

APPENDIX

A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

BRANDON J. WEATHERS,

Petitioner,

vs.

SCOTT FRAKES,

Respondent.

8:19CV296

MEMORANDUM AND ORDER

Petitioner brings this § 2254 case challenging his conviction for two counts of first-degree sexual assault of a child. Filing no. 9, the amended petition, is the operative pleading. The Respondent has answered and filed the relevant state court records. The matter has been briefed. I now deny the amended petition and dismiss this matter with prejudice for the reasons stated below.

Brief Overview

There is absolutely no doubt that Petitioner had intimate relations with a 13-year-old girl for whom he was supposed to be serving as a foster father. The child miscarried at the hospital and DNA established the paternity of Petitioner. To say the least, his defense at the jury trial was bizarre.

After dissatisfaction with his two public defenders¹, and despite repeated warnings by the trial judge, *e.g.*, Filing no. 11-16 at CM/ECF p. 50, Petitioner decided to represent himself. He testified and claimed that he had masturbated into a plastic bag at least four times and the child on multiple occasions inserted his semen into her vaginal cavity using several syringes. In other words, he claimed that he did not penetrate the child with his penis. Filing 11-20 at CM/ECF pp. 111–172.

¹ They served as standby counsel.

However, his pastor, who Petitioner called as his witness, testified that Petitioner had admitted to the pastor that at least once Petitioner penetrated the child with a syringe. *Id.* at CM/ECF p. 106–107.² The pastor also recounted that he told Petitioner he did not believe the syringe story either. *Id.* at CM/ECF p. 111.

There was a great deal more evidence, including the haunting testimony of the child, *e.g.*, Filing no. 11-18 at CM/ECF pp. 151-250 (direct examination), but it is enough to state that the evidence was overwhelming, the jury did not believe Petitioner and he was convicted on both counts. The sentencing range for each count was a minimum of 15 years to a maximum of life. He was sentenced to consecutive sentences of 50 to 80 years of imprisonment.

In fashioning Petitioner’s sentences, the trial judge recognized that Petitioner failed to take responsibility for his actions. The court relied on the nature of the offenses and Petitioner’s actions after the investigation began. The child was Petitioner’s 13-year-old foster daughter, and the sexual assaults began during the 7-week period she resided in his home. After she was moved from Petitioner’s home, he continued to sneak cell phones to her, followed her around, and maintained a sexual relationship with her, impregnating her more than 4 months after she was removed from his care. The trial judge observed that Petitioner was the only father figure the child ever had, which made his violation of her trust that much worse. And the child’s caseworkers were extremely fearful for her safety and exhausted themselves trying to keep the child away from Petitioner.

Procedural History

Petitioner, with newly appointed counsel, filed a direct appeal. The Nebraska Court of Appeals affirmed Petitioner’s convictions and sentences in an opinion filed on January 3, 2017. *State v. Weathers*, No. A-16-305, 2017 WL 24777 (Neb. App. 2017) (*Weathers I*). A copy of the opinion may be found at Filing no. 11-3. A petition

² On cross-examination by the prosecution, Petitioner then claimed that his pastor was not telling the truth. *Id.* at CM/ECF p. 158. (“He flat out lied.”)

for further review to the Nebraska Supreme Court was filed on February 6, 2017 and denied as untimely filed. Filing no. 11-1 at CM/ECF p. 4.

On November 2, 2017, Petitioner filed a timely motion for postconviction relief in the district court. An amended motion was later filed. The state district court denied the amended postconviction motion without an evidentiary hearing. Petitioner appealed, and on March 26, 2019, the Nebraska Court of Appeals affirmed the lower court's judgment. *State v. Weathers*, No. A-18-483, 2019 WL 1375345 (Neb. App. 2019) (*Weathers II*). A copy of that opinion may be found at Filing no. 11-4. The mandate was issued on May 1, 2019. After the issuance of the mandate, and on May 6, 2019, Filing no. 11-2 at CM/ECF p. 2, Petitioner filed an untimely petition for further review which was denied by the Nebraska Supreme Court. *Id.*

Petitioner endeavors to excuse the late filing of the two petitions for further review.³ Filing no. 17; Filing no. 18. I will discuss his arguments in slightly more detail later in this opinion. I assume, without deciding, that the exhibits (Exhibits 12-14) attached to Filing no. 17 are true and correct copies of "kites" he submitted to prison officials regarding mailings even though they are not properly authenticated by affidavit.

Claims

Here are the claims that I found potentially cognizable:

Claim One: Appellate counsel was ineffective for failing to assign as error the trial court's failure to conduct an adequate inquiry into Petitioner's motion to substitute counsel.

³ The petition for further review regarding the direct appeal has no particular relevance at least insofar as the ineffective assistance of counsel claims are concerned because they all related to counsel who represented Petitioner in the direct appeal. So, it is the second petition for further review regarding the post-conviction matter that is the most significant.

Claim Two: Appellate counsel was ineffective for failing to assign as error that the Petitioner's waiver of counsel was not knowingly, voluntarily and intelligently made.

Claim Three: Appellate counsel was ineffective for failing to assign as error that Petitioner was denied his right to effective assistance of trial counsel due to ineffective cross-examination.

Claim Four: Appellate counsel was ineffective for failing to assign as error that the prosecution withheld exculpatory evidence in violation of *Brady v. Maryland*.

Claim Five: Appellate counsel was ineffective for failing to assign as error that trial counsel was ineffective for failing to suppress the DNA evidence.

Claim Six: Petitioner is actually innocent.

Filing no. 14 at CM/ECF pp. 1-2.

Analysis

Respondent asserts that claims 1-5 are procedurally defaulted without excuse. Respondent also asserts that claim 6 is not cognizable, that is, it fails to state a federal claim, but even if it did the claim is meritless. I agree. Given the nature of this case, and the fact that the law is well understood, I will be brief.

Claims 1-5

The first five claims at stake here were not presented to the Nebraska Supreme Court and thus the Nebraska courts were not provided with one complete round of

review. Since Nebraska does not allow two bites of the post-conviction apple,⁴ Nebraska's highest court is, and will forever be, foreclosed from reviewing Petitioner's claims. Generally speaking, this violates the doctrine of comity that undergirds the present federal habeas corpus law. *See, e.g.*, 28 U.S.C. § 2254(b)(1)(A).

Under federal law, a state prisoner must present the substance of each federal constitutional claim to the state courts before seeking federal habeas corpus relief. In Nebraska, this ordinarily means that each § 2254 claim must have been presented to the trial court, then in an appeal to the Nebraska Court of Appeals, and finally in a petition for further review to the Nebraska Supreme Court if the Court of Appeals rules against the petitioner. *O'Sullivan v. Boerckel*, 526 U.S. 838, 845–848 (1999) (in order to satisfy exhaustion requirement, prisoner was required to present his claims to Illinois Supreme Court for discretionary review); *Akins v. Kenney*, 410 F.3d 451, 454–455 (8th Cir. 2005) (Nebraska law required petitioner to file a petition for further review with the Nebraska Supreme Court in order to exhaust his available state court remedies).

To be precise, a federal habeas court may not review a state prisoner's federal claims if those claims were defaulted in state court pursuant to an independent and adequate state procedural rule "unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or

⁴ That is, "[a]n appellate court will not entertain a successive motion for postconviction relief unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time the movant filed the prior motion." *State v. Ortiz*, 670 N.W.2d 788, 792 (Neb. 2003). Additionally, "[a] motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal." *Hall v. State*, 646 N.W.2d 572, 579 (Neb. 2002). *See also State v. Thorpe*, 858 N.W.2d 880, 887 (Neb. 2015) ("A motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal, no matter how those issues may be phrased or rephrased.")

demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.” *Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

I assume, without deciding, the doubtful proposition that Petitioner has demonstrated “cause” to excuse the procedural default of claim one as relates to the petition for further review of the post-conviction decision of the Nebraska Court of Appeals. This is because there may have been a mail screwup at the prison as possibly evidenced by Filing no. 17 CM/ECF p. 5.⁵ But Petitioner cannot establish “actual prejudice.” To establish “actual prejudice” under *Coleman*, a petitioner must show that the errors of which he complains “worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.” *United States v. Frady*, 456 U.S. 152, 170 (1982) (emphasis in original).

In claim one, Petitioner asserts that his appellate counsel was ineffective for failing to assign as error the trial court’s alleged failure to conduct an adequate inquiry into his pro se motion to substitute counsel (fire the two court appointed public defenders so he could get a new court appointed lawyer). However, in *Weathers II* the Nebraska Court of Appeals carefully examined the claim and found it entirely lacking in merit for among other reasons that under Nebraska law (and federal law too) indigent defendants are not entitled to a new court appointed lawyer for no good reason. 2019 WL 1375345, at *1–4.⁶ There is no chance that the

⁵ But the following should be noted: “Nebraska does not have a prison delivery rule.” *State v. Seberger*, 815 N.W.2d 910, 915 & n.5 (Neb. 2012) (citing *State v. Hess*, 622 N.W.2d 891 (Neb. 2001); *State v. Parmar*, 586 N.W.2d 279, 284 (Neb. 1998) (“We decline to adopt the ‘prisoner delivery rule’ and conclude that prisoners acting pro se are subject to the same filing rules as other litigants.”)

⁶ Among other things, Petitioner was upset with his public defenders because he thought that they were not doing enough to get exculpatory text or e-mails from the variety of phones he had provided the child. So far as the record reflects, Petitioner never identified what *specific* exculpatory text or e-mail messages were missing. In any event, the public defenders were in contact with the prosecutor and the prosecutor stated on the record that she had turned over and would turn over

Nebraska Supreme Court would have disagreed with the careful analysis of the Nebraska Court of Appeals. Indeed, I have independently reviewed the merits of the claim, and giving the deference due the Nebraska Court of Appeals, the decision was bullet proof under applicable federal standards.⁷ Hence, Petitioner has shown no actual prejudice.

Petitioner's second through fifth habeas claims involve additional assertions of ineffective assistance of direct appeal counsel that have been defaulted even without considering the tardy petition for further review. Petitioner concedes that these claims have been procedurally defaulted because he either failed to reassert the claims in his post-conviction appeal or he never raised them in his post-conviction motion. Filing No. 18 at CM/ECF pp. 14–15; Filing No. 20 at CM/ECF pp. 10-11. Petitioner seeks to excuse his procedural default because the claims involve ineffective assistance of appellate counsel. *Id.* But, Petitioner's claims of ineffective assistance of appellate counsel on direct appeal cannot serve as cause to excuse the procedural default because he did not present these ineffective assistance of appellate counsel claims in the post-conviction proceedings before the trial court or,

whatever she was provided by the technicians. The record reflects page after page after page of extraction reports from one or more of the cell phones. See portions of Filing no. 11-22; Filing no. 11-23; Filing no. 11-24.

⁷ Petitioner argues that the appellate court's decision was unreasonable because the court failed to consider the hearings held on November 13 and December 3, 2015. Filing No. 18 at CM/ECF pp. 12–13. However, these hearings, Filing no. 11-16 at CM/ECF pp. 63–101, occurred *after* the trial court ruled on Petitioner's motion to dismiss counsel on November 4, 2015, and thus, were not relevant to the court's analysis. *Id.* at CM/ECF pp. 49–54. Moreover, Petitioner never renewed his motion to dismiss his court appointed counsel but instead continued to insist that he would represent himself at trial. *Id.* at CM/ECF pp. 63–101.

alternatively, the Nebraska Court of Appeals.⁸ He had the opportunity to do so, and blew it.

Nebraska law is clear on this subject. A person seeking post-conviction relief must present his or her claim to the district court or the Nebraska appellate courts will not consider the claim on appeal. *State v. Deckard*, 722 N.W.2d 55, 63 (Neb. 2006) (denying postconviction relief in a murder case and stating: “An appellate court will not consider as an assignment of error a question not presented to the district court for disposition through a defendant’s motion for postconviction relief.”) Similarly, on appeal, the appealing party must both assign the specific error and specifically argue that error in the brief. Otherwise the claim is defaulted under Nebraska law. *State v. Henry*, 875 N.W.2d 374, 407 (Neb. 2016) (stating an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error to be considered by an appellate court). These rules are consistently applied in Nebraska

So, even if I disregard the untimely petition for further review, Petitioner has procedurally defaulted claims two through five. And, he has shown no cause for the default (some factor external to him). Moreover, he has shown no actual prejudice for the default either.

Claim 6

Claim six, regarding an allegation of actual innocence, while probably procedurally defaulted as well, can be easily denied on the merits for two reasons. First, the Supreme Court has never recognized a freestanding claim of actual innocence. *See Dansby v. Hobbs*, 766 F.3d 809, 816 (8th Cir. 2014). Second, even

⁸ *Martinez v. Ryan*, 566 U.S. 1 (2012) is not applicable to this case because the claims here involve only ineffective assistance of direct appeal counsel. *See Davila v. Davis*, 137 S. Ct. 2058, 2063 (2017) (*Martinez* does not apply to defaulted ineffective assistance of appellate counsel claims).

if there was such an animal, the burden on Petitioner would be extraordinarily high. *Id.* And Petitioner has not come anywhere close to meeting such a burden.⁹ Indeed, his assertion of actual—meaning factual—innocence is frivolous.¹⁰

Certificate of Appealability

A petitioner cannot appeal an adverse ruling on his or her petition for writ of habeas corpus under § 2254 unless he or she is granted a certificate of appealability. 28 U.S.C. § 2253(c)(1); 28 U.S.C. § 2253(c)(2); Fed. R. App. P. 22(b)(1). The standards for certificates (1) where the district court reaches the merits or (2) where the district court rules on procedural grounds are set forth in *Slack v. McDaniel*, 529 U.S. 473, 484–485 (2000). I have applied the appropriate standard and determined Petitioner is not entitled to a certificate of appealability.

IT IS ORDERED that this matter is dismissed with prejudice. No certificate of appealability will be or has been issued. A separate judgment will be filed.

Dated this 13th day of February, 2020.

BY THE COURT:


Richard G. Kopf
Senior United States District Judge

⁹ Petitioner concedes that he has no new evidence to support his actual innocence claim. Filing no. 18 at CM/ECF pp. 15–16; Filing no. 20 at CM/ECF pp. 11–12.

¹⁰ This necessarily means that I have concluded that there has been no miscarriage of justice that would excuse any of the procedural defaults described above.

APPENDIX

B

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 20-1507

Brandon J. Weathers

Petitioner - Appellant

v.

Scott Frakes

Respondent - Appellee

Appeal from U.S. District Court for the District of Nebraska - Omaha
(8:19-cv-00296-RGK)

JUDGMENT

Before GRUENDER, KELLY, and ERICKSON, Circuit Judges.

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The appeal is dismissed. The motion to expedite appeal is denied as moot.

July 24, 2020

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX

C

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 20-1507

Brandon J. Weathers

Appellant

v.

Scott Frakes

Appellee

Appeal from U.S. District Court for the District of Nebraska - Omaha
(8:19-cv-00296-RGK)

ORDER

The petition for rehearing by the panel is denied as overlength.

August 25, 2020

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX

[]

Exhibit #1

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

THE STATE OF NEBRASKA,

14-
CR16-3306

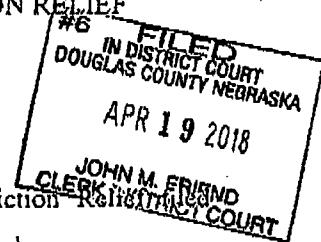
Plaintiff,

vs.

BRANDON WEATHERS,

Defendant.

ORDER DENYING DEFENDANT'S
AMENDED MOTION FOR
POSTCONVICTION RELIEF



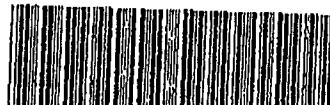
Before the Court is Defendant's Amended Motion for Postconviction Relief filed December 29, 2017. The Court takes judicial notice of the Bill of exceptions. Having now reviewed these documents, the Court finds and orders as follows:

STANDARD OF REVIEW

The Nebraska Postconviction Act, Neb. Rev. Stat. § 29-3001 et seq. (Reissue 2016), 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 constitutional rights such that the judgment was void or voidable. *State v. Crawford*, 291 Neb. 362, 865 N.W.2d 360 (2015). Thus, in a motion for postconviction relief, the defendant must allege facts which, if proved, constitute a denial or violation of his or her rights under the U.S. or Nebraska Constitution, causing the judgment against the defendant to be void or voidable. *Id.* If a postconviction motion alleges only conclusions of fact or law, or if the records and files in the case affirmatively show that the defendant is entitled to no relief, the court is not required to grant an evidentiary hearing. *Id.*

ANALYSIS

Defendant's amended postconviction consists of three sections, which will be addressed in the order they appear in the motion:



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I. Errors by trial court (¶ 3 a-f; ¶ 6)

Defendant's challenges to errors by the Court, including several of his due process being violated, do not need to be discussed in great detail, because a "motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal, no matter how those issues may be phrased or rephrased." *State v. Thorpe*, 290 Neb. 149, 858 N.W.2d 880 (2015). Furthermore, a defendant "cannot use a motion for postconviction relief to collaterally attack issues that were decided against him on direct appeal." *Id.* These claims are procedurally barred, because they could have been brought on direct appeal. In fact, most of these were brought and rejected by the Nebraska Court of Appeals, including the denial of the motion to continue, issues relating to refreshing a the recollection of a witness, and denial of the motion for mistrial.

II. Ineffective assistance of trial counsel

Defendant bring several claims based on ineffective assistance of trial counsel. Defendant, however, chose to represent himself at trial and his original court appointed counsel were relegated to standby counsel. (BOE 70:16-18). The record reflects Defendant represented himself during the entirety of the trial. Because Defendant represented himself, he can only raise a claim of ineffective assistance of counsel based on the standby counsel appointed to assist him during the trial. The Nebraska Supreme Court, however, has held there is no federal Sixth Amendment right to effective assistance of standby counsel:

Relief afforded under the Nebraska Postconviction Act, §§ 29-3001 through 29-3004, is limited to the denial or violation of constitutional rights. Although we have not previously analyzed it, the issue of whether standby counsel's performance is subject to the constitutional right to effective assistance of counsel has been considered by other courts. In this regard, we note that various federal courts have reasoned that a defendant cannot assert a federal constitutional violation based on ineffective assistance of standby counsel. E.g., *Simpson v. Battaglia*, 458 F.3d 585, 597 (7th Cir.2006) ("inadequacy of standby

counsel's performance, without the defendant's relinquishment of his [right to self-representation], cannot give rise to an ineffective assistance of counsel claim under the Sixth Amendment"); U.S. v. Schmidt, 105 F.3d 82, 90 (2d Cir.1997) ("[a]bsent a constitutional right to standby counsel, a defendant generally cannot prove standby counsel was ineffective"); Johnson v. Quarterman, 595 F.Supp.2d 735, 750 (S.D.Tex.2009) ("[a]lthough the court may appoint standby counsel to assist a pro se defendant, there is no constitutional right to the effective assistance of such counsel"). We agree with the reasoning of the foregoing federal authorities and numerous similar cases not cited here which conclude that there is no federal Sixth Amendment constitutional right to effective assistance of standby counsel. We adopt such reasoning and, by extension, now hold that there is no right to effective assistance of standby counsel under Neb. Const. art. I, § 11.

Because Gunther elected to represent himself and waived his constitutional right to counsel, Gunther's allegations of ineffective assistance of counsel serving only as standby counsel would not constitute an infringement of his constitutional rights to effective assistance of counsel under the U.S. or Nebraska Constitution. Under the Nebraska Postconviction Act, §§ 29-3001 through 29-3004, 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 U.S. or Nebraska Constitution. *State v. Jim*, 275 Neb. 481, 747 N.W.2d 410 (2008). 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. *Id.* Gunther alleges only conclusions that standby counsel, who is not alleged to have in fact served as trial counsel, provided ineffective assistance of standby counsel. Such allegations, if proved, would not entitle Gunther to postconviction relief, and the district court did not err in rejecting such claims without an evidentiary hearing.

State v. Gunther, 768 N.W.2d 453, 457-58, 278 Neb. 173, 178-79 (2009). Similarly here, because Defendant chose to represent himself, he waived his constitutional right to counsel. Therefore, all of his ineffective assistance of claims are denied without an evidentiary hearing.¹

¹ Even if these claims were not barred under *Gunther*, this Court finds the record refutes Defendant suffered any prejudice based on the overwhelming evidence offered at trial. *See e.g. Strickland v. Washington*, 466 U.S. 668 (1984) ("Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.").

III. Ineffective assistance of appellate counsel

Defendant had separate appointed counsel, not the standby counsel, for his direct appeal.

Defendant makes several allegations of ineffective assistance of appellate counsel. When analyzing a claim of ineffective assistance of appellate counsel, the Court must determine whether appellate counsel failed to bring a claim on appeal that actually prejudiced the defendant. *State v. Timmens*, 282 Neb. 787, 805 N.W.2d 704 (2011). In doing so, the court begins by assessing the strength of the claim appellate counsel purportedly failed to raise. *State v. Jim*, 278 Neb. 238, 245, 786 N.W.2d 464 (2009). Counsel's failure to raise an issue on appeal could be ineffective assistance only if there is a reasonable probability that inclusion of the issue would have changed the result of the appeal. *Id.*; see also *State v. Golka*, 281 Neb. 360, 378, 796 N.W.2d 198 (2011); *State v. McLeod*, 274 Neb. 566, 741 N.W.2d 664 (2007). The Nebraska Supreme Court has further explained that a reasonable probability "is a probability sufficient to undermine confidence in the outcome." *State v. Poe*, 284 Neb. 750, 822 N.W.2d 831 (2012).

The majority of Defendant's ineffective assistance of appellate counsel claims are based on failing to set forth arguments relating to ineffective assistance of trial counsel, however as noted above, those arguments would be unsuccessful based on *Gunther*. Appellate counsel was also not ineffective for failing to allege Defendant did not voluntarily waive his right to counsel, as the record supports Defendant waived this right knowing the consequences of the decision. (BOE 70:16-18). Any remaining claims relating to ineffective assistance of appellate counsel are denied without an evidentiary hearing, because Defendant's motion fails to articulate any issues that would have "changed the result of the appeal."

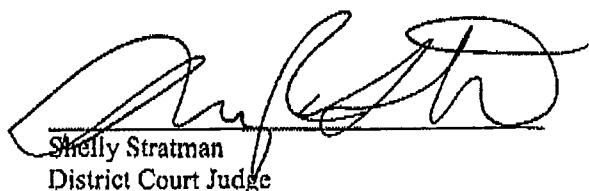
CONCLUSION

Each argument in Defendant's motion for postconviction relief is denied without an evidentiary hearing, because his arguments for relief are either not pled with specific facts, the record affirmatively establishes his claims are without merit, or they are procedurally barred.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendant's motion for postconviction relief is denied without an evidentiary hearing.

DATED this 19 day of April, 2018.

BY THE COURT:



Shelly Stratman
District Court Judge

APPENDIX

E

No Inquiry or Valid Waiver

1 I'm sure I would have a legal assistant, counsel, or
2 someone on the side. I mean, I know they could bring
3 it, and I could see it, and they can take it back
4 with them and return it back to the police
5 department.

6 THE COURT: Well, we'll address that as we
7 kind of go through some of these other motions. So
8 that's the Motion to Produce for Examination.

9 The Motion to Compel has been withdrawn.

10 So then we have the Motion to Dismiss
11 Current Counsel and Appoint New Counsel. Okay. Do
12 you still want to go forward on your Motion to
13 Dismiss Current Counsel?

14 MR. WEATHERS: Yes.

15 ~~*~~ THE COURT: One of the things you need to
16 understand, Mr. Weathers, is that you have a public
17 defender appointed to you. So your options going
18 forward at this point -- there's three of them. You
19 can hire your own attorney, which I'm assuming you
20 don't have the funds to do so.

21 MR. WEATHERS: No, ma'am.

22 THE COURT: Okay. Then you get a public
23 defender appointed, which you have, and you don't get
24 to choose which public defender you have. So you go
25 forward with Mr. Marcuzzo; or, three, you represent

No Inquiry or Valid Waiver

1 yourself, which on charges like this, I think it's a
2 really bad idea, but those are your options.

3 So your options are to hire your own
4 attorney, which you've indicated you don't have the
5 funds to do so; you have a public defender that's
6 already appointed for you, which he'll remain your
7 attorney; or you can represent yourself. How do you
8 want to proceed?

9 MR. WEATHERS: I'll represent myself.

10 THE COURT: That's a really bad idea,
11 Mr. Weathers, because --

12 MR. WEATHERS: Mr. Marcuzzo is not trying to
13 help me, ma'am.

14 THE COURT: Well, what I am going to tell
15 you right now is that, even if you want to represent
16 yourself, Mr. Marcuzzo is still going to be appointed
17 as your legal advisor.

18 MR. WEATHERS: That's fine.

19 THE COURT: But I think that you need to
20 take the opportunity to speak with Mr. Marcuzzo about
21 this, because it's --

22 MR. WEATHERS: I've lost my six-month speedy
23 trial, because I've told Mr. Marcuzzo repeatedly of
24 things that need to be done, what we needed, and he's
25 done absolutely nothing. He doesn't even know of any

No Inquiry or Valid Waiver

1 witnesses that I have after 11 months. He doesn't
2 know any of them.

3 THE COURT: There's an attorney/client
4 privilege as far as what you and Mr. Marcuzzo have
5 discussed.

6 MR. WEATHERS: I understand.

17 So I don't want to get into discussions that
18 you and Mr. Marcuzzo have had with respect to how
19 you're approaching your defense in this case, but
20 what I'm telling you is that you need to proceed with
21 an attorney.

22 MR. WEATHERS: I'm not going with
23 Mr. Marcuzzo. I will represent myself. This is --
24 all this is a story. And like I said, then, the
25 exact -- the relationship was inappropriate, but the

No Inquiry or Valid Waiver

1 entire --

2 THE COURT: I'm going to stop you right
3 there, Mr. Weathers. You're making statements on the
4 record that are not in your best interest, and based
5 on that and based on --

6 MR. WEATHERS: I'm not taking --

7 THE COURT: I'm going to deny your --

8 MR. WEATHERS: No. I'm not taking -- I'm
9 not going to talk to him if he comes to see me. I'm
10 not saying anything to him.

11 THE COURT: He is your --

12 MR. WEATHERS: I won't say anything else,
13 but I'm not --

14 THE COURT: Mr. Weathers, you're
15 interrupting me, and I don't appreciate that, sir.
16 So you need to stop --

17 MR. WEATHERS: I apologize.

18 THE COURT: -- talking right now.

19 MR. WEATHERS: Okay.

20 THE COURT: These charges are very serious,
21 and if you are convicted, you stand to potentially
22 serve a lengthy amount of time. So there is a lot at
23 stake here, and there's so much at stake here that
24 you should not proceed without Mr. Marcuzzo as your
25 attorney.

No Inquiry or Valid Waiver

1 MR. WEATHERS: I don't want him as my
2 attorney. I don't even know --

3 THE COURT: The other thing you need to
4 understand, Mr. Weathers, is that there are certain
5 rules of evidence and procedural rules that

6 absolutely must be followed.

7 MR. WEATHERS: Okay.

8 THE COURT: And because you choose to
9 represent yourself, I can't let go of those rules. I
10 can't give you a break that I wouldn't give an
11 attorney.

12 MR. WEATHERS: I understand.

13 THE COURT: And I just want you to
14 understand that -- we just had a gentleman in here
15 last month on very serious charges that carried a
16 whole lot of time, and he chose to represent himself
17 in front of a jury. And I'm telling you, it did not
18 go well for him. So it is not a good idea for you to
19 do so, and I think you need to keep Mr. Marcuzzo on
20 as your attorney and allow him to help you.

21 MR. WEATHERS: I'm going to represent
22 myself, Your Honor.

23 THE COURT: All right.

24 MR. MARCUZZO: Judge, I suppose, then -- I
25 guess at this point, then, I would make a formal

No Inquiry or Valid Waiver

1 Motion to Withdraw as his attorney; although, if the
2 Court desires me to remain his -- not counsel, but in
3 an advisory position, certainly our office would be
4 happy to do so.

5 THE COURT: And that's what I would do.

6 I'll note that Mr. Weathers wants to proceed
7 self-represented, but I am going to keep you on,
8 Mr. Marcuzzo, as his legal advisor.

9 MR. MARCUZZO: And, I guess, Judge, for the
10 record, Mr. Weathers needs to understand if -- for
11 our office to be able to aid him, he is going to have
12 to communicate with either myself and/or Ms. Andrews,
13 if he wishes us to assist him in this trial or the
14 lead-up to the trial.

15 THE COURT: Right. And for the record to be
16 clear, I will appoint both Mr. Marcuzzo and
17 Ms. Andrews as Mr. Weathers' legal advisors and
18 direct you, Mr. Weathers, that you need to
19 communicate with Mr. Marcuzzo and Ms. Andrews in
20 order to prepare for trial.

21 MR. WEATHERS: Yes, ma'am.

22 THE COURT: All right. The Motion to
23 Continue. At this point you're indicating your
24 Motion to Continue is because all text message
25 evidence has not been turned over completely. Well,

APPENDIX

F

I N D E X

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3	June 18, 2015, Motion to Suppress.....	Pages 16-39
4	November 4, 2015, Various Motions.....	Pages 40-62
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6	November 13, 2015, State's Motion.....	Pages 63-76
7	December 3, 2015, Hearing Subpoenas.....	Pages 77-105
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9	December 8, 2015, Trial.....	Pages 320-577
10	December 9, 2015, Trial.....	Pages 578-815
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12	December 11, 2015, Trial.....	Pages 1023-1025
13	February 17, 2016, Sentencing.....	Pages 1026-1051
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14 WITNESSES Dir. Cross Redir.

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19	Laquela Weathers	411	461
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22	Honesty Ali	587	638
23	Anne Boatright	655	
24	Helena Clay-Veitch	665	684
25	Callie Getzschman	688	716

1 MR. WEATHERS: May I add something, too, Your
2 Honor?

3 THE COURT: Go ahead.

4 MR. WEATHERS: I just want to say with this

5 phone, once they go into it with the passcode, there is
6 no trick wires or anything that will make this phone
7 self-delete once it's entered. I just want to make
8 that clear.

9 THE COURT: I'm not sure what you're saying.

10 You're saying that it's not going to --

11 MR. WEATHERS: Just wipe itself automatically
12 if somebody does something wrong to it.

16 Okay. All right. Now, are -- Mr. Weathers,
17 are you still wanting to proceed self-represented?

18 MR. WEATHERS: Yes.

19 THE COURT: Okay. Now, with respect to --

20 you're indicating that you -- last time we were here we
21 talked about the police reports and that there were
22 quite a few reports that there needed to be some things
23 redacted. Where are we at on that?

24 MS. BEADLE: Your Honor, I have spoken to the
25 Public Defender's Office, and Rob Marcuzzo has -- and

* They never need the password!
** ----- knows this