UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 23-3728

Joseph Thomas Saari

Appellant

v.

Jesse Pugh, Warden of MCF--Rush City

Appellee

Appeal from U.S. District Court for the District of Minnesota
(0:22-cv-02414-PJS)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Stras did not participate in the consideration or decision of this matter.

March 14, 2024

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

/s/ Michael E. Gans

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Joseph Thomas Saari,

Petitioner,

v.

Jesse Pugh,

Respondent.

Case No. 22-cv-2414 (PJS/DTS)

REPORT AND RECOMMENDATION

Petitioner Joseph Saari was convicted by a jury of domestic assault, aggravated witness tampering, and nonconsensual dissemination of private sexual images. He was sentenced to 158 months in prison. Saari brings this *pro se* habeas petition pursuant to 28 U.S.C. § 2254 asserting that the trial court erred in failing to sever the nonconsensual dissemination charges from the other charges at trial. He also alleges that the jury was improperly instructed on aggravated witness tampering; the nonconsensual dissemination statute is unconstitutional; and the pattern-of-stalking statute requires juror unanimity as to each of the underlying offenses on which a pattern-of-stalking conviction can be based. Saari also moves for an evidentiary hearing. For the reasons discussed below, the Court recommends that his petition and the motion be denied.

FINDINGS OF FACT

In September 2018, Petitioner Joseph Saari was charged with domestic assault and threats of violence following a violent confrontation with his partner, A.C. *State v. Saari*, No. A19-1102, 2020 WL 3172657, at *2 (Minn. App. June 15, 2020). After his arrest, A.C. discovered Saari had posted two videos of their sexual activity on a pornography site sometime between July and August 2018. *Id.* A.C. appeared to testify

at the scheduled trial, but due to a witness's illness, the trial was suspended. *Id.* The charges against Saari were dropped without prejudice. *Id.* Saari then called A.C. and threatened her and her children. *Id.* He obtained discovery materials from his case, including medical records and footage of A.C., and posted them on social media. *Id.*

In December 2018, the state filed a new complaint, charging Saari with one count of domestic assault, two counts of threats of violence, two counts of aggravated first-degree witness tampering, one count of stalking, and two counts of nonconsensual dissemination of private sexual images. *Id.* On March 13, 2019, a jury found Saari guilty on all counts. *Id.* The state dropped multiple charges, and on April 18, Saari was convicted of felony domestic assault, aggravated witness tampering, and two counts of nonconsensual dissemination of private sexual images. Dkt. No. 30-7 at 1-2. He was sentenced to 158 months in prison for witness tampering, to be served concurrently with the sentences for the other charges. *Id.* at 3.

On direct appeal, Saari raised four issues: (1) the district court erred by not severing the nonconsensual dissemination charges from the other charges at trial; (2) his conviction for aggravated witness tampering should be reduced to witness tampering because the district court instructed the jury on the latter; (3) the Minnesota statute regarding nonconsensual dissemination of private images is unconstitutional; and (4) the district court erred in imposing multiple sentences for nonconsensual dissemination when the offenses arose out of the same behavioral incident. *Saari*, 2020 WL 3172657, at *1. The Minnesota Court of Appeals affirmed his convictions except for those arising under the nonconsensual dissemination statute, Minn. Stat. § 617.261, which it held was

unconstitutionally overbroad. *Id.* at *6. It did not determine whether the two charges under that statute arose from the same behavioral incident. *Id.*

The state and Saari both filed petitions for further review with the Minnesota Supreme Court. Dkt. No. 30-11 at 2. The court granted the state's petition, then stayed further proceedings as it considered the constitutionality of the statute in *State v. Casillas,* 952 N.W.2d 629 (Minn. 2020). On December 30, 2020, the Minnesota Supreme Court held that Minn. Stat. § 617.261 is not unconstitutionally overbroad. *See id.* It lifted the stay and remanded Saari's case to the Minnesota Court of Appeals for reconsideration in light of *Casillas.* Dkt. No. 30-13. On remand, the Court of Appeals determined the nonconsensual dissemination statute was also not unconstitutionally vague. *State v. Saari*, No. A19-1102, 2021 WL 2645818 (Minn. Ct. App. June 28, 2021). It further found that the state had not proven the two counts of nonconsensual dissemination of private images arose from separate behavioral incidents. It remanded those convictions for resentencing, and the state agreed to vacate one of the convictions. Dkt. No. 30-18.

Saari filed a petition for postconviction relief with the St. Louis County District Court, arguing that the trial court's failure to sever the separate charges deprived him of a fair trial. Dkt. No. 30-8. The district court denied the petition because the issue had been addressed by the decision on direct appeal. Dkt. No. 30-19. The Minnesota Court of Appeals affirmed the order denying postconviction relief. Dkt. No. 30-25. Saari filed a Motion to Correct Sentence, which the district court denied on February 22, 2021. Dkt. No. 30-14. The Court of Appeals affirmed. Dkt. No. 30-20. He filed a second petition for postconviction relief, arguing that the trial court erred in instructing the jury on the pattern-of-stalking offense. Dkt. No. 30-16. The district court denied his second petition, and the

Court of Appeals affirmed, holding that the issue was moot because the pattern-of-stalking charge had been dropped. Dkt. No. 30-25.

Saari filed a habeas petition with this Court on September 29, 2022, which he amended on November 16, 2022. Dkt. No. 15. In his amended petition, Saari asserts four grounds for relief; the first three grounds are identical to those raised on direct appeal, while the fourth asserts that the pattern-of-stalking offense requires juror unanimity as to each of the underlying offenses on which a pattern-of-stalking conviction can be based.

CONCLUSIONS OF LAW

I. Standard of Review

This Court's review of habeas corpus petitions filed by state prisoners is governed by 28 U.S.C. § 2254 as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Section 2254(a) provides that a federal court shall entertain a habeas corpus petition of a state prisoner "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." It does not re-examine state court determinations of state law questions. *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). A state prisoner's application for a writ of habeas corpus

> shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C § 2254(d).

The standard in § 2254(d) is "difficult to meet." *White v. Woodall,* 572 U.S. 415, 419 (2014). The Supreme Court has stated that "'[c]learly established Federal law' for purposes of § 2254(d)(1) includes only the holdings, as opposed to the dicta, of [the] Court's decisions." *Id.* (quotations and citations omitted). A lower court may not consult its own precedent rather than that of the Supreme Court in assessing a habeas claim governed by § 2254. *Id.* at 420 n.2.

A decision is "contrary to" clearly established Supreme Court precedent "if the state court applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases," or "confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [Supreme Court] precedent." *Williams v. Taylor,* 529 U.S. 362, 405-06 (2000). An "unreasonable application" of the Supreme Court's holdings "must be objectively unreasonable, not merely wrong; even clear error will not suffice." *White*, 572 U.S. at 419 (quotations and citations omitted). "[A] state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* at 419-20 (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)).

II. Procedurally Defaulted Claims

"Before seeking a federal writ of habeas corpus, a state prisoner must exhaust available state remedies, 28 U.S.C. § 2254(b)(1), thereby giving the State the opportunity to pass upon and correct alleged violations of its prisoners' federal rights. To provide the State with the necessary opportunity, the prisoner must fairly present his claim in each

appropriate state court (including a state supreme court with powers of discretionary review), thereby alerting that court to the federal nature of the claim." *Baldwin v. Reese*, 541 U.S. 27, 29 (2004) (internal citations and quotations omitted). "A petitioner meets the fair presentation requirement if the state court rules on the merits of his claims, or if he presents his claims in a manner that entitles him to a ruling on the merits." *Gentry v. Lansdown*, 175 F.3d 1082, 1083 (8th Cir. 1999). Thus, before habeas relief is available to a petitioner, a court must first determine whether the petitioner has fairly presented his federal claims to the state court. *McCall v. Benson*, 114 F.3d 754, 757 (8th Cir. 1997).

For a petitioner to bring a § 2254 claim, he must have presented "the same facts and legal theories to the state court that he later presents to the federal courts. This allows the state court to apply the controlling legal principles to the facts that constitute the federal claims." *Jones v. Jerrison*, 20 F.3d 849, 854 (8th Cir. 1994). To have fairly presented a federal claim to the state courts, "a petitioner is required to refer to a specific federal constitutional right, a particular constitutional provision, a federal constitutional case, or a state case raising a pertinent federal constitutional issue." *Cox v. Burger*, 398 F.3d 1025, 1031 (8th Cir. 2005) (quoting *Barrett v. Acevedo*, 169 F.3d 1155, 1161–62 (8th Cir. 1999)).

If a petitioner has failed to do so, the federal court "must then determine whether the petitioner has complied with state procedural rules governing post-conviction proceedings, *i.e.,* whether a state court would accord the prisoner a hearing on the merits." *McCall*, 114 F.3d at 757. "If state procedural rules prevent the petitioner from obtaining such a hearing, then the petitioner is also procedurally barred from obtaining habeas relief in a federal court unless he can demonstrate either cause and actual

prejudice, or that a miscarriage of justice will occur if [the court] do[es] not review the merits of the petition." *Id.* "The fundamental miscarriage of justice exception . . . is only available to a petitioner who demonstrates that a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Id.* at 758 (citations and quotations omitted); *see also Coleman v. Thompson*, 501 U.S. 722, 750 (1991). When a petitioner has not exhausted a claim and state procedural rules preclude further attempts to present the claim to satisfy the exhaustion requirement, that claim is not unexhausted but rather is procedurally defaulted.

A. Claim that the District Court Erred in Failing to Sever Charges

Saari asserts that the district court erred when it declined to sever the charges of nonconsensual dissemination of private sexual images from the trial of the other charges. Respondent argues that because Saari did not raise a constitutional argument in the state courts, he is foreclosed from raising it here.

Saari's claim for relief cannot be considered on the merits in this federal habeas corpus proceeding because that claim has not been fairly presented to the Minnesota state courts. In state postconviction proceedings and on direct appeal, Saari did not cite federal case law or refer to his rights under the United States Constitution. In his first state petition for postconviction relief, Saari did argue that the district court's decision to try all the charges in a single trial deprived him of a "Fundamentally Fair Trial" and violated his "right to Due Process." Dkt. 30-8. But "it is not enough to make a general appeal to a constitutional guarantee as broad as due process to present the 'substance' of such a claim to a state court." *Gray v. Netherland*, 518 U.S. 152, 163 (1996). Indeed, in his

memorandum in support of that petition, Saari cited only state cases, indicating that he was referring to his rights under state law.[1] Saari also presented the issue solely as a matter of state law on direct appeal, and the Court of Appeals decided the issue on state law grounds. *See Saari*, 2020 WL 3172657.

Because Saari did not properly present a federal issue in any of those proceedings, he has failed to exhaust this claim. When no state court remedy is available, the exhaustion requirement is considered satisfied, and the failure to exhaust "provides an independent and adequate state-law ground for the conviction and sentence, and thus prevents federal habeas corpus review of the defaulted claim." *Gray,* 518 U.S. at 162. Saari raised this claim on direct appeal and is therefore barred from raising it in a petition for postconviction relief with the state. *See State v. Knaffla*, 243 N.W.2d 737, 741 (Minn. 1976) ("[W]here direct appeal has once been taken, all matters raised therein, and all claims known but not raised, will not be considered upon a subsequent petition for postconviction relief."). Accordingly, this claim is procedurally defaulted.

The only remaining question is whether Saari has demonstrated cause and prejudice sufficient to excuse the default, or that a fundamental miscarriage of justice will occur if the Court does not review the merits of his claim. *See Charron v. Gammon*, 69 F.3d 851, 857 (8th Cir.1995) ("[T]o receive federal review of a habeas claim that has been procedurally defaulted in state court, the petitioner must demonstrate cause for the default

[1] Saari primarily relied on *State v. Peterson*, 936 N.W.2d 912 (Minn. Ct. App. 2019). That case did not involve a motion to sever charges; instead, it held that Minnesota's stalking-by-telephone statute was unconstitutional under the First Amendment to the United States Constitution. The case raises a federal constitutional issue, but not a pertinent one.

and actual prejudice."). Saari has not explained the cause for defaulting his claim. Nor has he argued that he has been prejudiced by the procedural default. Though he does assert that he maintains his innocence, Dkt. No. 15 at 9, he does not provide support for that claim. "To establish actual innocence, [a] petitioner must demonstrate that, 'in light of all the evidence,' 'it is more likely than not that no reasonable juror would have convicted him.'" *Bousley v. United States*, 523 U.S. 614, 623 (1998) (quoting *Schlup v. Delo,* 513 U.S. 298, 327-28 (1995)). Saari has not shown that, but for the alleged errors at trial, no reasonable juror would have convicted him. *See id.* (noting that "'actual innocence' means factual innocence, not mere legal insufficiency"). The Court recommends denying his claim that the district court erred in failing to sever the charges.

B. Claim that Jury was Improperly Instructed on Witness Tampering

Saari asserts that his conviction for aggravated first-degree witness tampering should be reduced to first-degree witness tampering because the jury was instructed on the latter. Alternatively, he argues that bringing this charge constituted "unfair and selective" prosecution. Dkt. 15 at 4. Saari did not raise the selective prosecution argument in his proceedings with the Minnesota courts. As to the argument that the jury was improperly instructed, Saari did not fairly present this as a federal issue to the state courts. Because these arguments were either raised or "known but not raised" in the Minnesota courts, he is barred from raising them again in state court proceedings. *See Knaffla*, 243 N.W.2d at 741. This claim is therefore procedurally defaulted, and Saari has not demonstrated cause or prejudice to excuse the default.

Moreover, even if Saari had properly preserved this claim, "[a] federal court may grant habeas relief on the basis of a faulty state law jury instruction only if the erroneous instruction 'so infected the entire trial that the resulting conviction violates due process.'" *Iromuanya v. Frakes*, 866 F.3d 872, 881 (8th Cir. 2017) (quoting *Estelle*, 502 U.S. at 72). Saari does not meet that standard. At trial, the jury found him guilty on two counts of aggravated witness tampering. On one count, the court instructed the jury that the state must prove a threat of injury, but it failed to instruct that aggravated tampering required a threat of death or great bodily injury. On the other count, however, the jury was correctly instructed. Because of this, and because of the "overwhelming" evidence that there were threats of great bodily harm, the Minnesota Court of Appeals determined that the error did not have a significant effect on the jury's verdict. *Saari*, 2020 WL 3172657, at *6.

Because the claim is procedurally defaulted and Saari has failed to show cause and prejudice, the Court recommends denying his claim that the faulty jury instruction warrants a reduction from aggravated first-degree witness tampering to first-degree witness tampering.

III. Claim that Minnesota Statute is Unconstitutional

Saari argues that the Minnesota statute criminalizing nonconsensual dissemination of private sexual images is unconstitutional. In his amended habeas petition, Saari first argues that the victim "waived her reasonable expectation of privacy." Dkt. No. 15 at 5. This argument was not presented to the Minnesota courts and, because it was "known but not raised," it is procedurally defaulted. *Knaffla*, 243 N.W.2d at 741. In his reply brief, Saari next argues that the Minnesota courts erred in concluding that Minn.

Stat. § 617.261 is constitutional under the First Amendment to the United States Constitution. Because he has not shown that the decisions of the Minnesota courts were contrary to, or an unreasonable application of, existing federal law, this claim should be denied.

On direct appeal, Saari asserted that § 617.261 was unconstitutionally overbroad under the First Amendment to the United States Constitution. The Minnesota Court of Appeals agreed, reversing his conviction on the two counts of non-consensual dissemination of private sexual images. The Minnesota Supreme Court granted further review of that decision, then stayed further proceedings as it considered the constitutionality of the statute in *State v. Casillas,* 952 N.W.2d 629 (Minn. 2020). On December 30, 2020, the Minnesota Supreme Court held that § 617.261 is not unconstitutionally overbroad. It lifted the stay and remanded Saari's case to the Minnesota Court of Appeals for reconsideration in light of *Casillas*. On remand, the Minnesota Court of Appeals concluded the statute was also not unconstitutionally vague and affirmed Saari's convictions. Because Saari appears to challenge the Minnesota Supreme Court's constitutional analysis in *Casillas*, rather than the Court of Appeals' application of that case to Saari's appeal,[2] this Court will address *Casillas*.

The defendant in *Casillas* appealed his conviction under the nonconsensual dissemination statute, arguing that the statute was (1) an impermissible content-based restriction on speech that is not narrowly tailored to achieve a compelling government

[2] Saari "intentionally omitted the void for vagueness claim from the § 2254 petition and only presents the overbreadth challenge." Dkt. No. 35. Because *Casillas* addressed overbreadth, that is the state court decision Saari challenges here.

interest, and (2) unconstitutionally overbroad. The Minnesota Supreme Court first determined that the state "carried its burden of showing a compelling governmental interest in criminalizing the nonconsensual dissemination of private sexual images," and that § 617.261 is "narrowly tailored" and the "least restrictive means" to solve the problem. *Casillas*, 952 N.W.2d at 642. The court then addressed whether the statute was overbroad, concluding that because the statute survived strict scrutiny review, the claimant had also failed to show that "a substantial number of [the statute's] applications are unconstitutional." *Id.* at 646.

When "there has been a state court decision adjudicating the merits of a claim that a statute is overbroad in violation of the First Amendment, federal habeas review of the state court's rejection of such a claim is significantly deferential since the overbreadth doctrine is a very general rule." *Cohn v. Smith*, No. CV 14-4647, 2019 WL 4229692, at *30 (C.D. Cal. July 12, 2019) (citing *Sexton v. Beaudreaux*, 138 S. Ct. 2555, 2560 (2018)), *report and recommendation adopted*, No. CV 14-4647, 2019 WL 4221386 (C.D. Cal. Sept. 4, 2019). Under that general rule, a criminal statute may be invalidated as facially overbroad if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 468 (2010) (citation and internal quotation marks omitted).

Saari cites two United States Supreme Court cases to support his claim that the statute is unconstitutional. The first is *Virginia v. Hicks*, 539 U.S. 113 (2003), which he cites for the rule that an overbreadth claimant bears the burden of demonstrating overbreadth. He does not argue that the Minnesota courts misapplied the law of this case; rather, he appears to argue that he has met his burden as an overbreadth claimant in this

Court. That is not relevant to the inquiry under § 2254(d)(1). The second is *Reed v. Town of Gilbert*, 576 U.S. 155 (2015), which stands for the proposition that content-based restrictions on speech are subject to strict scrutiny. The Minnesota Supreme Court cited *Reed* for that very rule. It then declined to reach the question of whether the statute was a content-based restriction on speech, instead applying strict scrutiny from the outset. It ultimately determined that Minn. Stat. § 617.261 survived strict scrutiny, the most demanding analysis prescribed by the United States Supreme Court. Accordingly, the Minnesota Supreme Court's decision was not contrary to, nor an unreasonable application of, the existing federal law Saari cites.

Nor does the decision appear contrary to any existing federal law Saari could have cited. Assessing the statute under strict scrutiny, the Minnesota Supreme Court determined that the state showed a compelling governmental interest in criminalizing the nonconsensual dissemination of private sexual images, and that § 617.261 is narrowly tailored and the least restrictive means to solve that problem. *See Casillas*, 952 N.W.2d at 642. This was a reasonable application of United States Supreme Court precedent. The court also considered whether a substantial number of the statute's applications were unconstitutional, thus applying the test set forth in *Stevens*, 559 U.S. at 468. According to the court, the fact that the statute survives strict scrutiny necessarily answers the question whether it is substantially overbroad. An overbreadth claimant must show that a substantial number of a statute's applications are unconstitutional, but if a statute survives strict scrutiny, "the court has already determined that *all* of the statute's applications are constitutional." *Casillas*, 952 N.W.2d at 646. Thus, the Minnesota Supreme Court determined an overbreadth analysis would be "needlessly redundant." *Id.*

The court's decision to forego an overbreadth analysis in *Casillas* was not contrary to existing federal law. Noting that "the relationship between the overbreadth doctrine and a scrutiny analysis is unclear," the court consulted numerous United States Supreme Court cases, ultimately finding none that controlled the outcome. *Id.* at 645. The law in this area is not clearly established, and the Minnesota Supreme Court's decision was a reasonable application of existing federal law. *See Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009) (holding that "it is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by [the Supreme] Court") (internal quotations omitted); *Wright v. Van Patten*, 552 U.S. 120, 126 (2008) ("Because our cases give no clear answer to the question presented, let alone one in [the petitioner's] favor, it cannot be said that the state court unreasonabl[y] appli[ed] clearly established Federal law.") (internal quotations omitted); *Carey v. Musladin*, 549 U.S. 70, 77 (2006) ("Given the lack of holdings from this Court . . . it cannot be said that the state court unreasonabl[y] appli[ed] clearly established Federal law.") (internal quotations omitted).

Having concluded that the Minnesota Supreme Court appropriately applied United States Supreme Court precedent, this Court will not independently consider the constitutionality of the statute Saari challenges. *See Lyons v. Luebbers*, 403 F.3d 585, 592 (8th Cir. 2005) (quoting *Williams*, 529 U.S. at 411) (A federal court "may not issue the writ simply because it 'concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly'"). Section 2254(d) bars re-litigation of any claim that was adjudicated on the merits in state court subject only to the exceptions in § 2254(d)(1) and (2). Saari has not satisfied those

exceptions because he has not shown the Minnesota Supreme Court's decision in *Casillas* was contrary to clearly established federal law, involved an unreasonable application of such law, or was based on an unreasonable determination of facts.

IV. Pattern-of-Stalking Statute

Saari claims that the pattern-of-stalking jury instruction was ambiguous, which relieved the state of its burden and "essentially direct[ed] a verdict for the State." Dkt. No. 15. Specifically, he argues that the pattern-of-stalking statute requires juror unanimity as to each of the underlying offenses on which a pattern-of-stalking conviction can be based. Though the jury did find him guilty of this offense, the pattern-of-stalking charge was dismissed before sentencing. Because he was not sentenced on this charge, Saari is not "in custody pursuant to the judgment of a state court" as required by 28 U.S.C. § 2254. *See Maleng v. Cook*, 490 U.S. 488, 490–91 (1989) (noting that § 2254 "requir[es] that the habeas petitioner be 'in custody' under the conviction or sentence under attack at the time his petition is filed"); *cf. Flittie v. Solem*, 867 F.2d 1053, 1055 (8th Cir. 1988) (holding that incarcerated petitioner who had served sentence for one conviction was no longer "in custody" for purposes of that charge).

V. Motion for Evidentiary Hearing

Saari asserts that an evidentiary hearing is necessary for three reasons: (1) the pattern-of-stalking jury instructions should have required juror unanimity and their failure to do so deprived him of a fair trial; (2) Respondent relied on facts that lacked evidentiary support in its briefing; and (3) the Supreme Court's decision in *Counterman v. Colorado*,

600 U.S. 66 (2023), constitutes a new substantive rule of criminal law applicable to his petition.

"In deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief." *Schriro v. Landrigan,* 550 U.S. 465, 474 (2007). A federal court must take into account the standards prescribed by § 2254 in deciding whether an evidentiary hearing is appropriate. If a petitioner has failed to develop the factual basis of a claim in state court proceedings, an evidentiary hearing on the claim is not appropriate unless the petitioner shows that:

> (A) the claim relies on—
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2). Thus, "if the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing." *Schriro*, 550 U.S. at 474.

Saari's first argument regarding the pattern-of-stalking jury instructions simply reasserts the allegations made in Ground IV of his amended habeas petition. As addressed above, the pattern-of-stalking charge was dismissed before sentencing; Saari is not in custody pursuant to a conviction on this offense. Thus, even if the alleged error had not occurred, he would still be serving the same sentence. An evidentiary hearing on

this issue would not help Saari prove any factual allegations which could entitle him to habeas relief.

Saari next argues that Respondent mischaracterized the facts in its Memorandum in Support of Dismissal. In so doing, Saari argues, "Respondent is supplanting conduct [for] which it has no evidentiary support." Dkt. No. 44 at 2. This argument does not justify an evidentiary hearing because it is unrelated to the facts established in state courts proceedings; it has no impact on whether any "reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2254. An evidentiary hearing on this issue would not help Saari develop the factual basis of any claim.

Finally, Saari's contends that the United States Supreme Court announced a new substantive rule of criminal law in *Counterman v. Colorado*, 600 U.S. 66 (2023). In *Counterman*, the Court held that the First Amendment requires a minimum *mens rea* of recklessness for a criminal conviction for communications involving a true threat. 600 U.S. at 79-80. Saari claims that this new rule affects Grounds III and IV of his amended petition. Ground IV was the argument that the pattern-of-stalking statute requires juror unanimity as to each of the underlying offenses on which a pattern-of-stalking conviction can be based. Again, Saari is not in custody pursuant to a conviction for this charge; the Supreme Court's decision in *Counterman* is therefore irrelevant to the claim. Ground III claimed that the Minnesota statute criminalizing nonconsensual dissemination of private sexual images was unconstitutional. It is unclear how *Counterman*'s holding bears at all on Saari's conviction for nonconsensual dissemination of private sexual images, a charge that does not involve communication of a true threat.

The rule announced in *Counterman* is most relevant to Ground II of Saari's amended petition, challenging his conviction for aggravated witness tampering under Minn. Stat. § 609.498, subd. 1b(a)(3). Under *Counterman*, true threats are "'serious expression[s]' conveying that a speaker means to 'commit an act of unlawful violence,'" and statutes criminalizing such threats require a minimum *mens rea* of recklessness. 600 U.S. at 74 (quoting *Virginia v. Black*, 538 U.S. 343, 359 (2003)). The Minnesota aggravated witness tampering statute, which criminalizes threats "to cause great bodily harm or death" to a witness, is a crime involving a true threat. Minn. Stat. § 609.498, subd. 1b(a). But the Minnesota statute already requires that a defendant convey the threat "intentionally." *Id.* This is a more demanding *mens rea* than recklessness. *See, e.g.*, Model Penal Code § 2.02(5) ("When recklessness suffices to establish an element, such element also is established if a person acts purposely or knowingly."). The statute thus meets the requirement expressed in *Counterman*. Accordingly, "even with the benefit of an evidentiary hearing," Saari "could not develop a factual record that would entitle him to habeas relief." *Schriro*, 550 U.S. at 475.

VI. Certificate of Appealability

A § 2254 habeas petitioner cannot appeal an adverse ruling on his petition unless he is granted a certificate of appealability (COA). *See* 28 U.S.C. § 2253(c)(1); Rule 11(a), Rules Governing Section 2254 Cases in the U.S. District Courts. A COA will be granted only if the petitioner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make such a showing, "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the

constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). In this case, it is highly unlikely that any other court, including the Eighth Circuit Court of Appeals, would treat Saari's current habeas petition differently than it is being treated here. Saari has not identified, and this Court cannot discern, anything noteworthy or worrisome about this case that warrants appellate review. The Court therefore recommends that Saari not be granted a COA in this matter.

RECOMMENDATION

For the reasons set forth above, the Court RECOMMENDS THAT:

1. Joseph Thomas Saari's amended habeas petition [Dkt. No. 15] be DENIED.
2. No certificate of appealability be issued.

Dated: November 1, 2023

s/David T. Schultz
DAVID T. SCHULTZ
U.S. Magistrate Judge

NOTICE

Filing Objections: This Report and Recommendation is not an order or judgment of the District Court and is therefore not appealable directly to the Eighth Circuit Court of Appeals.

Under Local Rule 72.2(b)(1), "a party may file and serve specific written objections to a magistrate judge's proposed finding and recommendations within 14 days after being served a copy" of the Report and Recommendation. A party may respond to those objections within 14 days after being served a copy of the objections. *See* Local Rule 72.2(b)(2). All objections and responses must comply with the word or line limits set forth in Local Rule 72.2(c).

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

JOSEPH THOMAS SAARI,

Petitioner,

v.

JESSE PUGH,

Respondent.

Case No. 22-CV-2414 (PJS/DTS)

ORDER

Joseph Thomas Saari, petitioner, pro se.

Nathaniel T. Stumme, ST. LOUIS COUNTY ATTORNEY'S OFFICE, for respondent.

This matter is before the Court on Petitioner Joseph Thomas Saari's objections to the November 1, 2023 Report and Recommendation ("R&R") of Magistrate Judge David T. Schultz. Judge Schultz recommends denying the amended petition for habeas corpus. The Court has conducted a de novo review. See 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). Based on that review, the Court overrules Saari's objections and adopts Judge Schultz's thorough and careful R&R.

Only one matter merits comment. Saari appears to argue that, even though he was not sentenced on the pattern-of-stalking charge for which the jury found him guilty, the inclusion of that charge in the jury instructions gave the jury license to find him guilty on his other charges by a mere preponderance of the evidence, because those

charges formed the predicate for the pattern-of-stalking charge. It is unclear if Saari properly raised this argument in his state proceedings or before Judge Schultz, but even assuming he had, it would not matter. Far from convicting him by "general verdict" (as Saari suggests), the jury in his case filled out a separate verdict form for each count. *See* Answer Ex. 5, ECF No. 30-5. There is no reason to believe that the jury applied a lower standard of proof on all but one those verdicts, as Saari contends.

ORDER

Based on the foregoing, and on all of the files, records, and proceedings herein, the Court OVERRULES petitioner's objections [ECF No. 51] and ADOPTS the R&R [ECF No. 50]. IT IS HEREBY ORDERED THAT:

1. Petitioner Joseph Thomas Saari's amended petition for a writ of habeas corpus [ECF No. 15] is DENIED.
2. Petitioner's motion for status update in civil case [ECF No. 38] and motion for an evidentiary hearing [ECF No. 44] are DENIED as moot.
3. No certificate of appealability will issue.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: December 11, 2023

s/Patrick J. Schiltz
Patrick J. Schiltz, Chief Judge
United States District Court

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 23-3728

Joseph Thomas Saari

Petitioner - Appellant

v.

Jesse Pugh, Warden of MCF--Rush City

Respondent - Appellee

Appeal from U.S. District Court for the District of Minnesota
(0:22-cv-02414-PJS)

JUDGMENT

Before LOKEN, GRUENDER, and KOBES, 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.

February 08, 2024

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

/s/ Michael E. Gans

Additional material from this filing is available in the Clerk's Office.