IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF COCONINO

Dan Slayton, Judge
Division V
Date: March 15, 2007 **Carrie Faultner, Judicial Assistant**

ORDER

THE STATE OF ARIZONA,	)	
Plaintiff,	)	
vs.	)	**Case No. CR 2000-0538**
ERIC MICHAEL CLARK,	)	**UNDER ADVISEMENT**
Defendant.	)	

On June 21, 2001 Flagstaff Police Officer Jeff Moritz was shot and killed. After a search lasting approximately two days, petitioner was arrested and charged with the murder of Officer Moritz. Attorney Bryon Middlebrook, hired by petitioner's parents, initially directed the defense case for approximately two years. Mr. David Goldberg was appointed as co-counsel after consultation with Mr. Allen Gerhardt, Coconino County Public Defender and the Honorable H. Jeffrey Coker. During the intervening time between the commission of the murder and petitioner's bench trial, petitioner was twice sent to the Arizona State Hospital for restorative treatment after having been determined to be incompetent to stand trial. After petitioner's second restoration to competency, defense counsel and the prosecution entered into an agreement to waive the jury trial and set the matter for a bench trial before the Honorable H. Jeffrey Coker. During the trial, defense counsel and the prosecution agreed to limit the expert testimony in this case regarding defendant's mental state to one witness each. At the conclusion of the trial, Judge Coker found petitioner guilty of first degree murder.

In reviewing the petition for post-conviction relief and the evidence and testimony presented at the evidentiary hearing, petitioner has raised the following claims:

(1) Defense counsel was ineffective for failing to raise the issue of petitioner's competence to stand trial and waive a jury trial:

(a) at the time petitioner waived his right to a jury trial where the report of Dr. Susan Parrish stated petitioner was not competent and defense counsel was aware of this report at the time of that waiver or shortly thereafter.

(b)during trial where defense counsel believed petitioner had become incompetent due to his sleeping during portions of the trial.

(2) Defense counsel was ineffective for intentionally hiding Dr. Parrish's report indicating petitioner was incompetent to stand trial from co-counsel and the trial court.

(3) Defense counsel was ineffective for waiving defendant's right to a jury trial.

(4) Defense counsel was ineffective for limiting the expert trial testimony to one expert witness each.

(5) Defense counsel was ineffective for failing to preserve for appellate purposes an observational evidence claim.

I. APPLICABLE LAW

This Court has read and reviewed the record of proceedings at trial and for the evidentiary hearing, the testimony presented at the evidentiary hearing, the pleadings of both parties and the case law cited therein. In determining whether counsel for petitioner were ineffective in their representation of the defendant, this Court looks to the case law as set forth in applicable Arizona law[1]. The guidance given judges in reviewing ineffective assistance of counsel claims is found in the seminal case of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984), a case which finds great support in Arizona case law and is worth extensively quoting:

> Representation of a criminal defendant entails certain basic duties. Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest. *See Cuyler v. Sullivan*, 446 U.S. 335, 346, 100 S.Ct.1708, 1717. From counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution. Counsel also has a duty to bring to bear such skill and

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[1] *See also State v. Gerlaugh*, 144 Ariz. 449, 455, 98 P.2d 694, 700 (1985): "Following *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), we have recently modified the first prong to require 'deficient representation.' *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985). There is deficient representation only if, after examining all the circumstances existing at the time of the alleged act of ineffective assistance, we conclude that counsel's actions fell below objective standards of reasonable representation measured by prevailing professional norms. *Id.* The defendant must specify the acts or omissions allegedly constituting ineffective assistance." *Strickland v. Washington, supra*, 466 U.S. at 690, 104 S.Ct. at 2066, 80 L.Ed.2d at 694.

State v. Landrigan, 176 Ariz. 1, 8, 859 P.2d 111, 118 (1993): "To establish ineffective assistance of counsel, defendant must prove that (1) counsel lacked minimal competence as determined by prevailing professional norms, and (2) counsel's deficient performance prejudiced the defense. *Carver*, 160 Ariz.167, 174, 771 P.2d 1382, 1389 (1989). *Strickland v. Washington*, 466 U.S. 668, 691, 104 S.Ct. 2052, 2066, 80 L.Ed.2d 674, 695 (1984)."

State v. Mata 185 Ariz. 319, 916 P.2d 1035, Ariz.,1996 citing *State v. Amaya-Ruiz*, 166 Ariz. 152, 180, 800 P.2d 1260, 1288 (1990), *cert. denied*, 500 U.S. 929, 111 S.Ct. 2044, 114 L.Ed.2d 129 (1991) (citing *State v. Adamson*, 136 Ariz. 250, 665 P.2d 972, *cert. denied*, 464 U.S. 865, 104 S.Ct. 204, 78 L.Ed.2d 178 (1983)):"Absent and abuse of discretion, we will not disturb a trial court's denial of post-conviction relief. We will reverse a conviction due to ineffective assistance under this exacting standard only where counsel's performance was unreasonable under all the circumstances and there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different."

knowledge as will render the trial a reliable adversarial testing process. *See Powell v. Alabama*, 287 U.S., at 68-69, 53 S.Ct., at 63-64.

These basic duties neither exhaustively define the obligations of counsel nor form a checklist for judicial evaluation of attorney performance. In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. Prevailing norms of practice as reflected in American Bar Association standards and the like, e.g., ABA Standards for Criminal Justice 4-1.1 to 4-8.6 (2d ed. 1980) ("The Defense Function"), are guides to determining what is reasonable, but they are only guides. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions. *See United States v. Decoster*, 199 U.S.App.D.C., at 371, 624 F.2d, at 208. Indeed, the existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant's cause. Moreover, the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. The purpose is simply to ensure that criminal defendants receive a fair trial.

Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. *Cf. Engle v. Isaac*, 456 U.S. 107, 133-134, 102 S.Ct. 1558, 1574-1575, 71 L.Ed.2d 783 (1982). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." *See Michel v. Louisiana*, supra, 350 U.S., at 101, 76 S.Ct., at 164. There are countless ways to provide effective assistance in any given case. Even the best criminal

> defense attorneys would not defend a particular client in the same way. *See* Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U.L.Rev. 299, 343 (1983).
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> The availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges. Criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel's unsuccessful defense. Counsel's performance and even willingness to serve could be adversely affected. Intensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client.
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> Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.
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> *Strickland*, 466 U.S. at 688-90, 104 S.Ct. at 2065-66.

Arizona case law echoes the same view of an ineffective assistance of counsel claim[2]:

> A colorable claim of ineffective assistance of appellate counsel is a claim which, if true, might have changed the outcome. *State v.*

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[2] *See also State v. Gerlaugh.*, 144 Ariz. 449, 455, 698 P.2d 694, 700 (1985): "The accused must also overcome a 'strong' presumption that the challenged action was sound trial strategy under the circumstances. *State v. Nash, supra*, 143 Ariz. 392, 398, 694 P.2d 222, 228 (1985); *Strickland v. Washington, supra*, 466 U.S. 668, 689, 104 S.Ct. 2052, 2065-66, 80 L.Ed.2d 674, 694 (1984). Disagreements in trial strategy will not support a claim of ineffective assistance so long as the challenged conduct has some reasoned basis." (*citing State v. Meeker*, 143 Ariz. 256, 260, 693 P.2d 911, 915 (1984); *State v. Prince, supra*, 142 Ariz. 256, 260, 689 P.2d 515, 519 (1984).

> *Schrock*, 149 Ariz. 433, 441, 719 P.2d 1049, 1057 (1986). To state a colorable claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below objectively reasonable standards and the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). . . . If a defendant fails to make a sufficient showing on either prong of the *Strickland* test, the court need not determine whether the other prong was satisfied. *State v. Salazar*, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985)."
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> *State v. Febles*, 210 Ariz. 589, 596, 115 P.3d 629,636 (App. 2005).

II. PETITIONER'S CLAIMS

1. DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THE ISSUE OF PETITIONER'S COMPETENCE:

(A) AT THE TIME PETITIONER WAIVED HIS RIGHT TO A JURY TRIAL WHERE THE REPORT OF DR. SUSAN PARRISH STATED PETITIONER WAS NOT COMPETENT AND DEFENSE COUNSEL WAS AWARE OF THIS REPORT AT THE TIME OF THAT WAIVER OR SHORTLY THEREAFTER.

By agreement of both prosecution and defense counsel, the trial court considered the experts' reports submitted by both the state and defense experts in determining whether the petitioner was competent to stand trial. The trial court made a legal determination that defendant was competent to stand trial.[3] It is important to note that the trial court had been actively involved in being kept informed of petitioner's mental health treatment[4] in that he received regular progress reports from the mental health professionals treating petitioner and by conducting at least two prior competency hearings.[5] The petitioner waived a jury trial July 8, 2003. At the waiver of jury trial hearing, the trial court personally addressed the petitioner and ascertained that he knowingly, intelligently and voluntarily was waiving his right to a jury trial. A bench trial commenced August 5th, 2003, lasted eleven days, and concluded August 27, 2003.

This Court does not find evidence to support petitioner's claim that had Mr. Middlebrook disclosed Dr. Parrish's opinion regarding petitioner's competency to the trial court, Judge Coker would have

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[3] Minute Entry dated May 8th, 2003: "The Court has reviewed the records submitted of Dr. Kassel, Dr. DiBacco, Dr. Morenz, and Dr. Jazinski, and all other information filed in this matter. . . . [The Court] concludes that the Defendant is competent to stand Trial, understands the proceedings, and if he chooses, can assist his attorney in his defense. The Defendant's status, at this time, is one of volition, as opposed to any inability."

[4] Testimony of Bryon Middlebrook, February 20, 2007: "I mean, Judge Coker, when it came to treating Eric, was a good an alley (sic) as I could hope for during the process." (R/T 157:16).

[5] See for example Minute Entries and Rulings contained therein by trial court dated September 8, 19, 28, 2000; February 13th, March 28th (First Competency Hearing), August 8th, October 25th, 2001, June 5th, [June 26th, July 10th, July 11th- Second Competency Hearing] August 14th, September 5th, September 16, 2002, November 21st, May 8th 2003 (Third Competency Hearing?).

vacated the finding of competency and/or granting of the waiver of a jury trial, and ordered petitioner back into restorative treatment. This claim is speculative at best. The question petitioner has failed to answer is, "what information was the trial court lacking when determined competency and/or accepted the waiver?" The trial court was well acquainted with petitioner's mental health history. The trial court was also fully aware of the treatment petitioner had been receiving and the experts' latest opinions of petitioner's competency. In fact, the trial court had Dr. Parrish's opinion of petitioner's competency in front of him as he indicated he had reviewed "all other information filed in this matter" at the time of the second competency hearing. (Testimony of Bryon Middlebrook, February 20, 2007, R/T150:23-25, 151:1-12).

From the beginning Dr. Parrish *never* found petitioner competent. Dr. Susan Parrish met with petitioner on June 19th, and July 3rd, 2003 and issued a report at Mr. Middlebrook's direction on July 7th, 2003. Even though not directed by Mr. Middlebrook to conduct a competency evaluation, she found the petitioner to be incompetent to stand trial. Dr. Parrish had previously interviewed petitioner on July 16th, 2000, and November 1st, 2000. Her opinion contained in the report dated July 7th, 2003 was completely consistent with her opinion known to all parties including the trial court from the beginning of her involvement.[6]

Further, as the minute entry dated July 2nd, 2003 clearly shows, after the waiver of the jury trial, petitioner was to be returned to the Arizona State Hospital, was not to be discharged from the Arizona State Hospital Restoration Program, and remained under their care until his transfer back to Coconino County to stand trial a few days before trial began. Therefore, petitioner was in fact under the care of the Arizona State Hospital (ASH). There is no record of any of the treatment team finding petitioner incompetent or noticing anything in his behavior that would indicate petitioner was incompetent to stand to trial after his return to ASH. The very act that petitioner claims would have happened if the trial court had reviewed the Parrish report, and assuming he disregarded all the other experts' opinions, in fact did happen.

This Court does not find that Mr. Middlebrook's performance failed to meet minimal competence standards by not raising a competency claim at or shortly after the trial court accepted petitioner's waiver of jury trial on the basis of Dr. Parrish's July report. Mr. Middlebrook testified as to his concerns over the reliability of the methodology and testing conducted by Dr. Parrish. The July 7th written report was based on tests that were not widely recognized or generally accepted by the

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[6] Testimony of Bryon Middlebrook, February 20, 2007:
. . .[A]nd I believe we went through the efforts of having various experts appointed, and Dr. Kassell, Dr. DiBacco, and – were appointed by the Court to conduct a Rule 11 evaluation, and Dr. Parrish was the Defense doctor at that time. They did an evaluation. They determined he was incompetent – Eric was incompetent to stand trial, and he was sent to the Arizona State Hospital for rehabilitation." (R/T 81:7-15, Court's Copy);

By Mr. O'Toole: "When you received this report (from Dr. Parrish) you did not tell me that you didn't think it was anything substantially different than what the prior reports in May had indicated?" By Mr. Middlebrook: "I think – I want to be careful there because there were some differences, but overall I think that's accurate." By Mr. O'Toole: "The report basically confirmed that Eric had some impairment. Correct?" By Mr. Middlebrook: "Yes." By Mr. O'Toole: "And Judge Coker knew that Eric had some impairment. Correct?" By Mr. Middlebrook: "Yes." (R/T 126:6-14, Court's Copy, words in parentheses added for clarification by Court).

scientific community.[7]

The trial court made a legal determination as to petitioner's competency and ability to waive a jury trial. The trial court held hearings at which the medical experts' opinions regarding petitioner's restoration and competency to stand trial were argued, evaluated and decided. The trial court found petitioner competent to stand trial. At his hearing regarding the waiver of jury trial, petitioner answered questions put to him by the trial court lucidly, appropriately, and accurately. In reviewing the record and the totality of actions undertaken by defense counsel, Mr. Middlebrook actively and competently raised all issues regarding petitioner's mental health and acted diligently to protect his client's interests.

Petitioner argues, in essence, that Mr. Middlebrook did not do enough in re-raising this claim (ostensibly at the time the trial court found petitioner to be competent and/or waive jury trial). This Court rejects this claim. The record shows petitioner was determined by mental health experts to be competent to stand trial. The trial court made a determination that petitioner was legally competent. Mr. Middlebrook relied on the experts' opinions even though personally he disagreed with them and proceeded to trial. (Testimony of Bryon Middlebrook, February 20, 2007, R/T100:13-18, 128:1-13). Mr. Middlebrook competently and professionally exceeded minimal competence standards at all stages of the proceedings regarding the mental competence of petitioner. There is no case holding that an attorney falls below minimal competence standards by failing to raise the issue of competence immediately after a court's finding of competence or waiver of jury trial, *based upon the attorney's own subjective opinion* where numerous experts, after evaluating petitioner, find petitioner competent to stand trial. Petitioner has failed to show either an ineffective assistance of counsel claim as to this issue and/or that he was prejudiced.

I. DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THE ISSUE OF PETITIONER'S COMPETENCE:
(B) DURING TRIAL WHERE DEFENSE COUNSEL BELIEVED PETITIONER HAD BECOME INCOMPETENT DUE TO HIS SLEEPING DURING PORTIONS OF THE TRIAL.

Petitioner claims Mr. Middlebrook, "testified the he always believed that Eric Clark was not competent to stand trial."[8] This claim however, is at odds with the testimony presented at the evidentiary hearing. Mr. Middlebrook's views on petitioner's competency were conflicted to say the least. At one point during his testimony February 20, 2007, he stated he never believed petitioner was competent to stand trial, (disagreeing with the trial court's determination of legal competency).[9] Then a few minutes later, he testified that petitioner

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[7] *See* Testimony of Bryon Middlebrook, February 20, 2007, R/T 164:8-25, 165:1-20, Court's Copy.

[8] Closing Argument of Petitioner, p.5.

[9] *See for example*: Testimony of Bryon Middlebrook, February 20, 2007, R/T 99:20-21: "thought he was competent to stand trial;" Testimony of Bryon Middlebrook, February 20, 2007, R/T 100:4-8: "don't believe Eric is competent to stand trial;" Testimony of Bryon Middlebrook, February 20, 2007, R/T 100:16-18, 22-23: ". . .and I knew I had forced myself to rely on experts – mental health professionals to make that determination... ...[t]he thing is, Eric evolves. That's the problem.";Testimony of Bryon Middlebrook, February 20, 2007, R/T 102:11-20: disagreeing

was competent at least early on in the beginning of trial.[10] It is understandable to this Court after hearing his testimony how Mr. Middlebrook could be so conflicted in his evaluation of petitioner's competency. He formed an intensely significant relationship with a severely mentally ill teenager accused of committing a horrendous murder. The intensity of this relationship was evident in Mr. Middlebrook's testimony as several times he had to stop to compose himself as he spoke of its effects upon his professional, personal, and familial life. Based upon the record, evidence and testimony presented at the evidentiary hearing, Mr. Middlebrook competently, professionally, and doggedly maintained the highest ethical standards and zealous devotion to protecting his client. (Testimony of Bryon Middlebrook, February 20, 2007 R/T 161:4-8).

Mr. Middlebrook believes that his failure to raise defendant's continued competency (or the failure to maintain competency) during trial supports his belief that his representation constituted ineffective assistance of counsel. This Court is also mindful of the warning issued in *Strickland, supra:*

> It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.
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> *Strickland,* 466 U.S. at 689, 104 S.Ct. at 2065 (citation omitted).

It is because of the intensity of this relationship with petitioner that this Court concludes that Mr. Middlebrook's self-admission cannot be considered as legally credible in establishing petitioner's ineffective assistance of counsel claim. Based upon the record and testimony presented, Mr. Middlebrook competently represented and undertook to ensure petitioner's competency claims and mental health were protected at all stages of the proceedings including raising petitioner's mental health on at least two significant occasions resulting in petitioner's commitment and re-commitment to the Arizona State Hospital. He was intimately acquainted with petitioner's mental health history, family background, present as well as persistent symptoms, treatment and medical opinions as well as testing procedures. In short, he knew his client's mental health thoroughly and, as necessary,

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with Judge Coker's determination of petitioner's legal competency, "Was he competent? No."; Testimony of Bryon Middlebrook, February 20, 2007, R/T128:13, finding by Dr. Morenz that petitioner was competent, "So when he told me he thought he was competent, I had to trust him."

[10] Testimony of Bryon Middlebrook, February 20, 2007, R/T154:7-25, 155:1-10.

raised the issues of his client's competency, treatment and restorative therapy over the course of over two years prior to trial.

Mr. Middlebrook during that same time period diligently and competently prepared for trial and was eventually assisted by co-counsel David Goldberg. This Court finds that Mr. Middlebrook was not ineffective for failing to raise the issue of competency on the day petitioner was legally determined to be competent to stand trial because. Even though he may have disagreed with Judge Coker's decision, he was entitled to rely on the opinions of the experts who found petitioner competent to stand trial. For the same reason, this Court determines that he was not ineffective for not raise the issue of competency on the day petitioner waived his right to a jury trial as he was entitled to rely on the opinions of the experts. Further, as the State points out, as late as July 25th, 2003, Dr. DiBacco (whom petitioner's expert claimed was the strongest witness for petitioner's claim of insanity) found petitioner to be competent. (Report of Dr. DiBacco dated July 25th, 2003, and filed with trial court August 4th, 2003 ; Plaintiff's Exhibit 9, Evidentiary Hearing February 9th, 2007). Mr. Middlebrook's actions were objectively reasonable in light of all circumstances and expert opinions. This Court does not find a failure to re-raise a competency claim based upon an expert's opinion, which did not differ from her initial opinion, and based upon a questionable methodology used by the expert does not rise to a level of ineffectiveness justifying relief.

Petitioner claims Mr. Middlebrook failed in his advocacy of petitioner by failing to raise another competency claim during trial due to petitioner's falling asleep during trial. Petitioner asks this Court to find, on the basis of Mr. Middlebrook's conflicted opinions of petitioner's competency, that his subjective belief that petitioner's sleepiness indicated incompetence and failure to raise the same constitutes ineffective assistance of counsel.

At the evidentiary hearing, Mr. Middlebrook testified that he thought petitioner was competent during the first few days of trial because petitioner was awake and drawing non-sensical Chinese-like minuscule symbols across entire pages of paper, but that because he slept (or appeared to be sleeping) during certain points of his trial, this constituted a mental regression and/or incompetence requiring the raising before the trial court of petitioner's continued competency. (Testimony of Bryon Middlebrook, February 20, 2007, R/T154:7-25,155:1-25). The Court notes that petitioner never brought forth over what period of time during a trial day and/or over how many days this behavior occurred.

Minimal attorney competence does not place upon an attorney a duty to rely on subjective personal opinions about a defendant's mental state, disregarding the opinions of numerous mental health experts, and where, as in this case, mental health professionals who have been intimately involved in the evaluation and treatment of a defendant. Minimal competence standards do not place upon defense counsel the burden to interpret such subtle nuances as non-sensical scribblings during trial as meaning mental competence of the defendant, while periodic sleeping during trial indicates incompetence. This Court has not been cited to any case which so holds an attorney to such a high level of competence and this Court has been unable to find any case supporting petitioner's argument. Petitioner's claim fails for the reasons set forth above.

2. DEFENSE COUNSEL WAS INEFFECTIVE FOR INTENTIONALLY HIDING DR. PARRISH'S REPORT INDICATING PETITIONER WAS INCOMPETENT TO STAND TRIAL FROM CO-COUNSEL AND THE TRIAL COURT.

Petitioner claims that defense counsel hid the report of Dr. Parrish from the trial court and co-counsel.[11] This act of hiding the report constitutes ineffective assistance of counsel. The Court rejects this claim. The unrebutted testimony of Mr. Middlebrook was that he thought he in fact had disclosed the report. (Testimony of Bryon Middlebrook, February 20, 2007,. R/T 91:3-25, 92:6-12, 126-15-21). Further as noted in the Minute Entry dated June 5th , 2003, the trial court and prosecution were aware of Dr. Parrish's potential meeting with petitioner and that the prosecution may have had an objection to the same. Finally, the report was disclosed to the prosecution. There was no intentional act to hide the Parrish report. Further any such failure was not prejudicial to petitioner as the report was disclosed to the prosecution, the opinion was consistent with the opinion already known to the trial court, and the trial court and prosecution were aware as of June 5th, 2003 that Dr. Parrish was meeting with the petitioner.

3. DEFENSE COUNSEL WAS INEFFECTIVE FOR WAIVING DEFENDANT'S RIGHT TO A JURY TRIAL AND,
4. DEFENSE COUNSEL WAS INEFFECTIVE FOR LIMITING THE EXPERT TRIAL TESTIMONY TO ONE WITNESS APIECE.

Claims 3 and 4 are combined as they reasonably raise the same question of trial strategy and point of law. Petitioner claims that Mr. Middlebrook was ineffective for waiving petitioner's right to a jury trial and limiting expert testimony. In support of this claim, petitioner called Attorney Tom Gorman to testify as an expert. This Court has had the privilege of practicing with all three attorneys (Gorman, Middlebrook, and Goldberg). After reviewing the testimony of all three attorneys regarding the above issues, this Court does not attribute to Mr. Gorman any more professional credibility than attributed to either Mr. Middlebrook or Mr. Goldberg as all three attorneys have had extensive trial practice history. Mr. Gorman opined that the only reason to waive a jury trial was "is that there would have to be some type of objective basis, articulable basis, facts unique to the particular case with that particular client and that particular judge..." (Testimony of Thomas Gorman, February 9th, 2007 R/T 171:2-5).

In *State v. Febles, supra,* the Arizona Supreme Court addressed the issue of trial tactics and strategy by defense counsel: "Febles must overcome the presumption that his counsel's conduct fell within the broad range of conduct considered reasonable. *Id.* Additional scrutiny of counsel's conduct is highly deferential, granting wide latitude to counsel's tactical choices *State v. Nash*, 143 Ariz. 392, 398, 694 P.2d 222, 228 (1985). The matter is viewed from counsel's perspective at the time, *Strickland,* 466 U.S. at 689, 104 S.Ct. 2052, and a strategic decision to 'winnow out weaker arguments on appeal and focus on' those more likely to prevail is an acceptable exercise of professional judgment."

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[11] Closing Argument of Petitioner, p.5: "Instead, for his own self-interests, Mr. Middlebrook assured a finding of competency by stipulating to reports that left no room for any other finding. Then, when new tests were conducted by his own hand picked (sic) witness, Mr. Middlebrook hid the expert's findings of incompetency from Judge Coker and from co-counsel."

Mr. Goldberg testified that based upon his prior professional experience, juries were misled and/or confused as to mental health testimony. Further, in return for agreeing to a bench trial, the petitioner was guaranteed he would not get a life sentence. (Testimony of David Goldberg, February 9th, 2007, R/T 39: 24-25 through 42:1-6; 60:14 through 64:1-10). Mr. Middlebrook also clearly and articulably set forth his reasons for waiving a jury trial (*See* Testimony of Bryon Middlebrook, February 20th, 2007, R/T 109:8-25).

Even the United States Supreme Court in *Clark v. Arizona* recognized the concerns of trying this type of case before a jury: "And of course, in the cases mentioned before, in which the categorization is doubtful or the category of mental disease is itself subject to controversy, the risks are even greater that opinions about mental disease may confuse a jury into thinking the opinions show more than they do." *Clark v. Arizona*, 126 S.Ct. 2709, 2735, 165 L.Ed.2d 842, ___, (2006).

In sum, there were in fact, specific articulable reasons for waiving a jury trial. The facts of this case, of the defendant, and of the judge were uniquely considered by defense counsel. Defense counsel were not ineffective for waiving a jury trial as this was well within the range of sound trial strategy.

For the same reasons, petitioner's claim that Mr. Middlebrook was ineffective in limiting the expert witness testimony also fails. The decision to limit expert testimony was also based upon specific, articulable and reasonable trial strategy. (Testimony of Bryon Middlebrook, February 20th, 2007 R/T 136:17-25 through 140:1-10.)[12]

5. DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO PRESERVE FOR APPELLATE PURPOSES AN OBSERVATIONAL EVIDENCE CLAIM.

In *Clark v. Arizona, supra*, Justice Souter, writing for the five justice majority, set forth the major issue between the dissent and the majority with regard to the issue of whether petitioner had preserved the issue of the trial court's possible failure to consider observational evidence for appellate review: "The point on which we disagree with the dissent, however, is this: did Clark apprise the Arizona courts that he believed the trial judge had erroneously limited the consideration of observation evidence, whether from law witnesses like Clark's mother or (possibley) the expert witnesses who observed. . . .For the following reasons we think no such objection was made in a way the Arizona courts could have understood it, and that no such issue is before us now." *Clark*, 126 S.Ct at 2727.

Based upon the majority opinion, petitioner claims that Mr. Goldberg, who argued the appeal at both the state and federal level was ineffective in failing to preserve the issue of whether the trial court erred in not considering observational evidence bearing on petitioner's *mens rea*.

This Court agrees with the State's position as expressed in their closing argument. First, three justices dissented, and sharply criticized the majority for it's holding:

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[12] *See also State v. Nirschel*, 155 Ariz. 206, 208, 745 P.2d 953, 955 (1987). "It is well established in Arizona that disagreements in trial strategy will not support a claim of ineffective assistance of counsel, provided the challenged conduct has some reasoned basis" (citations omitted).

> Seizing upon a theory invented here by the Court itself, the Court narrows Clark's claim so he cannot raise the point everyone else thought was involved in the case. The Court says the only issue before us is whether there is a right to introduce mental-disease evidence or capacity evidence, not a right to introduce observation evidence. (Citation omitted). This restructured evidentiary universe, with no convincing authority to support it, is unworkable on its own terms. Even were that not so, however, the Court's tripartite construction is something not addressed by the state trial court, the state appellate court, counsel on either side in those proceedings, or the briefs the parties filed with us. The Court refuses to coniser the key part of Clark's claim because his counsel did not predict the Court's own invention. It is unrealistic, and most unfair, to hold the Clark's counsel erred in failing to anticipate so novel an approach.

Clark, 126 S.Ct at 2738.

The position taken by the dissent in *Clark, supra*, echoes the position taken by the Arizona Court of Appeals in a factually similar case:

> Counsel's failure to predict future changes in the law, and in particular the *Blakely* decision, is not ineffective because '[c]lairvoyance is not a required attribute of effective representation.' *United States v. Gonzalez-Lerma*, 71 F.3d 1537, 1541-42 (10th Cir.1995) (citations omitted). There is a difference between ignorance of controlling authority and 'the failure of an attorney to foresee future developments in the law.' Id. at 1542. We have rejected ineffective assistance claims where a defendant faults his former counsel ... for failing to predict future law and have warned that clairvoyance is not a required attribute of effective representation. *Bullock v. Carver*, 297 F.3d 1036, 1052 (10th Cir.2002).
>
> *State v. Febles*, 210 Ariz. 589, 597, 115 P.3d 629, 637 (App. 2005).

This Court denies petitioner's claim for relief on this issue as well. This Court finds based upon the argument of the dissent in *Clark v. Arizona, supra*, that Mr. Goldberg was not ineffective in failing to raise an observational evidence claim. Where arguably, three of the best legal minds in our country disagree with five others, finding that petitioner preserved his claim, this Court is hard pressed to find an ineffective assistance of counsel claim.

III. PRECLUDED CLAIMS

Petitioner raised the following additional claims relating to his competency:

(1) Defendant was not competent to stand trial or in the alternative, petitioner became incompetent during trial.

(2) Defendant was not competent to waive his right to a jury trial.

This Court submits that it has already addressed those claims as ineffective assistance of counsel claims as set forth above. In order to assist appellate review, this Court finds that Arizona Rules of Criminal Procedure Rule 32.2 does not allow these claims as set forth above as they could have been raised on direct appeal. Finally this Court finds that even if the competency claims were reviewable on their own, the entire record of this case including the reports, evaluations and testimony of the mental health professionals, and the testimony presented at the evidentiary hearing show defendant was competent to stand trial and waive his right to a jury trial.

IV. CONCLUSION

Based upon the foregoing, it is ordered denying Petitioner post-conviction relief as to each of his claims. Further, any other claims not specifically addressed are dismissed.

3-15-07
Date

Dan Slayton, Judge

cc: Eric Michael Clark, ADOC #187986, ASPC-Eyman, SMU II Unit, P.O. Box 3400, Florence, AZ 85232
Michael O'Toole, Attorney Generals Office, Criminal Appeals, 1275 W. Washington, Phoenix, AZ 85007
Allen Gerhardt, c/o Box in Courthouse

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF COCONINO

Dan Slayton, Judge
Division V
Date: March 15, 2007 **Carrie Faultner, Judicial Assistant**

ORDER

THE STATE OF ARIZONA,	)	
	)	
Plaintiff,	)	**Case No. CR2000-0538**
	)	
vs.	)	
	)	
ERIC MICHAEL CLARK,	)	
	)	
Defendant.	)	
	)	

ACTION: State's Motion to Strike the Affidavit of Terry Clark

"The Court has read the State's Motion to Strike the Affidavit of Terry Clark, petitioner's response and the State's reply.

IT IS ORDERED striking the affidavit of Ms. Clark."

3.15.07
Date

Dan Slayton, Judge

cc: Eric Michael Clark, ADOC#187986, ASPC-Eyman, SMU II Unit, P.O. Box 3400, Florence, AZ 85232
Michael O'Toole, Attorney Generals Office, Criminal Appeals, 1275 W. Washington, Phoenix, AZ 85007
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