

ALFRED P. SHADID, #114103
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 In Pro Se

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CLERK U S DISTRICT COURT DISTRICT OF ARIZONA	
BY _____	E. DEPUTY

IN THE UNITED STATES DISTRICT COURT
 IN THE DISTRICT OF ARIZONA

ALFRED P. SHADID,)	
)	NO. CV 02-1896-PHX-RCB (VAM)
Petitioner,)	
)	
vs.)	SUPPLEMENT TO APPLICATION FOR
)	CERTIFICATE OF APPEALABILITY
DORA SCHRIRO,)	
)	(Assigned to Hon. Judge Broomfield)
Respondent.)	
)	

On July 13, 2005 this Court entered its Order and Judgment denying Petitioner's request for issuance of a writ of habeas corpus. Amongst the various reasons cited in denying the petition, this Court held that Petitioner had failed to raise is Brady claim in his petition for post conviction relief and therefore it was procedurally defaulted. (Order and Judgment at 11-12, hereafter "Order"). Petitioner filed a timely "Notice of Appeal" and an "Application For Certificate of Appelability".

Amongst the various reasons cited by Petitioner why a certificate of appealability should be issued, Petitioner submits that other reasonable jurists would conclude that in denying his Brady claim (See Doc. #3 at 8-11), that this Court's holding that this issue was procedurally defaulted for failing to raise the claim in the state post conviction relief petition was clearly erroneous. (Application For Certificate of Appealability at ¶18-23). As pointed out by Petitioner, this claim was in fact raised in his post conviction petition, (Id.), which is exemplified by the State's Response to Petition For Post Conviction

Relief, (See State's Response To Petition For Post Conviction Relief at p. 6 Attached), and the state court's written opinion, (Doc. 24 at Ex. SS), both of which addressed the failure to disclose issue.

Petitioner requests that a certificate of appealability (COA) be issued regarding his Brady claim and on the separate issue on whether dismissal of the Brady claim on the grounds of procedural default might result in a fundamental miscarriage of justice.

Miscarriage of Justice/Actual Innocence Exception

To properly exhaust, the petitioner must present the operative facts and the asserted constitutional principle and/or United States Supreme Court law. Duncan v. Henry, 513 U.S. 364, 365-66 (1995). However, if the state court sua sponte reaches the merits of the federal claim, the claim will not be procedurally barred. See, Ylst v Nunnemaker, 501 U.S. 797, 801 (1991). The federal courts will also consider claims unexhausted or procedurally defaulted if cause and prejudice or a fundamental miscarriage of justice is established. Sawyer v. Whitley, 505 U.S. 333, 338 (1992); Coleman v. Thompson, 501 U.S. 722, 735, n.1 (1991); Engle v Isaac, 456 U.S. 107, 129 (1982). The fundamental miscarriage of justice exception must be shown by clear and convincing evidence. Sawyer v Whitley, 505 U.S. at 339. This exception is commonly referred to as the "actual innocence" exception. However, the actual innocence of the crime exception encompasses a slightly different standard. A petitioner must show that the constitutional violation has probably resulted in the conviction of someone actually innocent. Schlup v. Delo, 513 U.S. 298, 327 (1995). "To establish the requisite probability that he was actually innocent, the petitioner must support his allegations with new, reliable evidence that was not presented at trial and show that it was 'more likely than not that no reasonable jury would have convicted him in light of the new evidence.'" Fairman v. Anderson, 188 F.3d 635,

644 (5th Cir. 1999)(quoting Schlup v. Delo, 513 U.S. 298 (1995)).

In this case, Petitioner satisfies both the fundamental miscarriage of justice and the actual innocence exceptions. Petitioner's defense was that he was innocent of the charged crimes because the State mistakenly identified him, i.e., that he was not the person who the victim saw that early morning hours of October 31, 1996 driving the suspect vehicle. It is undisputed that Petitioner is a very small man of 5'4", 138 Lbs, with black hair that was cut along the top of his ears and collar. It is also undisputed that the victim described the suspect during the incident as 5'9", 165 Lbs., with Brown Hair, and further described him the very next day as having "shoulder length hair" and that the incident was so "accelerated" that he was completely unable to ascertain any clothing description of the suspect. It is also undisputed that the victim actually disregarded Petitioner as the suspect upon the initial show up confrontation. However, but for the constitutional violations of suppression of evidence, ineffective assistance of counsel, and misleading half truths by the prosecutor and his witnesses, none of this highly exculpatory evidence was presented to the jury. Under these circumstances, the district court's conclusion that Petitioner cannot show actual innocence seems too restrictive interpretation of the requirement. The purpose of the exception is to prevent a miscarriage of justice by the conviction of someone who is entitled to be acquitted because "he did not commit the crime of conviction." Fairman, 188 F.ed at 644.

Here, Petitioner has pointed to the undisclosed police report, the audio tape communications of the incident, and an affidavit of Joseph Konesky, all of which highly probative of his affirmative defense. Knowledge of these facts by the jury would have significantly bolstered Petitioner's defense and would have substantially undermined the prosecutors ability to argue the reliability

of the identification. The undisputed new evidence presented by Petitioner confirms his claim that he was not the driver of the vehicle and that the witness was simply wrong in identifying him in court. It is not just possible but more likely than not that no reasonable jury would have convicted him had they been informed that the victim's descriptions given in close proximity to the crime do not come remotely close to describing the Petitioner, and, further heard Mr. Konesky testify that he clearly heard the victim disregard the petitioner at their initial confrontation.

"[A] claim of 'actual innocence' is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." Herrera v. Collins, 506 U.S. 390, 404 (1993). In other words, if not for the constitutional errors of suppression of evidence and misleading testimony by the prosecution, and ineffective assistance of trial counsel conviction of petitioner who is actually innocent would not have resulted. Schlup v. Delo, supra.

Wherefore, Petitioner requests that an additional certificate of appealability be issued on whether, if his Brady claim has been procedurally defaulted even though he insists that it is not, a fundamental miscarriage of justice will occur.

RESPECTFULLY SUBMITTED this 10th day of August, 2005.

Alfred P. Shadid
Alfred P. Shadid, In Pro Se

I, Alfred P. Shadid, certify that the ORIGINAL AND ONE COPY of this document was deposited in the Arizona State Prison-Douglas, Mohave Unit, outgoing legal mail system with pre-paid first class postage attached this 10th day of August, 2005, to:

Clerk of United States District Court

TRUE COPY to:

Arizona Attorney General's Office

BY: Alfred Shadid

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA,

Plaintiff,

vs.

ALFRED PHILLIP SHADID,

Defendant.

NO. CR 96-012002

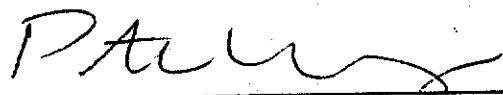
RESPONSE TO PETITION FOR
POST-CONVICTION RELIEF

(Assigned to the Honorable
Thomas W. O'Toole)

The State of Arizona, through undersigned counsel, opposes the petition and asks the Court to summarily dismiss it, pursuant to Rule 32.6 (c), Ariz. R. Crim. P., for the reasons set forth in the following memorandum.

Submitted January 29th, 2001.

RICHARD M. ROMLEY
MARICOPA COUNTY ATTORNEY

BY 
Patricia A. Nigro
Deputy County Attorney

MEMORANDUM OF POINTS AND AUTHORITIES

I. Factual and Procedural Background

A jury convicted Defendant/Petitioner Alfred P. Shadid ("Shadid") of aggravated assault, a class 2 dangerous felony, unlawful flight, a class 5 felony, and criminal damage, a class 6 felony. The Court found that Shadid had two prior felony convictions. The Court subsequently sentenced Shadid to 15.75 years imprisonment for the aggravated assault conviction, 5 years imprisonment for the unlawful flight conviction, and 3.75 years for the criminal damage conviction. The Court further ordered that Shadid would serve his sentences for the aggravated assault and criminal damage convictions concurrently, with his sentence for the unlawful flight conviction to be served consecutively.

Shadid appealed, and the Court of Appeals remanded for a determination of whether the violation of Shadid's speedy trial rights caused him prejudice. After the trial court determined that Shadid suffered no such prejudice, he appealed from that ruling. The Court of Appeals affirmed the trial court's ruling that Shadid suffered no prejudice as a result of the violation of his speedy trial rights.

Shadid then filed his notice of post-conviction relief, followed by his petition for post-conviction relief and two supplements.

II. Argument

Shadid raises the following claims for relief: (1) he received ineffective assistance of both trial and appellate counsel; (2) newly-discovered evidence undermines the credibility of the victim; (3) the State violated his constitutional rights by failing to disclose material facts; (4) the State violated his constitutional rights by presenting false evidence at trial; (5) he suffered a denial of his right to counsel at a critical point in the proceedings;

and (6) the Maricopa County Sheriff's Office wrongly intruded into his communications with his legal representatives.

A. Claims which may be raised in these proceedings

1. Ineffective Assistance of Counsel

Shadid first claims that he received ineffective assistance of both trial and appellate counsel. To obtain relief on a claim of ineffective assistance of counsel, a defendant must make two showings: (1) that counsel's performance was not reasonable under all the circumstances; and (2) that there is a reasonable probability that but for counsel's unreasonable conduct the result of the proceedings would have been different. *State v. Salazar*, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985). There is no need to address both prongs of this test if the defendant makes an insufficient showing on one. *State v. Rankovich*, 159 Ariz. 116, 122, 765 P.2d 518, 524 (1988). Matters of strategy and tactics are committed to defense counsel's judgment and will not support claims of ineffective assistance. *State v. Beaty*, 158 Ariz. 232, 250, 762 P.2d 519, 537 (1988). Further, there is a strong presumption that counsel has provided effective assistance to a defendant. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed2d 674 (1984). A trial court is not required to conduct evidentiary hearings based on mere generalizations and unsubstantiated claims of ineffective assistance. *State v. Borbon*, 146 Ariz. 392, 706 P.2d 718 (1985).

Shadid's claims of ineffective assistance of trial counsel have no merit. First, Shadid's main complaint seems to be that he did not have a satisfactory relationship with his attorney. This does not constitute a colorable claim for post-conviction relief, however. Although a defendant is entitled to representation by competent counsel, he is entitled to

neither an attorney of his own choosing nor a meaningful relationship with counsel. *State v. Bible*, 175 Ariz 549, 591, 858 P.2d 1152, 1194 (1993). Shadid received that to which he was entitled: zealous representation by a competent attorney. His disagreements with his attorney's decisions regarding trial strategy do not entitle him to post-conviction relief.

Moreover, this Court specifically found that Shadid received effective assistance of counsel when it denied Shadid's motion for a new trial. See March 13, 1998 Reporters Transcript of Proceedings ("3/13/98 RT") at 61-63. Shadid has presented nothing in his petition for post-conviction relief which would change that finding.

Defendant's claim of ineffective assistance of appellate counsel is similarly without merit. Defendant claims that his appellate counsel should have raised claims in addition to those raised before the Court of Appeals. This argument ignores the fact that "hallmark of effective appellate advocacy" is focusing on those arguments most likely to prevail. *State v. Herrera*, 183 Ariz. 642, 647, 905 P.2d 1377, 1382 (App. 1995), quoting *Smith v. Murray*, 477 U.S. 527, 526 (1986). Appellate counsel can not be deemed ineffective for determining which issues to present on appeal. *Id.* Therefore, unless Defendant can show that the failure to raise additional issues on appeal "fell below prevailing professional norms and would have changed the outcome of the appeal" *Id.*, his claim must fail. Defendant has not made the required showing in this case.

2. Newly-Discovered Evidence

According to Shadid, newly-discovered evidence regarding the credibility of Officer Guy Willis entitles him to a new trial. A petitioner is entitled to an evidentiary hearing if he presents a colorable claim, that is, a claim which if his allegations are true might have changed the verdict. *State v. D'Ambrosio*, 156 Ariz. 71, 73, 750 P.2d 14, 16 (1988). A

newly discovered evidence claim is colorable only if all five of the following requirements are met: (1) the evidence must appear on its face to have existed at the time of trial but be discovered after trial; (2) the petition must allege facts from which the court could conclude the petitioner was diligent in discovering the facts and bringing them to the court's attention; (3) the evidence must not simply be cumulative or impeaching; (4) the evidence must be relevant to the case; and (5) the evidence must be such that it would likely have altered the verdict, finding or sentence if known at the time of trial. *State v. Bilke*, 162 Ariz. 51, 52-53, 781 P.2d 28, 29-30 (1989).

Shadid's claim of newly-discovered evidence fails for several reasons. First, most of the "evidence" cited by Shadid did not exist at the time of trial, and thus fails to meet the first requirement of the test for newly-discovered evidence. Second, none of the "evidence" cited by Shadid is relevant to the case, nor would it have likely been admissible at trial. Finally, all of the "evidence" cited by Shadid is simply impeachment evidence, which "will rarely be of a type which would probably have changed the verdict at trial." See Comment to Rule 32.1(e), Ariz.R.Crim.P. Thus, Shadid has failed to establish a colorable claim of newly-discovered evidence which would entitle him to a new trial.

B. Claims which are precluded and/or waived

The remainder of Shadid's claims for post-conviction relief are either precluded or waived at this point in the proceedings. The petition for post-conviction relief is not designed to afford a second appeal or to unnecessarily delay the rendition of justice. *State v. Carriger*, 143 Ariz. 142, 692 P.2d 991 (1984), *cert. denied*, 471 U.S. 1111 (1985). A defendant must strictly comply with Rule 32 or be denied relief, and it is the defendant's burden to assert grounds that bring him within the provisions of the Rule in order to obtain

relief. *Ibid.* A defendant cannot avoid application of the waiver and preclusion doctrines by claiming that his appellate attorney was ineffective for failing to raise the issues on appeal. *State v. Smith*, 169 Ariz. 243, 818 P.2d 228 (App. 1991).

Post-conviction relief is unavailable based on any claim finally adjudicated on the merits on appeal or in any previous post-conviction relief proceeding. Rule 32.2(a)(2), Ariz.R.Crim.P. Moreover, any claim not raised at trial, on appeal, or in a previous post-conviction relief proceeding will be presumed waived. Rule 32.2(a)(3), Ariz.R.Crim.P.; *State v. Alford*, 157 Ariz. 101, 754 P.2d 1376 (App. 1988).

Even if Shadid's remaining claims were not precluded or waived, moreover, they would not entitle him to relief.

3. Failure to Disclose Material Facts

Shadid claims that the State failed to disclose material facts which would have been helpful to his defense. This argument consists of nothing but speculation and a distortion of the facts, however. Shadid presents nothing which establishes that the State withheld exculpatory information which would have aided his defense at trial.

4. Presentation of False Evidence

Shadid's claim that the State presented false evidence is similarly unsupported by the record. Additionally, this Court considered and rejected this claim, at least in part, when it denied Shadid's motion for a new trial. See 3/13/98 RT at 61.

5. Denial of Counsel

Shadid next claims that he was denied the assistance of counsel at a critical stage of the proceedings against him. Shadid has established neither that he had an entitlement

to counsel before he was charged nor that he was denied access to counsel at that time. He has thus failed to state a colorable claim for relief.

6. Government Intrusion Into Legal Communications

Finally, Shadid claims that the government, namely the Maricopa County Sheriff's Office, illegally intruded into his communications with his attorney. This is not a valid claim for post-conviction relief, however. See Rule 32.1, Ariz.R.Crim.P. If Shadid had a valid claim in this regard (which he does not establish in his petition for post-conviction relief), he would be required to bring suit against the Maricopa County Sheriff's Office. He is not entitled to post-conviction relief on this basis, especially when he has not established that the alleged interference had any affect on his trial or sentencing.

III. Conclusion

Shadid has failed to show a colorable claim for post-conviction relief. Therefore, the State requests that this Court summarily dismiss the petition for post-conviction relief.

Submitted January 29th, 2001.

RICHARD M. ROMLEY
MARICOPA COUNTY ATTORNEY

BY


Patricia A. Nigro
Deputy County Attorney

Copy of the foregoing
mailed\delivered this
29th day of January 2001,
to:

The Honorable Thomas W. O'Toole
Judge of the Superior Court

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