunster,* 262 Neb. 329, 631 N.W.2d 879 (2001); *Bjorklund, supra; State v. Lotter,* 255 Neb. 456, 586 N.W.2d 591 (1998).

In the present case, the State alleged, and the jury and sentencing panel found, the existence of three statutory aggravating circumstances: (1) Hessler had a substantial prior history of serious assaultive or terrorizing criminal activity (§ 29–2523(1)(a)); (2) the murder was committed in an effort to conceal the commission of the crimes of the kidnapping and sexual assault of Heather and the sexual assault of another girl, J.B. (§ 29–2523(1)(b)); and (3) the murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence (§ 29–2523(1)(d)). At sentencing, Hessler offered no evidence other than his "Interlocutory Statement of the Defendant" that would bear on mitigating circumstances, and the sentencing panel concluded that no statutory and no nonstatutory mitigating circumstances were established. The panel also concluded that a death sentence would not be excessive or disproportionate to penalties imposed in similar cases, considering both the crime and the defendant.

We have reviewed our relevant decisions on direct appeal from other cases in which aggravating circumstances were found and the death penalty was imposed by the district court. See, e.g., *Gales, supra* (and ****433** cases gathered therein). In considering ***515** proportionality in its sentencing order, the sentencing panel in this case took particular note of the circumstances presented in *Gales, supra; State v. Joubert,* 224 Neb. 411, 399 N.W.2d 237 (1986); *Bjorklund, supra; and State v. Otey,* 205 Neb. 90, 287 N.W.2d 36 (1979). We also find these cases to be of particular note in considering the proportionality of the sentence in this case. In *Gales,* the defendant was convicted of the first degree murder of a 13–year–old girl he had sexually assaulted, the first degree murder of the girl's 7–year–old brother, and the attempted second degree murder of the children's mother. The

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defendant in *Gales* was sentenced to death based upon, inter alia, aggravating circumstances under § 29–2523(1)(a), (b), and (d). In *Joubert,* the defendant was convicted of the first degree murders of a 13–year–old boy and a 12–year–old boy, both of whom disappeared during early morning hours, one while delivering newspapers. The defendant in *Joubert* was sentenced to death based upon aggravating circumstances under § 29–2523(1)(a), (b), and (d). In *Bjorklund,* the defendant was convicted of the first degree murder of an 18–year–old girl he had sexually assaulted, and the defendant was sentenced to death based upon aggravating circumstances under § 29–2523(1)(a), (b), and (d). In *Otey,* the defendant was convicted of the first degree murder of a woman he had sexually assaulted, and the defendant was sentenced to death based upon aggravating circumstances under § 29–2523(1)(b) and (d). We further note *State v. Williams,* 205 Neb. 56, 287 N.W.2d 18 (1979), in which the defendant was convicted of the first degree murders of two women and the sexual assault of another woman and was sentenced to death based upon aggravating circumstances similar to those in the present case. Having reviewed the relevant cases, we find that the imposition of the death sentence in this case is proportional to that in the same or similar circumstances.

VI. CONCLUSION

Having rejected each of Hessler's assignments of error and having found that the death sentence imposed in this case is proportional, we affirm Hessler's convictions and sentences.

Affirmed.

HEAVICAN, C.J., not participating.

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