the Board noted that it was uncontested that Southern's line had the capacity to service Minden's needs and that Southern would provide this service for a fee to Minden. To summarize, the two lines were to begin at the same place and both connected to Minden's substation. And only one line was needed to carry the load. The record shows sufficient evidence to support the Board's decision that Minden's line would be unnecessarily duplicative of Southern's line, and that decision is not arbitrary or unreasonable.

CONCLUSION

We conclude the Board did not err when it concluded that Minden's line was not the most economical and feasible line. Further, the Board did not err when it concluded that Minden's line would be unnecessarily duplicative of Southern's existing line. Accordingly, we affirm.

AFFIRMED.

WRIGHT, J., not participating in the decision.

STATE OF NEBRASKA, APPELLEE, V. JEFFREY A. HESSLER, APPELLANT.

807 N.W.2d 504

Filed December 23, 2011. No. S-11-379.

1. **Effectiveness of Counsel.** A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact.
2. **Postconviction: Appeal and Error.** On appeal from a proceeding for postconviction relief, the trial court's findings of fact will be upheld unless such findings are clearly erroneous.
3. **Effectiveness of Counsel: Appeal and Error.** Determinations regarding whether counsel was deficient and whether the defendant was prejudiced are questions of law that an appellate court reviews independently of the lower court's decision.
4. **Postconviction: Appeal and Error.** A motion for postconviction relief cannot be used to secure review of issues that were known to the defendant and could have been litigated on direct review.
5. **Postconviction: Effectiveness of Counsel: Appeal and Error.** When a defendant was represented both at trial and on direct appeal by lawyers employed by the same office, the defendant's first opportunity to assert ineffective assistance of trial counsel is in a motion for postconviction relief.
6. **Postconviction: Constitutional Law.** Postconviction relief is a very narrow category of relief available only to remedy prejudicial constitutional violations.

7. **Postconviction: Effectiveness of Counsel: Proof.** The defendant has the burden in postconviction proceedings of demonstrating ineffectiveness of counsel, and the record must affirmatively support that claim.
8. **Postconviction: Mental Competency: Effectiveness of Counsel: Proof.** In order to demonstrate prejudice from counsel's failure to investigate competency and for failure to seek a competency hearing, the defendant must demonstrate that there is a reasonable probability that he or she was, in fact, incompetent and that the trial court would have found the defendant incompetent had a competency hearing been conducted.
9. **Effectiveness of Counsel: Records.** Counsel is not ineffective for failing to undertake useless procedural challenges merely to create a record impregnable to assault for claimed inadequacy of counsel.
10. **Constitutional Law: Trial: Mental Competency.** An individual has a constitutional right not to be put to trial when lacking mental competency.
11. **Constitutional Law: Right to Counsel: Waiver.** A criminal defendant has a constitutional right to waive the assistance of counsel and conduct his or her own defense.
12. **Mental Competency.** There are no fixed or immutable signs of incompetence.

Appeal from the District Court for Scotts Bluff County: RANDALL L. LIPPSTREU, Judge. Affirmed.

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

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

CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ., and INBODY, Chief Judge, and PIRTLE, Judge.

MCCORMACK, J.

I. NATURE OF CASE

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

II. BACKGROUND

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

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

1. Motions to Remove Counsel and Proceed Pro Se

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

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

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

[2] See Neb. Rev. Stat. § 29-2523 (Reissue 2008).

[3] *Hessler I, supra* note 1.

challenging the constitutionality of the death penalty statute did not "need to happen."

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

2. Sentencing Hearing

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

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

Hessler explained why he had to discharge his counsel: "GOD has shown me to move into HIS LIGHT and that is why I had to finially expuregate my council of Attorney's from continuing from representing Me in this case. They refused to follow GOD's and My wishes." More specifically, Hessler

described a recent encounter with a "Brother of Christ" at the prison who was awoken from his sleep and led to Hessler's cell to "bring GOD back into My Life and understanding." When he took this man's hand, he "felt this powerful Energy to start to flow through my whole body. . . . GOD was speaking through him to Me . . . I saw a single tear . . . and . . . His eyes . . . were flaming at me."

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

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

3. Direct Appeal

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

We held that the trial court did not err when it failed to conduct a competency hearing.[4] Further, there was no error when the court did not make an explicit determination that Hessler was competent to waive counsel.[5] We explained that the trial court did not have reason to suspect Hessler's competence. We noted that when Hessler moved to waive counsel,

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[4] *Id.*

[5] *Id.*

he was still represented by counsel, and that counsel did not move for a determination of Hessler's competence at that time or at any previous time.[6] And there was "no indication . . . that Hessler was unable to consult with counsel with a reasonable degree of rational understanding. To the contrary, the record contains references to consultations between Hessler and his counsel."[7]

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

4. Postconviction

After we affirmed Hessler's convictions and sentences on direct appeal, Hessler changed his mind about wanting to be put to death. He filed a motion for postconviction relief and obtained appointed counsel. In his amended postconviction motion, Hessler presented several allegations, including the allegation that trial counsel was ineffective in failing to investigate Hessler's mental state and failing to object to going forward with the sentencing hearing without a formal competency

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[6] *Id.*

[7] *Id.* at 509, 741 N.W.2d at 429.

[8] *Id.*

[9] *Id.*

[10] *Id.* at 509-10, 741 N.W.2d at 429.

[11] *Id.* at 510, 741 N.W.2d at 429-30.

investigation and hearing. After a preliminary hearing to narrow the issues, the postconviction court concluded that Hessler was entitled to an evidentiary hearing on the limited issue of whether trial counsel was ineffective for failing to raise issues of competency after Hessler's convictions but prior to mitigation and sentencing. In addition to the entire trial record, the following evidence was accepted into evidence at the postconviction evidentiary hearing.

(a) Hessler's Deposition

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

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

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

(b) Arias' Report

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

expressed some concern that he was a "Mafia target" because he had associated with local drug dealers.

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

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

(c) Scharf's Letter

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

(d) Medical Records

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

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

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

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

> all your help, time, and services in this important matter at hand.

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

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

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

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

(e) Trial Counsel

The deposition testimonies of Hessler's trial counsel, James Mowbray and Jeffrey Pickens, were introduced. Both testified that their decision not to bring the issue of competency to the

trial court's attention was not a strategic one. Rather, they explained they had no doubt that Hessler met the legal test of competency. In light of this, Mowbray and Pickens were concerned that calling for a competency hearing would result in divulging confidential attorney-client communications and would violate their client's wishes.

(i) Pickens

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

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

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

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[12] *State v. Guatney*, 207 Neb. 501, 299 N.W.2d 538 (1980).

(ii) Mowbray

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

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

(f) Disposition

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

III. ASSIGNMENTS OF ERROR

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

IV. STANDARD OF REVIEW

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

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

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[13] *State v. McGhee*, 280 Neb. 558, 787 N.W.2d 700 (2010).

[14] *State v. Poindexter*, 277 Neb. 936, 766 N.W.2d 391 (2009).

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

V. ANALYSIS

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

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

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[15] *State v. Yos-Chiguil*, 281 Neb. 618, 798 N.W.2d 832 (2011).

[16] *State v. Ryan*, 248 Neb. 405, 534 N.W.2d 766 (1995), *abrogated on other grounds, State v. Mata*, 275 Neb. 1, 745 N.W.2d 229 (2008).

[17] *State v. Dunster*, 278 Neb. 268, 769 N.W.2d 401 (2009).

[18] See *State v. Johnson*, 4 Neb. App. 776, 551 N.W.2d 742 (1996).

failing to hold a competency hearing sua sponte,[19] this was a different legal question than whether defense counsel should have requested a competency hearing.[20]

[6,7] Postconviction relief is a very narrow category of relief available only to remedy prejudicial constitutional violations.[21] The defendant has the burden in postconviction proceedings of demonstrating ineffectiveness of counsel, and the record must affirmatively support that claim.[22] Specifically, the defendant must show, in accordance with *Strickland v. Washington*,[23] that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area.[24] Second, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case; that is, there was a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.[25] The two prongs of this test, deficient performance and prejudice, may be addressed in either order.[26]

[8,9] In order to demonstrate prejudice from counsel's failure to investigate competency and for failure to seek a competency hearing, the defendant must demonstrate that there is a reasonable probability that he or she was, in fact, incompetent and that the trial court would have found the defendant incompetent had a competency hearing been conducted.[27] Other courts have said

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[19] *State v. Hessler, supra* note 1.

[20] *Lawrence v. State*, 969 So. 2d 294 (Fla. 2007).

[21] See *State v. Boppre*, 280 Neb. 774, 790 N.W.2d 417 (2010).

[22] *State v. Ray*, 266 Neb. 659, 668 N.W.2d 52 (2003).

[23] *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

[24] See *State v. Watkins*, 277 Neb. 428, 762 N.W.2d 589 (2009).

[25] See *id.*

[26] *State v. Amaya*, 276 Neb. 818, 758 N.W.2d 22 (2008).

[27] See, *Matheney v. Anderson*, 377 F.3d 740 (7th Cir. 2004); *Hull v. Kyler*, 190 F.3d 88 (3d Cir. 1999); *Williamson v. Ward*, 110 F.3d 1508 (10th Cir. 1997); *Futch v. Dugger*, 874 F.2d 1483 (11th Cir. 1989); *Felde v. Butler*, 817 F.2d 281 (5th Cir. 1987); *Nelson v. State*, 43 So. 3d 20 (Fla. 2010); *Ridgley v. State*, 148 Idaho 671, 227 P.3d 925 (2010).

that in order to successfully advance a claim that counsel was ineffective for failing to obtain or have a transcribed record for review, a defendant must demonstrate specific prejudice resulting from not having that record.[28] Counsel is not ineffective for failing "to undertake useless procedural challenges merely to create a record impregnable to assault for claimed inadequacy of counsel."[29]

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

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

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[28] See, e.g., *Bates v. State*, 3 So. 3d 1091 (Fla. 2009).

[29] *People v. Shelburne*, 104 Cal. App. 3d 737, 744, 163 Cal. Rptr. 767, 772 (1980).

[30] See *Hull v. Kyler,* supra note 27.

[31] See, *State v. Iromuanya*, 272 Neb. 178, 719 N.W.2d 263 (2006); *State v. Billups*, 263 Neb. 511, 641 N.W.2d 71 (2002).

[32] See *Indiana v. Edwards*, 554 U.S. 164, 128 S. Ct. 2379, 171 L. Ed. 2d 345 (2008).

[33] See, e.g., *State v. Hittle*, 257 Neb. 344, 598 N.W.2d 20 (1999); *State v. Johnson, supra* note 18; Neb. Rev. Stat. § 29-1823(1) (Reissue 2008).

[34] *State v. Guatney, supra* note 12.

[35] *Id.*

"desire for undeserved punishment rather than justice," did not render him incompetent.[36]

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

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

After being sentenced to death, the defendant asked for postconviction relief, asserting that the trial court erred in allowing him to represent himself and in accepting his plea. The Ninth Circuit Court of Appeals granted the motion, reasoning that competency to waive constitutional rights required a higher level of the "capacity for 'reasoned choice'"[40] than did the requirement to stand trial, which is that a defendant have a "'rational and factual understanding of the proceedings and is capable of assisting his counsel.'"[41] The U.S. Supreme Court disagreed. It noted that the decision to plead guilty is no more

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[36] *Id.* at 505, 299 N.W.2d at 541.

[37] See *State v. Lewis*, 280 Neb. 246, 785 N.W.2d 834 (2010).

[38] *Godinez v. Moran*, 509 U.S. 389, 113 S. Ct. 2680, 125 L. Ed. 2d 321 (1993).

[39] *Id.*

[40] See 509 U.S. at 397.

[41] See 509 U.S. at 394.

complicated than the sum total of decisions a defendant must make during the course of a trial when represented by counsel, such as whether to take the witness stand, waive the right to a jury trial, and other strategic choices.[42]

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

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

After sentencing, the defendant filed a motion for new trial based on previously undisclosed medical records indicating an acute psychotic episode and undiagnosed depression. The trial court stated that the defendant's mental condition had "'ebbed and flowed'" during the sentencing hearing, but that he was

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[42] *Godinez v. Moran, supra* note 38.

[43] 509 U.S. at 400 (emphasis in original).

[44] 509 U.S. 402.

[45] *State v. Dunster*, 262 Neb. 329, 631 N.W.2d 879 (2001).

[46] *State v. Dunster*, 270 Neb. 773, 707 N.W.2d 412 (2005).

[47] *Id.* at 779, 707 N.W.2d at 417.

[48] *Dunster II, supra* note 46. See, also, *Dunster I, supra* note 45.

legally competent, and the motion for new trial was denied.[49] We affirmed, reasoning that the record and the trial court's specific findings of competency made it clear that had the newly discovered evidence been known, the trial court would have reached the same conclusion.[50]

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

[12] There are no fixed or immutable signs of incompetence.[55] As the above cases illustrate, a defendant can meet the "modest aim"[56] of legal competency, despite paranoia, emotional disorders, unstable mental conditions, and suicidal tendencies. The desire for capital punishment certainly does not create a reasonable probability of incompetency.[57] This is

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[49] *Dunster II, supra* note 46, 270 Neb. at 783, 707 N.W.2d at 420.

[50] *Id.*

[51] *State v. Gunther*, 271 Neb. 874, 716 N.W.2d 691 (2006).

[52] *Id.*

[53] *Id.*

[54] *Id.*

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

[56] *Godinez v. Moran, supra* note 38, 509 U.S. at 402.

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

not an overly uncommon or inherently irrational trial strategy. Furthermore, a rule requiring reversal when a capital defendant chooses self-representation and insists on the death penalty "could easily be misused by a knowledgeable defendant who wished to embed his trial with reversible error."[58]

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

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

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

The "Interlocutory Statement of the Defendant" was unusually worded. It was thus difficult, but not impossible, to understand. The sentiment conveyed in the statement was reportedly guided by Hessler's religious experiences and beliefs. The vocabulary was apparently derived from religious books

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

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

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

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

Hessler was reading. This does not demonstrate a reasonable probability that Hessler was incompetent at the time of sentencing. Hessler testified that he never spoke in such an unusual manner. Pickens did not observe any form of incoherent or unusual speech when he met with Hessler shortly before the sentencing hearing. Hessler's written communications on other matters to prison staff reflects a completely different tone and content which were appropriate to Hessler's age and education and the topic at hand.

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

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

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

Hessler's profession that he was under God's control was not new. Similar sentiments had been shared with Arias, who concluded that Hessler demonstrated a "clear and organized

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

attempt to portray himself in an overly negative light, particularly with regard to psychotic symptoms to explain his behavior." Prison psychological records similarly report a tendency of "exaggerating" symptoms. A report near the time of sentencing stated that Hessler was displaying appropriate thought patterns consistent with reality and on track. As noted by the district court, rather than meeting his burden of affirmatively demonstrating incompetence, the record developed at the evidentiary hearing affirmatively shows that Hessler met the legal standard of competency required to waive counsel and proceed pro se at sentencing.

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

We have already discussed the substantial record developed at trial and during the evidentiary hearing on the issue of competency. What Hessler is truly arguing is that trial counsel's failure to call for a competency hearing resulted in the possible loss of vital additions to that evidence. Because competency changes over time, Hessler argues he can never obtain the evidence that trial counsel failed to obtain at the time of the sentencing hearing and he can never know what that evidence would or would not have been.

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

We decline to adopt such a rule. Counsel is not required to move for a competency hearing at every alleged sign of mental illness. Counsel is not required "to undertake useless

[63] Brief for appellant at 14.

procedural challenges merely to create a record impregnable to assault for claimed inadequacy of counsel."[64] Insofar as the failure to call into question the defendant's competency could conceivably be deemed prejudicial because of a lost moment in time, the defendant must still demonstrate specific prejudice resulting from not having the hearing.[65] That showing is not made through mere speculation that a hearing *might* have revealed something more.

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

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

VI. CONCLUSION

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

AFFIRMED.

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

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

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