No. ___- ____

IN THE

SUPREME COURT OF THE UNITED STATES

EMEM UFOT UDOH,

Petitioner,

vs.

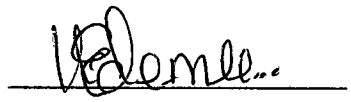
STATE OF MINNESOTA,

Respondent.

APPENDIX

April 22, 2019

Respectfully Submitted,



Emem U. Udoh,
Pro se Litigant, 245042
1000 Lake Shore Drive
Moose Lake, MN 55767

STATE OF MINNESOTA

IN SUPREME COURT

A18-1804

In re Emem Ufot Udoh,

Petitioner,

State of Minnesota,

Respondent,

vs.

Emem Ufot Udoh,

Petitioner.

ORDER

Based upon all the files, records, and proceedings herein,

IT IS HEREBY ORDERED that the motion of Emem Ufot Udoh for leave to proceed in forma pauperis for purposes of the filing fee in this court be, and the same is, granted.

IT IS FURTHER ORDERED that the petition of Emem Ufot Udoh for further review be, and the same is, denied.

Dated: February 27, 2019

BY THE COURT:

Lorie S. Gildea
Chief Justice

STATE OF MINNESOTA

IN COURT OF APPEALS

In re Emem Ufot Udoh, Petitioner,

State of Minnesota,

Respondent,

vs.

Emem Ufot Udoh,

Petitioner.

O R D E R

#A18-1804

Considered and decided by Cleary, Chief Judge; Bjorkman, Judge; and Florey, Judge.

BASED ON THE FILE, RECORD, AND PROCEEDINGS, AND FOR THE FOLLOWING REASONS:

Petitioner has filed a petition for a writ of prohibition seeking to prevent the assigned judge from presiding over postconviction proceedings in Hennepin County. Petitioner has also filed several motions to stay the postconviction proceedings pending this court's decision on his petition for prohibition. The state has filed a response opposing prohibition. And petitioner has filed a reply.

A writ of prohibition "is a preventative, not a corrective, measure, and if normal appeal procedures could rectify any errors, a writ is generally not appropriate." *State v. Deal*, 740 N.W.2d 755, 769 (Minn. 2007). Three requirements must be met for a writ of

prohibition to issue from this court: "(1) an inferior court or tribunal is about to exercise judicial or quasi-judicial power; (2) the exercise of such power is unauthorized by law; and (3) the exercise of such power will result in injury for which there is no adequate remedy." *Id.* (quotation omitted). Prohibition is the proper remedy for obtaining review of the denial of a notice to remove a judge, including a notice to remove for cause. *See In re Jacobs*, 802 N.W.2d 748, 750 (Minn. 2011). The question of whether a judge is disqualified from presiding over a case is a question of law, which we review de novo. *Id.* But we review the denial of a motion to disqualify a judge for cause for an abuse of discretion. *Hooper v. State*, 680 N.W.2d 89, 93 (Minn. 2004).

A notice to remove a judge for cause is "heard and determined" by the chief judge of the district. Minn. R. Crim. P. 26.03, subd. 14(3). "A judge must not preside at a trial or other proceeding if disqualified under the Code of Judicial Conduct." *Id.* "A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned," including where the judge has "personal bias or prejudice concerning a party," "or personal knowledge of facts that are in dispute in the proceeding." Minn. Code Jud. Conduct Rule 2.11(A)(1). "A judge is disqualified for a lack of impartiality under Rule 2.11(A) if a reasonable examiner, from the perspective of an objective layperson with full knowledge of the facts and circumstances, would question the judge's impartiality." *Troxel v. State*, 875 N.W.2d 302, 314 (Minn. 2016) (quotations omitted). But "[t]he mere fact that a party declares a judge partial does not in itself generate

a reasonable question as to the judge's impartiality." *State v. Burrell*, 743 N.W.2d 596, 601-02 (Minn. 2008).

The chief judge denied petitioner's disqualification motion after a hearing and issued a written order and memorandum concluding that petitioner's "claim of partiality" "lacks any supporting facts or evidence."

In the petition for prohibition, petitioner advances multiple reasons why the assigned judge is biased. Many of these reasons involve the judge's adverse rulings with respect to his pending postconviction claims. But dissatisfaction with a court's rulings is not a sufficient basis for establishing judicial bias. *See State v. Mems*, 708 N.W.2d 526, 533 (Minn. 2006). To the extent petitioner is seeking to disqualify the assigned judge to obtain relief from the judge's adverse rulings, he has an ordinary remedy to challenge these rulings in an appeal should the judge deny his postconviction petition seeking a new trial based on the witness recantations. *See* Minn. R. Crim. P. 28.02, subd. 2(1).

Petitioner also contends that the assigned judge has knowledge of disputed evidentiary facts that relate to the witness recantations because the judge presided over the trial. But it is common for the same judge who presided at trial to preside over the postconviction proceeding, and this fact alone does not present an adequate ground for disqualification. *Rossberg v. State*, 874 N.W.2d 786, 790 (Minn. 2016). Moreover, the fact that the judge presided over the trial only means that she obtained knowledge through her role as a judge and not by any personal involvement in the case. *See State v. Dorsey*, 701 N.W.2d 238, 246-47 (Minn. 2005) (interpreting phrase "personal knowledge" of

disputed facts as "knowledge that arises out of a judge's private, individual connection to particular facts" and does not include knowledge "a judge acquires in her day-to-day life as a judge and citizen").

Finally, petitioner asks this court to stay the postconviction proceedings so that he can obtain a transcript of the entire postconviction evidentiary hearing. Petitioner asserts that a full review of the entire transcript is also necessary for this court to obtain full knowledge of the circumstances and evaluate his claim that the assigned judge is biased. Based on our objective examination of the entire district court record, which includes the transcript of the October 18, 2018 hearing on petitioner's disqualification motion and partial transcripts of the postconviction evidentiary hearing, petitioner has not established that the assigned judge's impartiality might reasonably be questioned. The chief judge did not, therefore, abuse her discretion in denying petitioner's motion to disqualify the assigned judge. Because there is no basis for granting prohibition, petitioner's motion to stay the postconviction proceedings will be denied as unnecessary.

IT IS HEREBY ORDERED:

1. The petition for a writ of prohibition is denied.

2. The motion for a stay of the district court proceedings is denied.

Dated: January 2, 2019

BY THE COURT

Edward J. Cleary
Chief Judge

Filed in District Court
State of Minnesota
10/24/2018 11:58 AM

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

State of Minnesota,

Plaintiffs,

vs.

ORDER DENYING MOTION TO REMOVE JUDGE FOR CAUSE

Emem Ufot Udoh,

Defendant.

District Court File 27-CR-13-8979

This matter came before the undersigned in her capacity as Chief Judge on Defendant's Motion for Removal of Judge Tamara Garcia for Cause.

The Court presided over a hearing on this motion on October 18, 2018.

The State was represented by Krista White, Esq.

Defendant was present with his counsel, Eric Newmark, Esq., who advised the Court that he was not acting on behalf of his client for purposes of this motion, which was filed independently by Mr. Udoh, but he was representing Mr. Udoh for the post-conviction relief motion pending.

Based upon the Court's review of the files, records, and proceedings, including the arguments of counsel for the State and Mr. Udoh,

IT IS ORDERED:

1. Defendant's motion to remove Judge Tamara Garcia for Cause is **denied.**

Filed in District Court
State of Minnesota
10/24/2018 11:58 AM

2. Judge Garcia shall proceed to hear Defendant's motion for post-conviction relief.

3. The attached memorandum is incorporated herein.

BY THE COURT:

Dated: October 23, 2018

Ivy S. Bernhardson
Chief Judge of District Court

Filed in District Court
State of Minnesota
10/24/2018 11:58 AM

MEMORANDUM

No judge should preside over a proceeding if the judge would be disqualified under the Code of Judicial Conduct. Minn. R. Crim. P. 26.03, Subd. 14(3). Canon 2.11(A) of the Code of Judicial Conduct provides that a judge should disqualify himself or herself if the judge's impartiality might reasonably be questioned, including when the judge has a personal bias or prejudice concerning a party. Minn. Code Jud. Conduct, Canon 2.11(A)(1).

The criminal standard does not require demonstrating actual bias, but instead looks at whether a reasonable examiner could question the judge's impartiality under the same or similar facts and circumstances. Minn. Code Jud. Conduct, Canon 3(C)(1).

The Minnesota Supreme Court explains it this way: "...an impartial judge has no actual bias against the defendant or interest in the outcome of his particular case. To remain impartial, the judge should avoid the appearance of impropriety and should act to assure that parties have no reason to think their case is not being fairly judged." *State v. Munt*, 831 N.W.2d 569, 580 (2013).

In this case, it is readily apparent that the defendant's claim of partiality of Judge Garcia lacks any supporting facts or evidence. He alleges various defects in the underlying jury trial presided over by Judge Garcia, which are outside the scope of a motion to remove for cause, and which have already been the subject of a post-conviction appeal, all of which were denied.

The defendant fails to provide any quality information substantiating this claim. "The mere fact that a party declares a judge partial does not in itself generate a reasonable question as to the judge's impartiality." *State v. Burrell,* 743 N. W.2d 596, 601-602 (Minn. 2008). Defendant

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State of Minnesota
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alluded to an inappropriate relationship between Judge Garcia and the prosecutor, but without any substantial offer of facts constituting improper behavior.

He also claimed Judge Garcia treated him unfairly in the three prior days of hearing previously on the pending post-conviction hearing regarding victims' recantation (July 27, 2018; July 30, 2018 and August 1, 2018). Judge Garcia issued a comprehensive order dated August 3, 2018 laying out what had transpired over the hearing dates, and the reasons for various actions she took, which ultimately ended with a continuance to provide defendant with an additional opportunity to complete the evidentiary hearing in October 2018. Judge Garcia then issued a subsequent order (September 21, 2018) to outline expectations for the continued hearing, given that at that date, Mr. Udoh did not have counsel. Under the Code of Judicial Conduct, judges may make accommodations (in this case, to provide an explanation of the process) to ensure that pro se litigants have their matters fairly heard). See Comment to Rule 2.2, Minn. Rules Jud. Conduct.

Judges should be sensitive to the appearance of impropriety and should take measures to assure that litigants have no cause to think their case is not being fairly judged; nevertheless, a judge who feels able to preside fairly over the proceedings should not be required to step down upon allegations of a party which themselves may be unfair, and which simply indicate dissatisfaction with the possible outcome of the litigation. *State v. Burrell*, 743 N.W.2d 596, 601-602 (Minn. 2008)(quoting *McClelland v. McClelland*, 359 N.W.2d 7, 11 (Minn. 1984)).

The United States Supreme Court has also explained the standard implicit in these matters in *Liteky v. United States,* 510 U.S. 540, 555 (1994): "First, judicial rulings alone almost never constitute a valid basis for a bias or partiality motion. Second, opinions formed by the Judge on the basis of facts introduced or events occurring in the course of current proceedings, or

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State of Minnesota
10/24/2018 11:58 AM

of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge."

Viewing all of the facts and circumstances of this matter as a reasonable examiner, the Court does not find that defendant has demonstrated that Judge Garcia should be disqualified. Therefore, the defendant's motion to remove Judge Garcia for cause is denied and her assignment to hear Defendant's motion for post-conviction relief shall proceed.

ISB

Filed in Fourth Judicial District Court
6/15/2018 2:04 PM
Hennepin County, MN

STATE OF MINNESOTA	DISTRICT COURT
COUNTY OF HENNEPIN	FOURTH JUDICIAL DISTRICT
State of Minnesota, Respondent, v. Emem Ufot Udoh, Petitioner.	Case Type: Criminal Judge Tamara Garcia Court File No. 27-CR-13-8979 **ORDER DENYING POST-CONVICTOIN PETITION IN PART AND GRANTING AN EVIDENTIARY HEARING IN PART**

The above-entitled matter came before the Honorable Tamara Garcia on April 10, 2018 on Petitioner's petition for post-conviction relief.

PARTIES

Christina Warren, Assistant Hennepin County Attorney, is the attorney of record for the State of Minnesota.

Emem Udoh, Petitioner, is pro se.

Upon the evidence adduced, the arguments of counsel, and all files, records and proceedings herein, the Court makes the following:

PROCEDURAL POSTURE AND FINDGS OF FACT

1. Petitioner was charged with (1) Criminal Sexual Conduct in the First Degree in violation of Minn. Stat. § 609.342, subd. 1(b), (2) Criminal Sexual Conduct in the Second Degree in violation of Minn. Stat. § 609.343, subd. 1(b), (3) Criminal Sexual Conduct in the First Degree in violation of Minn. Stat. § 609.342, subd. 1(a), and (4) Criminal Sexual Conduct in the Second Degree in violation of Minn. Stat. § 609.343, subd. 1(a). Counts 1 and 2 related to the sexual abuse of Petitioner's stepdaughter, K.K.W. Counts 3 and 4 related to the sexual abuse of Petitioner's stepdaughter, K.C.W.

2. A full recitation of the facts presented at trial can be found in *State v. Udoh*, which the Court adopts and incorporates here. 2016 WL 687328, *1-2 (Minn. 2016).

3. On August 19, 2014, following trial, a jury found Petitioner guilty of Counts 1, 2 and 4, but acquitted him on Count 3. On September 25, 2014, Petitioner was convicted on Counts 1, 2 and 4 and sentenced on Counts 1 and 4.

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4. On direct appeal, Petitioner's appellate counsel raised two issues: (1) "that the district court abused its discretion by allowing expert testimony on the ultimate issue" and (2) that the district court "erred by entering a conviction on a count of second-degree criminal sexual conduct." *Id.* at *1.

5. The first issue dealt with the district court allowing Dr. Thompson to testify as to whether or not a person would have to penetrate the female genital opening in order to touch a female on her hymen. *Id.* at *2-3. The Court of Appeals ultimately held that the District Court did not abuse its discretion in overruling Petitioner's objection and allowing Dr. Thompson's testimony on that point and that there was "little likelihood that the challenged testimony substantially influenced the jury's decision." *Id.* at *3-4 (internal quotations omitted).

6. On the second issue raised by appellate counsel, the Court of Appeals agreed that Petitioner was incorrectly convicted of Count 2, as it was a lesser-included offense to Count 1.

7. Petitioner also raised four issues pro se on appeal: "that (1) the district court abused its discretion by limiting cross-examination of K.K.W.; (2) the district court erred by admitting certain evidence; (3) the prosecutor committed misconduct; and (4) the district court erred by denying his motion for a judgment of acquittal." *Id.* at *4. The Court of Appeals denied all of Petitioner's pro se grounds for relief.

8. The Court of Appeals issued its opinion on this matter on February 22, 2016 and remanded to the district court for vacation of Petitioner's conviction on Count 2. Immediately upon receipt of the appellate court opinion and also on February 22, 2016, the undersigned issued an order vacating Petitioner's conviction on Count 2 and ordering a new warrant of commitment be issued. On May 31, 2016, the Minnesota Supreme Court declined review of this matter and affirmed the appellate court decision.

9. On April 10, 2018, Petitioner filed a petition for post-conviction relief requesting relief on the following 10 grounds[1]:

    a. that the District Court abused its discretion in excluding evidence of specific instances of conduct showing untruthfulness on the part of K.K.W.;
    b. that the District Court erred in admitting the CornerHouse videos into evidence;
    c. prosecutorial misconduct;
    d. that the District Court erred in denying Petitioner's motion for judgment of acquittal on the grounds of insufficient evidence;
    e. that the District Court erred in convicting Petitioner of Count 2;
    f. that the District Court erred in allowing Dr. Thompson to testify about what constituted penetration in this matter;
    g. that Petitioner received ineffective assistance of trial counsel for failing to properly preserve issues a-f;

[1] The Court refers to these grounds as claims a-j throughout the remainder of this order.

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h. that Petitioner received ineffective assistance of appellate counsel for failing to "adequately and effectively" raise issues a-g;
i. that Petitioner is entitled to an acquittal or a new trial based on newly recanted witness testimony[2]; and
j. that *Knaffla*,[3] which acts as a procedural bar to Petitioner's claims in a-g, is unconstitutional.

Petitioner seeks relief in the form of discovery, subpoenas for identified witnesses, an evidentiary hearing, vacation of his convictions and a new trial.

10. Petitioner's claims a-f are virtually identical to claims raised by Petitioner and his counsel on direct appeal. Additionally, Petitioner's claim that *Knaffla* is unconstitutional is not truly a ground for relief, but rather an argument for why claims a-g should not be procedurally barred, thus, it will be treated as argument applicable to all claims a-g rather than a separate claim for relief.

11. In his petition, Petitioner includes the following exhibit to support his claim that the victims have recanted their trial testimony:

A7: Notarized Affidavits of K.K.W. and K.C.W.

Both affidavits are dated March 17, 2018 and notarized on March 18, 2018. K.K.W.'s affidavit states that she lied about Petitioner abusing her following the suggestion of her friend in order to get her phone back. She also indicates she was pressured to maintain the story under threats by unspecified persons who told her that her brothers would be taken away, that her mom would go to jail and she would be in trouble if she did not do as they said. She states that she is sorry and wants her family back because she misses her mother, her brother and her stepdad. K.C.W.'s affidavit states that she lied about Petitioner abusing her because she was scared of the police, social worker, and all of the other people with whom she spoke. K.C.W. also expressed that she stuck with her story due to threats that her mother would go to prison and that she would get in trouble if she changed her story.

CONCLUSIONS OF LAW

Discovery

1. Chapter 590 provides a vehicle for relief when appellate review is no longer available. *State v. Vikeras*, 378 N.W.2d 1, 3 (Minn. Ct. App. 1985). "These procedures were not devised to permit parties to engage in legal games or to permit a petitioner to embark upon unlimited and undefined discovery proceedings." *Thompson v. State*, 170 N.W.2d 101, 104 (Minn. 1969). "A criminal defendant proved guilty after a fair trial does not have the same liberty interests as a free man." *District Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 68 (2009). Therefore, "preconviction trial rights,"

[2] Petitioner describes this as "newly discovered evidence."
[3] *State v. Knaffla*, 309 N.W.2d 246 (Minn. 1976).

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including rights under the pre-trial discovery rules and *Brady v. Maryland*, 373 U.S. 83 (1963), do not extend to postconviction proceedings. *Id.* In the postconviction proceeding, discovery is closed and will not be reopened absent good cause. *Carter v. State*, 2001 WL 682790 at *3 (Minn. Ct. App. June 19, 2001).

2. Petitioner has failed to identify any specific items of discovery he is requesting and has made no showing of good cause that the Court should reopen discovery in this matter. Thus, Petitioner is not entitled to discovery at this point in the proceedings.

Claims a-f: Errors during the Trial Court Proceedings

3. "The court...may summarily deny a petition when the issues raised in it have previously been decided by the Court of Appeals or the Supreme Court in the same case." Minn. Stat. § 590.04, subd. 3. Moreover, while a person convicted of a crime is entitled to review, claims that have been fully and fairly litigated, should not be re-litigated on subsequent appeals or petitions. *State v. Knaffla*, 243 N.W.2d 737,741 (Minn. 1976).

4. Petitioner argues that *Knaffla* should not be applied as a bar to his claims as the decision is unconstitutional. *Knaffla* has been a part of Minnesota jurisprudence for over 40 years and has been relied upon repeatedly by both the Minnesota Court of Appeals and the Minnesota Supreme Court throughout that time. The Supreme Court has cited it as recently as June 6, 2018. *See Wayne v. State*, -- N.W.2d --, 2018 WL 2708743 (Minn. 2018). The Court is not persuaded by any of Petitioner's arguments that *Knaffla* is unconstitutional either generally or as applied to his case.

5. There are two exceptions to the *Knaffla* rule; (1) "the claim is so novel that its legal basis was not reasonably available at the time of the direct appeal" or (2) "when fairness so requires and the petitioner did not deliberately and inexcusably fail to raise the issue on direct appeal". *Greer v. State*, 673 N.W.2d 151, 155 (Minn. 2004). Neither exception applies to any of Petitioner's claims.

6. While Petitioner cites *Tome v. United States*, for the proposition that the admission of prior consistent statements of witnesses should not have been admissible (claim b), and argues that it is a "novel" legal claim not available to him during appeal, the *Tome* decision is not an exception to the *Knaffla* bar for two reasons. 513 U.S. 150 (1995). First, *Tome* dealt with the federal rules of evidence and is therefore not binding in a state court, unless adopted by the individual state. Minnesota has not adopted the reasoning in *Tome*. Second, *Tome* was decided in 1995, 20 years before Petitioner's appeal. Thus, it was equally available to him at the time of his appeal and is, therefore, not a "novel" legal claim.

7. In this case, a number of Petitioner's claims have already been decided by the Minnesota Court of Appeals. Specifically, Petitioner's claims a-d were raised by Petitioner pro se and claims e-f were raised by appellate counsel. With the exception of the request to vacate Petitioner's conviction on Count 2 (claim e), the Minnesota Court of Appeals denied all of Petitioner's claims. Petitioner has offered no reason sufficient to show that

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fairness requires that this Court revisit claims already decided by the Court of Appeals. Because these claims were already fully and fairly litigated before the Court of Appeals,[4] Petitioner may not re-litigate these claims now. Therefore, claims a-d and f are summarily denied.

8. Petitioner is correct that he was erroneously convicted of both Count 1 and Count 2, where Count 2 was a lesser-included charge of Count 1. However, pursuant to the Court of Appeals opinion, this Court vacated Petitioner's conviction on Count 2 on February 22, 2016. The court record of Petitioner's convictions on this matter accurately reflects this vacation and Petitioner no longer stands convicted of Count 2. Petitioner has already received the appropriate remedy for this error and, therefore, his request to vacate the conviction of Count 2 is moot.

Claim g: Ineffective Assistance of Trial Counsel.

9. "[T]he *Knaffla* rule also bars any claims not made but about which a petitioner knew or should have known at the time of an earlier appeal or petition." *Walen v. State*, 777 N.W.2d 213, 25 (Minn. 2010) (citing *Knaffla* at 741). As discussed above, *Knaffla* is not unconstitutional, and therefore applies in this matter.

10. Petitioner's claims relating to ineffective assistance relate to alleged errors counsel made leading up to and during Petitioner's trial. Petitioner knew or should have known about all of these issues at the time of his direct appeal. Petitioner himself did not raise ineffective assistance of trial counsel at his appeal, despite raising four other claims pro se. Petitioner has failed to assert any reason that his failure to raise the claim was anything but deliberate and inexcusable. *See supra State v. Greer*. Nothing has changed about trial counsel's performance or Petitioner's ability to know about trial counsel's performance since Petitioner's appeal. Thus, Petitioner is procedurally barred from now raising an ineffective assistance of trial counsel claim.

11. Even if this Court were to consider Petitioner's ineffective assistance of counsel claim on its merits, Petitioner would still not prevail. When an ineffective assistance of counsel claim is raised, courts analyze the claim under the test articulated in *Strickland v. Washington*, 466 U.S. 668 (1984). Under the *Strickland* test, Petitioner must first show that counsel's representation fell below an objective standard of reasonableness, and second, that there was a reasonable probability that but for counsel's errors, the result would have been different. *Id.* "A defendant is provided with effective representation if his attorney 'exercise[s] the customary skill and diligence that a reasonably competent attorney would exercise under similar circumstances.'" *State v. Heinkel*, 322 N.W.2d 322, 326 (Minn. 1982). "There is a strong presumption that a counsel's performance falls within the wide range of reasonable professional assistance." *State v. Jones*, 392 N.W.2d 224, 236 (Minn. 1986); *see also State v. Vang*, 847 N.W.2d 248, 266-67 (Minn. 2014) (noting that "counsel's performance is presumed to be reasonable"). A reviewing court

[4] The Court notes that Petitioner has also tried to unsuccessfully litigate portions of claim b in federal court. *See* Petitioner's Exhibit A8.

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need not address both elements of the *Strickland* test if one is dispositive. *Hawes v. State*, 826 N.W.2d 775, 783 (Minn. 2013).

12. Petitioner cannot meet either prong with regard to trial counsel. The Minnesota Supreme Court has generally held that reviewing courts should not review ineffective assistance of counsel claims that are based on trial strategy. *State v. Bobo*, 770 N.W.2d 129, 138 (Minn. 2009); *Opsahl v. State*, 677 N.W.2d 414, 421 (Minn. 2004). What evidence to present to the jury, what witnesses to call, and whether to object are all considered part of trial strategy which lie within the proper discretion of trial counsel and will generally not be reviewed later for competence. *Boitnott v. State*, 631 N.W.2d 362, 370 (Minn. 2001); *State v. Jones*, 392 N.W.2d 224, 236 (Minn. 1986). This position is grounded in the public policy of allowing counsel to "have the flexibility to represent a client to the fullest extent possible." *Jones*, 392 N.W.2d at 236.

13. Determining which witnesses to call at trial and who to reasonably investigate before trial falls squarely within the trial strategy discretion of counsel. Thus, Petitioner cannot show ineffective assistance of counsel to the extent that his claim of ineffective assistance of counsel relies on trial counsel's failure to investigate or subpoena certain witnesses.

14. Petitioner's other arguments of ineffective assistance of trial counsel likewise fail. First, even though Petitioner argues that he received ineffective assistance of trial counsel because trial counsel failed to preserve a number of his other claims, Petitioner's own citation of the record undermines this assertion. In support of the majority of his other claims, Petitioner actually cites to portions of the transcript where his counsel either objected to the evidence Petitioner claims was error to admit, or made the requests on Petitioner's behalf he is now claiming it was error to deny. Thus, Petitioner has not demonstrated that trial counsel's performance fell below the standard of reasonableness.

15. Additionally, because the Court of Appeals did not deny any of Petitioner's claims on the basis that they were not properly preserved by a failure to object, Petitioner cannot show that but for any deficiencies on the part of trial counsel his outcome on appeal would have been different. Rather, the Court of Appeals considered each of Petitioner's claims on its merits and found each to be meritless. Thus, after considering the entire record, including the appellate court opinion, the Court concludes that Petitioner's claim of ineffective assistance of trial counsel is wholly without merit.[5]

Claim h: Ineffective Assistance of Appellate Counsel

16. As with Petitioner's ineffective assistance of trial counsel claim, in order to demonstrate he received ineffective assistance of appellate counsel, he must meet the *Strickland* test. Petitioner must first show that counsel's representation fell below an objective standard of reasonableness, and second, that there was a reasonable probability that but for

[5] The Court acknowledges that based upon the Court of Appeals' reversal on the issue of Petitioner's conviction on Count 2, trial counsel may have been ineffective in not objecting to that conviction. However, since the issue of Petitioner's erroneous conviction has already been remedied, there is no reason to believe counsel's ineffectiveness on that issue continues to impact Petitioner.

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counsel's errors, the result would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984). Additionally, "appellate counsel [does] not have a duty to include all possible claims on direct appeal, but rather [is] permitted to argue only the most meritorious claims." *Schneider v. State*, 725 N.W.2d 516, 523 (Minn. 2007).

17. Petitioner's claims of ineffective assistance of appellate counsel center on appellate counsel's failure to effectively raise claims a-g on appeal. First appellate counsel did raise claims e and f on appeal, and won a reversal on claim e. Petitioner has not demonstrated that appellate counsel failed to raise appropriate arguments with regard to claim f. Rather, the appellate court considered claim f fully on its merits and determined that the trial court did not commit error in allowing Dr. Thompson's testimony.

18. With regard to claims a-d, while it is true that appellate counsel did not raise these claims on appeal, Petitioner did and they were fully considered on their merits by the Court of Appeals. Petitioner has failed to demonstrate that the outcome of his appeal on these issues would have been any different had they been raised by counsel instead of pro se. Moreover, the Court of Appeals found claims a-d to be meritless and thus, appellate counsel was not required to raise them. Instead, appellate counsel exercised professional judgment in determining that claims e-f were the most meritorious claims to raise on appeal. Because Petitioner has failed to demonstrate that appellate counsel's performance was ineffective under *Strickland*, he is not entitled to any relief on this ground.

Evidentiary Hearing on Claims a-h

19. Since the petition, files and records of the proceedings in this matter conclusively show that Petitioner is not entitled to relief on claims a-h, he is not entitled to an evidentiary hearing on those claims. Minn. Stat. 590.04, subd. 1. Neither is he entitled to have witnesses on those claims subpoenaed.

Claim i: Victim Recantations

1. The Court evaluates a request for a new trial on the basis of recanted trial testimony using the three-prong "*Larrison* test"; that "(1) the court is reasonably well satisfied that the testimony given by a material witness was false; (2) without the false testimony, the jury might have reached a different conclusion; and (3) the petitioner was taken by surprise when the false testimony was given and was unable to meet it or did not know that the testimony was false until after trial." *State v. Caldwell*, 835 N.W.2d 766, 772 (Minn. 2014). The first two prongs are compulsory, however, the third prong, while relevant is not an "absolute condition precedent." *Id.* Petitioner "does not need to satisfy the *Larrison* standard at this stage of the proceeding. Rather, to determine whether [Petitioner] is entitled to an evidentiary hearing, [the Court] assumes the truth of his allegations that bear sufficient indicia of trustworthiness and determine[s] whether those allegations would be legally sufficient to entitle him to relief if they were proven at a hearing." *Id.*

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2. The recantations come in form of notarized affidavits signed by the victims themselves, thus they bear sufficient indicia of trustworthiness for the Court to consider them. Assuming then, as it must, that the allegations laid out in Petitioner's claim and as supported by the affidavits are true, the Court is persuaded that but for the victims' alleged false testimony, the jury might have reached a different conclusion. While it is true, as the State points out in its brief, that both victims were impeached with their character for untruthfulness and that the motives for fabrication were presented in part at trial, the fact that the recanting witnesses are the victims is significant. The State did produce other evidence of Petitioner's abuse of the victims at trial, however, all of that evidence was ultimately based on the statements of the two victims. The Court is not convinced that if these two witnesses had testified at trial consistent with the affidavits attached to Petitioner's petition or were to do so at a new trial, the jury would reach the same conclusion. Thus, in order for the Court to fully analyze Petitioner's claims under the *Larrison* test, an evidentiary hearing, including testimony subject to cross examination from K.K.W. and K.C.W. is necessary so the Court may adequately assess the genuineness of the recantations and from there determine the falsity of the trial testimony.

IT IS HEREBY ORDERED

1. Petitioner's request for discovery is DENIED.

2. Petitioner's requests for post-conviction relief on the basis of errors during the trial process (claims a-d and f) are summarily DENIED in their entirety.

3. Petitioner's request for the vacation of his conviction on Count 2 (claim e) is DENIED as moot.

4. Petitioner's request for post-conviction relief on the basis of ineffective assistance of trial counsel (claim g) is DENIED in its entirety.

5. Petitioner's request for post-conviction relief on the basis of ineffective assistance of appellate counsel (claim h) is DENIED in its entirety.

6. Petitioner's request for subpoenas of Charles E. Johnson, Donothan Bartley, Ann Norton, Daniel E. Johnson, Catrina Blair, Molly Lynch, Kelvin Pregler, Joanne Wallen, Karen Wegerson, Ann Mock, Patricia Harmon, Bill Koncar, Grace W. Ray, Linda Thompson, Christa Groshek, Kelly Moore, Davi E. Axelson, and any other person related to claims a-h is DENIED.

7. Petitioner's request for an evidentiary hearing on his motion for a new trial based upon recanting witness testimony is GRANTED.

8. Counsel for the State of Minnesota shall contact the Court regarding her availability for an evidentiary hearing upon receipt of this order.

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9. Once an evidentiary hearing has been scheduled, a writ shall be obtained to ensure Petitioner's presence at the hearing.

10. Parties shall subpoena or otherwise secure the presence of any witness they believe is necessary on the issue of the victims' recantation. Witnesses will not be allowed to testify as to any other issue at the evidentiary hearing.

BY THE COURT:

Dated: 6.15.18

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Tamara Garcia
Judge of District Court
Fourth Judicial District

Filed in Fourth Judicial District Court
6/18/2018 4:00 PM
Hennepin County, MN

STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF HENNEPIN | FOURTH JUDICIAL DISTRICT

State of Minnesota,

Respondent,

v.

Emem Ufot Udoh,

Petitioner.

Case Type: Criminal
Judge Tamara Garcia

Court File No. 27-CR-13-8979

SCHEDULING ORDER

The above-entitled matter came before the Honorable Tamara Garcia on April 10, 2018 on Petitioner's petition for post-conviction review. After reviewing the submissions, on June 15, 2018, the undersigned issued an order denying Petitioner's request in part and granting him an evidentiary hearing on the issue or witness recantation. Counsel have now been in contact with the court regarding scheduling.

Upon the evidence adduced, the arguments of counsel, and all files, records and proceedings herein:

IT IS HEREBY ORDERED

1. An evidentiary hearing on the issue of witness recantation is scheduled for July 27, 2018 at 9:30 A.M. in courtroom 1353 of the Hennepin County Government Center.

2. The State shall obtain a writ to bring Petitioner from the DOC to the Hennepin County Government Center for the hearing.

3. Parties shall subpoena or otherwise secure the presence of any witness they believe is necessary on the issue of the victims' recantation. Witnesses will not be allowed to testify as to any other issue at the evidentiary hearing.

BY THE COURT:

Dated: 6-18-18
jal

Tamara Garcia
Judge of District Court
Fourth Judicial District

STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF HENNEPIN | FOURTH JUDICIAL DISTRICT

State of Minnesota,

Respondent,

v.

Emem Ufot Udoh,

Petitioner.

Case Type: Criminal
Judge Tamara Garcia

Court File No. 27-CR-13-8979

ORDER DENYING REQUEST FOR SUBPOENAS IN PART AND GRANTING IN PART

The above-entitled matter came before the Honorable Tamara Garcia on July 9, 2018 on Petitioner's petition requests for subpoenas.

PARTIES

Christina Warren, Assistant Hennepin County Attorney, is the attorney of record for the State of Minnesota.

Emem Udoh, Petitioner, is pro se.

Upon the evidence adduced, the arguments of counsel, and all files, records and proceedings herein, the Court makes the following:

PROCEDURAL POSTURE AND FINDGS OF FACT

1. On June 15, 2018, this Court issued an order granting Petitioner an evidentiary hearing on one issue presented in his petition for post-conviction relief. Specifically, the hearing was granted on the sole issue of witness recantation by the two victims in this matter, K.K.W. and K.C.W. The Court specifically ordered that testimony would only be allowed on that issue and denied Petitioner's previous request to subpoena 17 people identified by name in his post-conviction filings.[1]

2. Petitioner submitted an additional request for subpoenas in two parts. First, he submitted a list of witness names and addresses on July 3, 2018, followed by a motion and proposed order filed on July 9, 2018. The witness lists 22 people, including 15 of the people for whom subpoenas had already been denied. The additional 7 people are as follows:

    a. Melissa Parker, the school liaison officer who took one of K.K.W.'s initial reports regarding sexual abuse by Petitioner;

[1] *See* 6/15/18 Order Denying in Part Petitioner's Petition for Post-Conviction Relief.

b. Krista White, the prosecutor at trial;
c. Eric Bond Anunobi, the notary who signed K.K.W. & K.C.W.'s affidavits recanting their trial testimony;
d. K.K.W., one of the recanting victims;
e. K.C.W., one of the recanting victims;
f. Bobby Woody, Jr., father of the recanting witnesses, with whom the recanting witnesses reside; and
g. Tonya Udoh, mother to the recanting witnesses and Petitioner's wife.

Petitioner's lists physical addresses for all witnesses, except Tonya Udoh, for whom he only provides a P.O. Box address.

3. Based on the DOBs listed in the complaints, K.K.W., who was a minor at the time of trial, is now 19 years old and K.C.W. is now 17 years old.

CONCLUSIONS OF LAW

1. "A defendant not represented by an attorney may obtain a subpoena only by court order." Minn. R. Crim. Pro. 22.01, subd. 3. Pursuant to its previous order, the Court will not issue subpoenas for any witnesses not relevant to issue of the victims' recantations. K.K.W. and K.C.W., being the victims who have recanted, are clearly relevant to the evidentiary hearing, and the Court will grant subpoenas for these two witnesses.

2. Petitioner has not established to this courts satisfaction that the following people have any knowledge or relevant testimony on the issue of K.K.W. and K.C.W.'s recantations:

a. Joanne Waller;
b. Karen Wegerson;
c. Ann Mock;
d. Melissa Parker;
e. Donothan Bartley;
f. Catrina Blair;
g. Ann Norton;
h. Kevin Pregler;
i. Patricia Harmon;
j. Bill Koncar;
k. Linda Thompson;
l. Grace W. Ray;
m. Krista White;
n. Christa Groshek;
o. Kelly Moore; or
p. Davi Axelson.

Therefore, the Court will not issue subpoenas for these witnesses.

3. The relevance of the remaining three witnesses, Eric Bond Anunobi, Bobby Woody, Jr., and Tonya Udoh is less clear. As the notary who signed the recanting affidavits, Mr. Anunobi's testimony is likely relevant as he can testify as to the circumstances under which K.K.W. and K.C.W. signed their affidavits. As the custodial parent, Mr. Woody may have relevant information regarding K.K.W. and K.C.W.'s decision to recant. Finally, Ms. Udoh, as both the victims' mother and Petitioner's wife may have relevant information regarding the circumstances under which the victims decided to recant. However, Petitioner has not provided an address where Ms. Udoh can be personally served. Therefore, the Court will grant the request for subpoenas of these three additional witnesses, but no subpoena will issue for Ms. Udoh until a physical address is provided.[2]

IT IS HEREBY ORDERED

1. Petitioner's request subpoenas of the following witnesses is GRANTED: K.K.W., K.C.W., Eric Bond Anunobi, Bobby Woody, Jr., and Tonya Udoh. Subpoenas will issue for K.K.W., K.C.W., Eric Bond Anunobi, Bobby Woody, Jr. No subpoena will issue for Tonya Udoh until a physical address is provided.

2. Petitioner's request for subpoenas of the following witnesses is DENIED: Joanne Wallen, Karen Wegerson, Ann Mock, Melissa Parker, Donothan Bartley, Catrina Blair, Ann Norton, Molly Lynch, Kevin Pregler, Patricia Harmon, Bill Koncar, Linda Thompson, Grace W. Rey, Krista White, Christa Groshek, Kelly Moore and Davi Axelson.

BY THE COURT:

Dated: July 11, 2018
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Tamara Garcia
Judge of District Court
Fourth Judicial District

[2] The Court notes that Petitioner does have other means of securing Ms. Udoh's presence at the hearing, short of a court-issued subpoena. That she is Petitioner's wife and from all the filings appears sympathetic to his position, it is likely she will attend the hearing at Petitioner's request, even without a court order.

State of Minnesota **District Court**

County of: Hennepin Select County	Judicial District: Fourth Court File Number: 27-CR-13-8979 Case Type: Criminal, Postconviction

Emem Ufot Udoh
Plaintiff/Petitioner (first, middle, last)

vs.

State of Minnesota
Defendant/Respondent (first, middle, last)

ORDER
☒ **DENYING**
☐ **GRANTING**

In Forma Pauperis Application
(Minn Stat. § 563.01)

Order Denying In Forma Pauperis Application

Based on the affidavit of the applicant _____
and the authority of Minn Stat. § 563.01, the Court FINDS:

☐ The action is frivolous.

☐ The applicant is not found to be indigent and is not entitled to proceed in forma pauperis.

☐ The applicant has not provided the court with enough information to make a finding of indigency. The record shall be kept open until _____ to allow the applicant to submit additional evidence to the court for consideration of the application. If no additional evidence is submitted by this date, the case will be closed.

☒ Other: See attached

IT IS ORDERED THAT: The applicant's request to proceed in forma pauperis is **DENIED.**

Recommended by:

_____
Referee of District Court Date

Dated: _____

BY THE COURT

_____
Judge of District Court Date

Dated: 9.13.18

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State of Minnesota
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STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF HENNEPIN | FOURTH JUDICIAL DISTRICT

State of Minnesota,

Respondent,

v.

Emem Ufot Udoh,

Petitioner.

Case Type: Criminal
Judge Tamara Garcia

Court File No. 27-CR-13-8979

ORDER CONTINUING THE EVIDENTIARY HEARING AND CLARIFYING THE SCOPE OF THE REMAINDER OF THE HEARING

The above-entitled matter came before the Honorable Tamara Garcia on July 27, and July 30-August 1, 2018 at the Hennepin County Government Center for an Evidentiary Hearing on Petitioner's Petition for Post-Conviction Relief.

APPEARANCES

Christina Warren & Krista White, Assistant Hennepin County Attorney, appeared on behalf of the State of Minnesota.

Emem Udoh, Petitioner, who was present and appeared pro se.

Upon the evidence adduced, the arguments of counsel, and all files, records and proceedings herein, the Court makes the following:

PROCEDURAL POSTURE AND FINDINGS OF FACT

1. Petitioner was charged with (1) Criminal Sexual Conduct in the First Degree in violation of Minn. Stat. § 609.342, subd. 1(b), (2) Criminal Sexual Conduct in the Second Degree in violation of Minn. Stat. § 609.343, subd. 1(b), (3) Criminal Sexual Conduct in the First Degree in violation of Minn. Stat. § 609.342, subd. 1(a), and (4) Criminal Sexual Conduct in the Second Degree in violation of Minn. Stat. § 609.343, subd. 1(a). Counts 1 and 2 related to the sexual abuse of Petitioner's stepdaughter, K.K.W. Counts 3 and 4 related to the sexual abuse of Petitioner's stepdaughter, K.C.W.

2. A full recitation of the facts presented at trial can be found in *State v. Udoh*, which the Court adopts and incorporates here. 2016 WL 687328, *1-2 (Minn. 2016).

3. Petitioner was ultimately found guilty of Count 1, 2 and 4 and convicted on all 3 counts.

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4. Petitioner appealed his convictions and was represented by counsel during that appeal. Petitioner's appeal was denied on almost all grounds, but was reversed and remanded for vacation of Count 2, which amounted to a lesser-included charge of Count 1.

5. On April 10, 2018, Petitioner filed a petition for post-conviction relief. Shortly after his Petition was filed, the State Public Defender's office sent a letter declining representation of Petitioner as he had already been represented by their office on the direct appeal.

6. One of the grounds upon which Petitioner requested relief was that the victims had recanted their trial testimony. On June 15, 2018, this Court issued an order denying Petitioner relief on all grounds, except that of witness recantation. Petitioner was granted an evidentiary hearing on the sole issue of the victims' recantation.[1]

7. A partial evidentiary hearing was held on this issue on July 27 and July 30-August 1, 2018. Petitioner called one witness; Eric Anunobi on July 27. Petitioner called two witnesses on July 30; K.K.W. and K.C.W. Petitioner attempted to call two witnesses on July 31; Tonya Udoh and Bobby Woody. However, neither witness appeared to testify. Petitioner then testified and was subject to cross examination by the State. Throughout the hearings on July 27, July 30, and the first portion of the hearing on July 31, Petitioner was articulate, calm, collected and exhibited no signs of stress, distress, or illness of any kind. Petitioner began to lose his calm demeanor during his cross examination by the State.

8. The State was then allowed to call its first witness to rebut allegations made by the two recanting victims. Petitioner objected to these witnesses, even though at least one witness, Det. Molly Lynch, was on his own witness list, claiming he had no notice. The State argued that because the recanting affidavits were vague as to who had threatened the victims prior to Petitioner's trial, they had no way of knowing until the victims testified who they would call as necessary witnesses in the hearing. The State then proceeded to outline what they expected each of their witnesses to say. The State indicated they would call three witnesses; Ann Burgoyne, the victim-witness advocate assigned to the case, Det. Molly Lynch, the lead investigator on the case, and Deputy Pat Chelues, who was responsible for pulling DOC and jail visitation logs and recorded phone calls. The Court overruled Petitioner's objection to these witnesses.

9. Petitioner then requested a continuance so he could go back to the DOC and get his notes on Det. Lynch. The Court denied this request. Petitioner then made a number of objections to the Court proceeding with the hearing, claiming violations of his due process rights. The Court overruled all of his objections and denied his requests. Petitioner then claimed to be ill and in need of the restroom. The Court granted a 5 minute recess during which time Petitioner could use the restroom. After Petitioner was returned to the Courtroom, he made further objections to continuing the hearing and continued to claim illness. The Court denied Petitioner's requests and the State called its first witness. As the State began its direct examination of the first witness, Petitioner claimed he could not hear the witness and upon being questioned said he was too ill. The

[1] *See* Court Order Denying Post-Conviction Petitioner in Part and Granting Evidentiary Hearing in Part.

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Court continued the matter and told the parties to return to the courtroom at 1:30 p.m., approximately two hours after recessing.

10. The case was recalled at approximately 2:45 p.m. The witness resumed the stand. Petitioner again claimed to be so ill he could not hear the witness, or indeed the attorney from the State sitting only about 1 foot away from him. Petitioner told the Court he needed to see a nurse. The Court questioned Petitioner as to whether or not he had asked to see a nurse in the three hours he was not in the courtroom. Petitioner refused to answer the question, kept repeating that he could not hear anyone, and that he needed to see a nurse. The Court granted Petitioner's request, and informed everyone that the hearing would resume on August 1 at 8:30 a.m. The Court requested that the deputies transporting Petitioner ensure that Petitioner was seen by a nurse and requested documentation.

11. The Court received documentation from both a nurse and a sergeant who spoke with Petitioner. The nurse's note indicated that Petitioner appeared "calm, no sweating, and showing no signs of distress." The nurse's notes also indicated that his blood pressure was 155/90 and his pulse was 86 bpm. The Sgt.'s note indicated that the nurse found Petitioner's vital signs were high, but that he required "no further medical treatment" at that time. The Sgt. noted Petitioner "appeared alert and normal in appearance."

12. The parties reassembled for the hearing on August 1. At that time, Petitioner stated he was no longer able to represent himself in this matter and requested the ability to obtain either a public defender or private counsel. Petitioner was informed that he did not qualify for the services of a public defender, as he was already represented on direct appeal and the Court denied Petitioner's request to continue the hearing to allow Petitioner time to seek private counsel. Petitioner then insisted he was too ill and under too much stress to continue with the hearing at that time. The Court eventually continued the hearing until October 11 allowing Petitioner time to both seek a private attorney and to address whatever physical ailments he might be experiencing. Throughout Petitioner's representation of himself as being ill, Petitioner continually, repeatedly, and loudly interrupted the proceedings and would frequently and insistently speak over the Court as it attempted to ask questions and make its rulings. These types of interruptions and refusal to allow the Court to speak were typical of Petitioner any time the Court began to rule against him during the entirety of the post-conviction proceedings.

13. Despite granting Petitioner multiple continuances for his claimed sudden onset illness which included symptoms of headache, deafness and stomach distress among others, the Court wishes to make clear that it finds both Petitioner's timing and representations of illness during the evidentiary hearing, to be highly suspicious and entirely lacking credibility. Petitioner exhibited no signs of illness or distress until the Court denied his request for a continuance. Petitioner's descriptions of his symptoms ranging from stomach and bowel issues to an inability to hear persons within mere feet of him, despite perfectly working court microphones, were unbelievable. On July 31, Petitioner declined to answer the Court's inquiry as to whether or not during the hours long recess, he had even asked to see the nurse or another healthcare professional. The Court therefore

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assumes that he did not make such a request. Additionally, despite an overnight recess on July 31, Petitioner could provide no documentation of legitimate illness from the nurse or any health care professional available at the jail. The Court recognizes that hearings on criminal matters are often stressful and that representing oneself is certainly a difficult situation, however, the Court views Petitioner grossly exaggerated symptoms, antics and body language as nothing more than an attempt to manipulate the Court into granting Petitioner more time and to prevent the State from presenting its case. However, in an abundance of caution, and because this District Court Judge earned a J.D. and not an M.D., the Court granted Petitioner a continuance to address any physical ailments he may have. The purpose of this order is to clarify the Court's reasoning in granting the continuance request and to clearly establish its expectations for the conclusion of the evidentiary hearing and Petitioner rights in those regards.

CONCLUSIONS OF LAW

Requests for Counsel

1. "There is no [federal] constitutional right to an attorney in state post-conviction proceedings." *Coleman v. Thompson*, 501 U.S. 722, 752 (1991). Additionally, a petitioner "who has been represented by counsel on direct appeal has no right under the Minnesota Constitution to the assistance of counsel—effective or otherwise—in a subsequent postconviction proceeding." *Ferguson v. State*, 826 N.W.2d 808, 816 (Minn. 2013). Representation by the public defender of persons who have already been represented by a public defender on their direct appeal is discretionary with the public defender's office. Minn. Stat. § 590.05.

2. Petitioner was represented by counsel during his direct appeal, therefore, he has no right to counsel under either the federal or state constitution during his post-conviction proceeding. The State Public Defender's office has declined representation in this matter.

3. Because Petitioner is not entitled to counsel in this matter, the Court will grant no further continuances of the evidentiary hearing to allow Petitioner to further pursue hiring private counsel, nor will it continue the evidentiary hearing due to counsel unavailability. Petitioner should consider counsel's availability for the evidentiary hearing currently set for the mornings of October 11 and 12 before agreeing to hire any such counsel.

4. Whether or not Petitioner is successful in hiring counsel for the remainder of the evidentiary hearing, the Court will not revisit portions of the hearing which have already been conducted, including any recalling of witnesses previously called by Petitioner. Instead, the Court will proceed with the State's witnesses, as if the hearing had not been continued.

Petitioner's Presence at the Evidentiary Hearing

5. There is no absolute right for a petitioner to be present at a post-conviction proceeding. *See* Minn. Stat. § 590.04; *Effinger v. State*, 380 N.W.2d 483, 487 (Minn. 1986) (finding

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that the use of the word "may" rather than "shall" in the statute gives the court discretion in ordering the petitioner's appearance). However, personal appearance of a petitioner is preferred for evidentiary hearings where there are questions of fact and law to be determined and the questioning of witnesses will take place. *See Smude v. State*, 249 N.W.2d 876 (Minn. 1976).

6. The Court will make every attempt to ensure Petitioner is personally present during the evidentiary hearing on October 11. To that end, the Court will order that the State file a writ to bring Petitioner to court from the DOC. Should Petitioner refuse transport on the writ, absent documented good cause to the satisfaction of this Court, the Court shall construe any such refusal as a waiver by Petitioner of his presence at the remainder of the evidentiary hearing.

7. Additionally, given Petitioner's antics during the final portions of the evidentiary hearing held in July and August, the Court will also address the circumstances under which it will consider Petitioner to waive his appearance by conduct.

8. Case law does not specifically address a petitioner waiving his appearance through disruptive conduct at a post-conviction hearing, however, there are both rules of criminal procedure and case law addressing a criminal defendant waiving his appearance at trial through disruptive conduct. The Minnesota Rules of Criminal Procedure allow trial to proceed to verdict without the presence of the defendant where "[t]he defendant, after warning, engages in conduct that justifies expulsion from the courtroom because it disrupts the trial or hearing." Minn. R. Crim. Pro. 26.03, subd. 1(2). Additionally, "Disruptive conduct by an accused at trial may justify his removal from the courtroom and effectively constitute a waiver of sixth amendment rights." *State v. Holland*, 421 N.W.2d 382, 387 (Minn. 1988) (citing *Illinois v. Allen*, 397 U.S. 337, 342 (1970)). "The right of self-representation gives neither a 'license to abuse the dignity of the courtroom,' nor a 'license not to comply with relevant rules of procedural and substantive law.'" *Id.* (citing *Faretta v. California*, 422 U.S. 806, 835 n. 46 (1975)).

9. Because a criminal defendant is afforded significantly more rights during trial than a petitioner is during a post-conviction proceeding, the Court holds that Petitioner may effectively waive his presence during the evidentiary hearing by being disruptive just as he could waive it during a criminal trial. Thus, Petitioner must follow typical rules of courtroom decorum, including not interrupting or attempting to speak over other persons, or else risk waiving his appearance. The Court will give Petitioner any necessary warnings and do all in its power to ensure an orderly proceeding short of removing Petitioner from the hearing.

10. Additionally, because the Court found Petitioner's claims of illness during portions of the evidentiary hearing held between July 31 and August 1 to be unbelievable and a veiled attempt to manipulate the Court into continuing the matter, Petitioner must present written documentation from a qualified medical professional establishing a valid reason why Petitioner cannot proceed with the hearing, before the Court will consider any medical reason for continuing the hearing. Upon receipt of such documentation, the

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Court will consider whether or not the cause of Petitioner's condition is the hearing itself, before granting any further continuances for medical reasons. Additionally, the Court will not allow Petitioner to use the stress of representing himself as a medical condition to circumscribe this Court's order that any counsel be hired and ready to participate at the hearing on October 11.

Further Submissions

11. Once a petition for post-conviction relief has been submitted and briefed, no further pleadings are necessary, except as ordered by the Court. Minn. Stat. § 590.03.

12. The Court is fully apprised of the issues remaining in this matter and requires no further pleadings from either party between now and the hearing date of October 11. The Court will not consider additional motions or amendments to the petition, unless permission is first obtained from this Court.

IT IS HEREBY ORDERED

1. Parties shall appear and be ready to proceed for the remainder of the evidentiary hearing on October 11, 2018 at 8:30 a.m. Should the hearing fail to conclude that day, parties shall also appear on October 12, 2018 at 8:30 a.m.

2. The State shall file a writ to secure Petitioner's presence for the hearing on October 11, 2018. Absent documented good cause, as determined by this Court, any refusal of transport on the writ by Petitioner will be construed as a waiver of his presence at the hearing.

3. Any counsel Petitioner wishes to retain must file a certificate of representation and be prepared to proceed with the evidentiary hearing on October 11, 2018. No further continuances for the purpose of obtaining counsel shall be granted.

4. No portion of the evidentiary hearing already conducted on July 27 and July 30-August 1, 2018 shall be revisited at the continued evidentiary hearing, including, but not limited to, recalling of witnesses already heard or any who were not present when called at the original hearing which was conducted over a 4 day period.

5. Petitioner must present documentation from a qualified medical professional before this Court will consider any further continuances on medical grounds.

6. Petitioner must conduct himself with appropriate courtroom decorum during the evidentiary hearing or risk waiving his appearance through disruptive conduct.

7. Parties must obtain permission before filing any additional submissions including but not limited to additional motions or amendments to the post-conviction petition or pleadings.

BY THE COURT:

Dated: 8.3.18

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Tamara Garcia
Judge of District Court
Fourth Judicial District

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