2010 WL 4279076 (Alaska App.) (Appellate Brief)
Court of Appeals of Alaska.

Steven NOOK, a/k/a Stanley Nook, Jr., Appellant,
v.
STATE OF ALASKA, Appellee.

No. A-10311.
August 25, 2010.

Appeal from the Superior Court Fourth Judicial District, Leonard R. Devaney, Judge
Superior Court No. 4BE-05-122Ci

Brief of Appellee

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Statutes

28 United States Code § 2254(d)(1) provides:

State custody; remedies in Federal courts

...

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States[.]

Rules

Alaska Rule of Evidence 404(b)(4) provides:
Character Evidence Not Admissible to Prove Conduct-Exceptions-Other Crimes.
(b) **Other Crimes, Wrongs, or Acts.**
(4) In a prosecution for a crime involving domestic violence or of interfering with a report of a crime involving domestic violence, evidence of other crimes involving domestic violence by the defendant against the same or another person or of interfering with a report of a crime involving domestic violence is admissible. In this paragraph, "domestic violence" and "crime involving domestic violence" have the meanings given in AS 18.66.990.

***1** *STATEMENT OF ISSUE*

Should this court adopt the rule that a post-conviction applicant is automatically entitled to have relief - without having to show actual ineffectiveness and prejudice - because his attorney was placed on retroactive disability inactive status on account of mental illness for a period of time that included the time he was representing the applicant?

2** ***STANDARDS OF REVIEW

The issue of whether a post-conviction applicant is automatically entitled to post-conviction relief when an attorney has been placed on disability status retroactively on account of mental illness presents a legal question that is reviewed *de novo*. *Nelson v. State*, 68 P.3d 402, 406 (Alaska App. 2003).

***3** *STATEMENT OF THE CASE*

Statement of facts

1. The murder

Steven Nook [1] and his girlfriend, Virginia Evan, were living in Lower Kalskag with Nook's father, Stanley Nook Sr. [Exc. 2] *Nook*, A-7837, 2004 WL 1336268 at *1 (Alaska App., June 16, 2004) (unpublished). Nook's father was 71 years old and in such poor health that he could barely get around. *Id*.

On the evening of January 1, 1999, after Nook and Evan drank most of a bottle of liquor, Nook began beating Evan. *Nook*, 2004 WL 1336268 at *1. Nook kicked Evan, punched her in the face, pulled her hair, and threw her around. [*Id*.]

While Nook was beating Evan, Nook's father yelled at Nook from his bedroom, telling his son to go to bed. *Nook*, 2004 WL 1336268 at *1. The younger Nook, apparently offended that his father was telling him what to ***4** do, grabbed the **elder** Nook from his bed, threw him against the wall, punched him, and repeatedly kicked him in the head and the chest. [*Id*.]

Later that night, Olga Wigley (Nook's stepsister) came to the house to sleep in a guest bed. *Nook*, 2004 WL 1336268 at *1. While Wigley was there, Nook resumed his assault on Virginia Evan; he hit her, pulled her hair, and threw her around the living room. [*Id*.] While Wigley was in the house, she saw that the **elder** Nook's head was swollen, so she went to the home of the village health aide, Matilda Epchook, and asked Epchook to return with her to check on the **elder** Nook. *Id*.

Epchook and Wigley arrived at the house at about 5:15 a.m. on January 2. *Nook*, 2004 WL 1336268 at *1. According to Epchook, the younger Nook was acting like a "mad dog"; he was still assaulting Evan by hitting her and throwing her around the room. *Id*. When Epchook told Nook to stop, Nook picked up a piece of plywood and threatened to hit Epchook. *Id*. While Nook's attention was on Epchook, Wigley helped Evan escape from the house. [*Id*.] (Evan left her shoes behind. [*Id*.]) Nook chased after Evan, thus leaving Epchook alone in the house with the **elder** Nook. *Id*.

Epchook went into the **elder** Nook's bedroom to check on him. *Nook*, 2004 WL 1336268 at *1. He was sitting up in his bed, but his face was bloody. *Id*. He asked Epchook to help him get out of the house, but Epchook ***5** refused because she was fearful of what the younger Nook would do if she helped him. [*Id*.] Instead, Epchook left the house. *Id*.

In the meantime, Evan burst through the door of the house of Village Police Officer Peter Levi. *Nook*, 2004 WL 1336268 at *1. She was shoeless, crying, and scared. *Id*. Her face was bloody, and her arms were bruised. *Id*. Evan reported that Nook had beaten her and had beaten his father. *Id*.

Levi went to the Nook residence, arriving at about 6:00 a.m. *Nook*, 2004 WL 1336268 at *1. Standing at the doorway, Levi saw the younger Nook inside and asked him what was going on. *Id*. Nook slammed the door shut and locked it. *Id*. Levi then peered through a window into the residence. *Id*. He saw the younger Nook kicking someone or something at the door to the **elder** Nook's bedroom. *Id*. Then Levi saw Nook pick up a large object and throw it straight down onto the floor, in the place where he had been kicking. *Id*.

Levi summoned help from Village Public Safety Officer William Alexie, and together the two officers returned to the Nook residence. *Nook*, 2004 WL 1336268 at *1. Levi heard the **elder** Nook call for help. *Id*. The officers asked Nook to let them enter the house and check on his father, but Nook angrily told the officers to leave; he threatened to "start shooting." [*Id*.]

***6** At 9:30 a.m., Levi and Alexie returned to the Nook residence, this time accompanied by two of Nook's brothers and one of his brothers-in-law. *Nook*, 2004 WL 1336268 at *1. The five men told Nook that they wanted to check on the **elder** Nook. *Id*. Nook again threatened to shoot them, so they retreated. *Id*.

An hour and a half later, Levi and Alexie returned to the Nook residence. *Nook*, 2004 WL 1336268 at *1. This time, Nook was not there. *Id*. The two officers entered the house and found the **elder** Nook in his bedroom; he was not moving and was not responsive. *Id*. The officers then summoned health aides Matilda Epchook and Agnes Kameroff to the residence. *Id*. Epchook examined the **elder** Nook and concluded that he was dead. *Id*.

After the Alaska State Troopers were notified that a death had occurred in Lower Kalskag, Troopers Lawrence Erickson and Scott Grasle flew into the village, arriving around 3:00 p.m. *Nook*, 2004 WL 1336268 at *1. They entered the Nook residence and confirmed that the **elder** Nook was dead. *Id*.

An autopsy revealed that the **elder** Nook had suffered multiple blunt-force injuries to his body, including five broken ribs and hemorrhaging beneath the scalp. *Nook*, 2004 WL 1336268 at *1. The pathologist who ***7** performed the autopsy concluded that the **elder** Nook, already weakened by heart and lung disease, died as a result of these blunt-force injuries. *Id*.

Nook was convicted of second-degree murder and of fourth-degree assault (for assaulting Evan). *Nook*, 2004 WL 1336268 at *1.

2. The direct appeal

In his direct appeal, Nook was represented by Assistant Public Defender Averil Lerman. *Nook*, 2004 WL 1336268 at *1. Nook claimed (1) that the state violated Rule 16 and/or due process by failing to disclose a statement that Virginia Evan had made to the prosecutor during trial preparation, (2) that the jury instruction on the question of juror unanimity constituted plain error, (3) that Evidence Rule 404(b)(4) was unconstitutional so that the admission of Nook's prior acts of domestic violence was error, and (4) that the trial judge had erred in refusing to grant a motion to suppress the evidence found in the Nook home because the initial search of the home had been warrantless. *Id*. This court affirmed Nook's convictions. *Id*.

Course of proceedings

After the conclusion of the direct appeal, Nook filed a *pro se* application for post-conviction relief. [R. 67-73] In August of 2005, Nook filed an amended application. [R. 60-66]

***8** The Public Defender was appointed to represent Nook, and on May 4, 2007, filed a second amended application for post-conviction relief. [Exc. 21-70] On September 4, 2007, the state moved to dismiss the amended application and Nook replied. [Exc. 109-14, 116-25]

Superior Court Judge Leonard Devaney issued a written decision. [Exc. 2-20] He rejected the claim that Nook was entitled to a new trial solely because Nook's trial attorney, Scott Sidell, had been transferred retroactively to disability inactive status retroactive to January 1, 1998. [*Id.*] Nook was given an opportunity to supplement his application with specific claims that Sidell had represented him ineffectively. [Exc. 20] Nook then notified the court that he did not intend to file a supplemental application. [R. 85-86] Judge Devaney then issued a final order denying Nook's application for post-conviction relief. [Exc. 1]

This appeal followed.

***9** *ARGUMENT*

I. THE TRIAL JUDGE PROPERLY REJECTED THE ARGUMENT THAT NOOK IS ENTITLED TO POST-CONVICTION RELIEF SOLELY BECAUSE HIS ATTORNEY WAS PUT IN DISABILITY STATUS RETROACTIVELY FOR THE PERIOD OF TIME HE REPRESENTED NOOK

A. *Introduction*

Nook argues he is presumptively entitled to post-conviction relief solely because his trial attorney, Scott Sidell, was placed on disability status retroactively for the period of time when Sidell was representing Nook and therefore the *per se* reversal of his murder and assault convictions is warranted. Nook claims that he should be excused from having to establish, as *Risher v. State*, 523 P.2d 421, 424-25 (Alaska 1974), would normally require, that Sidell was actually ineffective and that he was prejudiced.

Judge Devaney gave Nook's argument thorough consideration and properly rejected it. It is not particularly difficult to establish ineffective assistance of counsel or prejudice when they exist, even when the cause is said to be mental illness. It would not be sound public policy for this court to grant new trials without evidence of ineffectiveness and without evidence of actual prejudice simply on account of the retroactive determination of disability. It would also be a windfall for Nook. ***10** *United States v. Ross*, 338 F.3d 1054, 1057 (9th Cir. 2003) (if counsel, "who once passed bar but was suspended at time of trial, still performed adequately, the process is not made fairer by awarding defendant a windfall even if he can't identify a single thing a licensed attorney would have done differently").

B. *Events Related to Sidell's Retroactive Disability Status*

During 1999 and half of 2000, Sidell was the Office of Public Advocacy's contract attorney in the Bethel area. [Exc. 2] In this capacity, Sidell represented Nook at his seven-day jury trial that began on September 7, 1999. [*Id.*] At the time, Sidell was a licensed attorney with over 15 years of experience and he was in good standing with the Alaska Bar Association. [Exc. 4; R. 121]

Events related to a civil lawsuit, *Keppel v. Sidell*, 4BE-00-251 Ci., later led to Sidell being placed on disability inactive status by the Alaska Supreme Court. [Exc. 5] Sidell had been Keppel's attorney in a personal injury case and had filed a complaint on his behalf, *Keppel v. Dostert*, 4BE-98-198 Ci. [*Id.*] Summary judgment was entered against Keppel after Sidell failed to move for default judgment, failed to provide initial disclosures, failed to conduct discovery, and otherwise failed to handle the case. [*Id.*]

Keppel later sued Sidell for malpractice. [Exc. 5] Sidell, representing himself, filed an answer to the malpractice claim but failed to ***11** appear at scheduled pretrial conferences, submit initial disclosures, or file responses to dispositive motions. [*Id.*]

Summary judgment against Sidell was granted on Keppel's motion, and the court scheduled a trial on damages. [*Id.*] At that trial, Superior Court Judge Mark Wood court found that Sidell had failed to meaningfully respond to the malpractice lawsuit, found that Sidell's conduct was willful and malicious, and awarded $673,402.44 in damages against Sidell. [Exc. 5]

At this time, Sidell hired an attorney for the malpractice action. [Exc. 5] The attorney had Sidell undergo a psychiatric examination by Dr. Irvin Rothrock, a psychiatrist, and Dr. David [2] Sperbeck, a psychologist. [Exc. 5] Dr. Rothrock diagnosed Sidell as suffering from Major Depression, chronic severe, without psychotic features, and Personality Disorder, Not Otherwise Specified, with Schizoid and Passive-Aggressive features. [Exc. 41] Dr. Rothrock opined that Sidell's psychiatric illness "contributed substantially to his inability to meet his responsibilities in the cases in which he represented others." [Exc. 42] Dr. Sperbeck agreed that Sidell's depression and detached personality were chronic, and said that his "acute depressive episodes would ***12** be expected to produce serious and at times disabling cognitive . . . impairment rendering him disabled from working as an attorney." [Exc. 44]

Armed with Dr. Rothrock's and Dr. Sperbeck's opinions, Sidell's attorney moved to vacate the damages portion of the judgment in the malpractice action. [Exc. 6] The motion argued that Sidell, as a result of mental illness, was neither capable of responding to the legal proceedings against him nor competent to represent himself or others. [*Id.*] At the same time, Alaska Bar Association counsel and Sidell's attorney filed a joint motion in the Supreme Court of Alaska to transfer Sidell to disability inactive status. [Exc. 3, 6, 46] On March 14, 2003, the Supreme Court of Alaska granted the motion. [Exc. 3, 6, 46] The order was entered *nunc pro tunc* to January 1, 1998. [*Id.*]

Judge Wood subsequently granted Sidell's motion for relief from the judgment as the medical evidence negated Keppel's claim that Sidell had been willful and malicious. [Exc. 6] But Judge Wood found the argument that Sidell was incompetent for the entire period from 1998 onward "was without merit," stating that Sidell's "duration and degree of participation in [*Keppel v. Sidell*] indicates more than periodic competency." [Exc. 6 (citing Judge Wood's findings in *Keppel v. Sidell*)] Judge Wood also noted "several ***13** affidavits from local counsel asserting that Sidell competently represented other clients and a tribal entity during this period." [Exc. 6]

C. *The decision of the Superior Court in Nook's post-conviction action*

Judge Devaney ruled that the retroactive transfer to disability status did not equate to ineffective assistance of counsel as a matter of law in any case in which the attorney had been a member of the bar. [Exc. 7-20] Judge Devaney relied on the assessment of a noted treatise that the lack of "bar certification" is generally held to warrant a finding of *per se* ineffectiveness, but that a subsequent disbarment or current suspension does not warrant the application of a *per se* rule. [Exc. 8 (quoting LaFave, Israel, King, & Kerr, *Criminal Procedure*, (3d ed. 2007) § 11.8(c), Vol. 3, pp. 862-63)] In other words, Professor LaFave and his fellow treatise authors would require proof of ineffectiveness and prejudice unless the person representing the defendant was an imposter masquerading as an attorney.

Judge Devaney quotes the treatise's additional statement that courts "*generally have refused to declare per se ineffective attorneys operating under personal difficulties (e.g., alcohol **abuse**, cocaine use, or psychological ailments) that might impact the attorney's performance*." [Exc. at 8-9 (quoting *Criminal Procedure*, 11.8(c), Vol 3, pp. 862-63) (emphasis supplied by Judge Devaney)]

***14** Judge Devaney ruled the *per se* ineffectiveness rule should not apply to Sidell as he had graduated from law school and had been admitted to practice by the Alaska Bar Association. [Exc. 10] The judge found the situation here was most like the situation presented by an attorney later suspended or disbarred for conduct predating the representation at issue. [Exc. 10-12 (citing and discussing, *inter alia*, *United States v. Mitchell*, 216 F.2d 1126, 1132 (D.C. Cir. 2000), *United States v. Stevens*, 978 F.2d 565, 566-67 (10th Cir. 1992), *Waterhouse v. Rodriguez*, 848 F.2d 375, 378 (2d Cir. 1988)), *United States v. Ross*, 338 F.3d 1054, 1056-57 (9th Cir. 2003; *United States v. Hoffman*, 733 F.2d 596, 599-601 (9th Cir. 1984), and *United States v. Mouzin*,

785 F.2d 682, 696-97 (9th Cir. 1986))] Judge Devaney also relied upon *Bellamy v. Cogdell*, 974 F.2d 302, 303-08 (2d Cir. 1992) (*en banc*), where the Second Circuit refused to apply a *per se* rule in the case of an attorney who was mentally ill. [Exc. 13]

Judge Devaney observed that a trial judge could not know a retroactive order entered three years after the representation ultimately would have an effect on the attorney's bar status at the time of the representation, and that there would be no way for a trial judge to identify and guard against such a situation. [Exc. 13] He said it was important for courts to be able to rely on "the *de jure* authority that presently licensed ***15** lawyers have to practice law," and that the difficulty of identifying and preventing representation by impaired attorneys would impose intolerable burdens on trial courts given the high incidence of undiagnosed mental illness and substance **abuse** in the legal profession. [Exc. 14 & n.13 (citing G. Andrew, H. Benjamin, Elaine J. Darling, & Bruce Sales, *The Prevalence of Depression, Alcohol **Abuse**, and Cocaine **Abuse** among United States Lawyers*, 13 Int'l J. of L. & Psychiatry 233, 240-42 (1990))]

Judge Devaney separately concluded that the retroactive transfer of a licensed attorney to disability inactive status did not give rise to ineffective assistance as a matter of law under the Alaska Constitution. [Exc. 17-19] He pointed out that this court had rejected the argument that an attorney's alleged failure to subject the state's case to adversarial testing amounted to *per se* ineffectiveness. [Exc. 16 (quoting *State v. Jones*, 759 P.2d 558, 569 (Alaska App. 1988), as follows: "because the constitution does not guarantee error-free representation, rarely can a specific act or admission be judged *per se* incompetent. Rather, courts have evaluated attorney errors against the background of the trial as a whole[.])]

Judge Devaney also pointed out this court did not apply a *per se* rule in *Mute v. State*, No. A-8894, 2007 WL 4323004 *3 (Alaska App., December 12, 2007) (unpublished), where the defendant had contended that ***16** he was entitled to a new trial on account of Sidell's mental illness. Mute claimed that Sidell's mental illness, apparently both prior to and after January 1, 1998, had caused Sidell to represent him ineffectively. *Mute* 2007 WL 4323004 at *3. Mute relied on Dr. Sperbeck's statement that Sidell had suffered from depression from at least 1996 and the order transferring him to disability status, but this court ruled that Mute was required to satisfy the *Risher test* - to establish specific instances of ineffectiveness and prejudice. *Id*.

Judge Devaney found that the factual circumstances surrounding the transfer to disability status showed that "Sidell, out of his own **financial** self-interest, very much wanted himself declared incompetent in order to lift the finding that his conduct in the civil action was willful and malicious." [Exc. 19] Indeed, most of the damage award (which was for malicious wrongdoing so that it could not be discharged in bankruptcy) was vitiated by the medical evidence showing Sidell was depressed. [Exc. 6]

Finally, Judge Devaney said he did not believe that the Alaska Supreme Court intended that all court orders in cases in which Sidell had participated for the five years that he was mentally ill (including the period when he held the OPA contract) would be vacated when it entered the order transferring him to disability status. [Exc. 19] In sum, the judge concluded ***17** Nook was not entitled to a new trial simply because of Sidell's transfer to disability status and ruled that Nook would be required to establish specific instances of ineffectiveness and prejudice. [Exc. 19-20]

D. *Argument*

1. Nook should be required to show actual ineffectiveness and prejudice in order to obtain post-conviction relief on account of Sidell's mental illness

This court should employ the rule it applied in *Mute* to the very similar situation presented here and hold that Nook is required to satisfy *Risher*, 523 P.2d at 424-25, and show that Sidell was actually ineffective and that he (Nook) was prejudiced. In *Mute*, this court said Judge Devaney "did not err in rejecting Mute's argument that Sidell was ineffective as a matter of law" on account of Sidell's mental illness when he was representing Mute. *Mute*, 2007 WL 4323004 at *3. This court held Mute was required to prove that Sidell had actually been ineffective - (1) that his conduct fell below the minimal range of competence required of an attorney with ordinary skill and training in the criminal law, and (2) that the lack of competency contributed to Mute's conviction. *Id*.

The only material distinction between the case at bar and the *Mute* case is that the *nunc pro tunc* order granting disability status to Sidell did not include the entire period of time that Sidell had represented Mute. ***18** This distinction is not meaningful. The evidence here is that Sidell represented many clients competently and effectively during the retroactive period. [Exc. 5-6]

More, it is not difficult to evaluate whether an attorney has provided ineffective assistance. Courts do it every day. Other respected jurisdictions require a showing of ineffectiveness and prejudice when it is alleged an attorney was ineffective on account of mental illness. In *Mute*, this court relied upon *Dows v. Reed*, 211 F.3d 480, 484-85 (9th Cir. 2000), and *Johnson v. Norris*, 207 F.3d 515, 517-18 (8th Cir. 2000). *Mute*, 2007 WL 4323004 at *3 n.11.

In *Dows*, the defendant's attorney had been diagnosed with advanced stages of Alzheimer's disease. Dows argued that his attorney was "*per se* " ineffective because of the disease and medical testimony that he was probably affected by the disease during Dow's trial. *Dows*, 211 F.3d at 482-85. The *Dows* court relied on the proposition that a lawyer is generally presumed to be competent and it is the post-conviction applicant's obligation to overcome the presumption. *Id*. at 485 (citing *United States v. Cronic*, 466 U.S. 648, 658, 104 S.Ct. 2039, 2046 (1984)).

Although the decision of the *Dows* court was subject to the rule of deference now applicable to habeas cases under the Antiterrorism and ***19** Effective Death Penalty Act (AEDPA) (28 U.S.C. § 2254(d)(1)), the *Dows* panel pointed out that the Ninth Circuit had, before the enactment of the AEDPA, specifically rejected mental illness as a basis for a *per se* rule in cases claiming ineffective assistance of counsel. *Id*. (citing *Smith v. Ylst*, 826 F.2d 872, 876 (9th Cir. 1987)). *Ylst* reasons that "mental illness is too varied in its symptoms and effects to justify a *per se* reversal rule without evidence that the attorney's performance fell below the constitutional norm." *Id*.

The *Dows* panel agreed with the Washington Court of Appeals that the "best indicator of [the mentally ill attorney's] ability, or lack thereof, to represent [the defendant] at trial was [the attorney's] performance." *Dows*, 211 F.3d at 486; *see State v. Dows*, No. 30992-9-I, 1997 WL 11922 at *3-4 (Wash. App., January 13, 1997) (unpublished). The *Dows* panel also observed that a *per se* rule might compel "judges . . . to deny defendants' choice of counsel, when they hired old lions of the bar, often to the defendants' detriment." *Id*.

The second case this court relied upon in *Mute*, *Johnson v. Norris*, involved an attorney who had been diagnosed with bipolar disorder. 207 F.3d at 517-18. Johnson contended that the bipolar disorder of the attorney (who represented him at trial and on appeal) should be "structural error, which should require a *per se* presumption of prejudice." ***20** 207 F.3d at 517. The Eighth Circuit refused to adopt the *per se* rule as it was "not convinced that there is anything about [the attorney's] bipolar condition that would not lend itself to the normal fact-specific *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984] analysis."

In *Bellamy v. Cogdell*, 974 F.2d 302, 308 (2d Cir. 1992) (en banc) the Second Circuit rejected application of the *per se* rule to deal with alleged mental and physical health problems of an attorney. The court said that claims of ineffective assistance based on attorney illness are best suited to the fact-specific *Strickland* inquiry. *Id*. Nook argues *Bellamy* is irrelevant because there was a finding that the attorney's illness did not affect his ability to practice law. [At.Br. 11] But *Bellamy* supports Judge Devaney's refusal to apply the *per se* rule here.

As Judge Devaney pointed out, Bellamy argued (1) his attorney had erroneously represented to the bar association that he would have an attorney assist him at Bellamy's trial, which in turn allowed the attorney to fraudulently retain his law license where he would have otherwise been suspended for mental health problems, and (2) that the attorney's statements and submissions to the bar about his compromised mental health provided an alternative basis for application of the *per se* rule. *Bellamy*, 974 F.2d at 307-09. Judge Devaney relied on the *Bellamy* decision for its statement that ***21** "there is simply nothing inherent in an attorney's illness that necessarily will impede a spirited defense most of the time to justify finding the attorney's representation per se ineffective. Rather, given the varying effects of health problems can have on an individual's ability to function, claims of ineffective assistance based on attorney illness are best suited to the fact-specific inquiry mandated by *Strickland*." [Exc.

13 (quoting *Bellamy*, 974 F.2d at 308)] In short, the principles of law expounded in *Bellamy* fully support Judge Devaney's decision here. *See also United States v. Lopez*, 2005 WL 957341 at *7 (S.D.N.Y. 2005) (following *Bellamy*).

Respected state courts have similarly required proof of actual ineffectiveness in similar cases. In *State v. Edwards*, 736 N.W.2d 334, 337 (Minn. App. 2007), the defendant, convicted of sexual assault, moved for a new trial on the ground that his attorney had been suffering from a mental illness, bipolar disorder, during his trial. Six weeks after trial, the attorney was placed on disability inactive status by the Minnesota Supreme Court based on a stipulation between the attorney and bar counsel. *Edwards*, 736 N.W.2d at 337. The Minnesota Court of Appeals found that the attorney's behavior was "odd" at various times throughout the trial, but refused to find the attorney's mental illness was "structural error" so that the defendant would automatically receive a new trial. *Id*. at 339-41. The Minnesota court, ***22** following the Eighth Circuit decision in *Johnson* and the Second Circuit decision in *Bellamy*, ruled that Edwards would be required to establish ineffectiveness as *Strickland* requires - by showing actual ineffectiveness and prejudice. *Id. Accord State v. Dows*, No. 30992-9-I, 1997 WL 11922 at *3-*4 (Wash. App., January 13, 1997) (unpublished).

In sum, courts have unanimously held that an attorney's mental illness is not reason to adopt a *per se* rule that would automatically require a new trial. Such a rule would also be directly at odds with the "strong presumption" that an attorney's actions and decisions are competent. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052, 2065 (1984); *State v. Jones*, 759 P.2d 558, 569 (Alaska App. 1988). This court should follow its similar decision in *Mute* and refrain from adopting a *per se* rule in Nook's case.

2. Nook's legal analysis to support his argument for a per se rule is built on an inaccurate understanding of the record and the decisions he cites to support his position are distinguishable as they are based on actual, serious misconduct

In arguing that the *per se* rule should be applied here, Nook misunderstands an important aspect of the case fact when he states that Sidell could not *legally* represent him at his trial because he had been placed on disability inactive status retroactive to a date before Nook's trial. [At.Br. ***23** 4] The fact is that Sidell was not in disability status when he represented Nook.

Nook then asserts that the "retroactive aspect of the supreme court's order" requires this court to analyze his claim as if Sidell had been suspended from the practice of law while he was representing Nook. [At.Br. 4] But, as aforesaid, Sidell was not on disability status while he was representing Nook. To pretend that Sidell was on disability status at the time he was representing Nook would elevate form over reality and would have far-reaching undesirable consequences. As Judge Devaney pointed out, Sidell was the OPA contact attorney in an extremely busy jurisdiction when he was representing Nook. [Exc. 14, 19] Thus, a ruling that Nook does not have to show actual ineffectiveness could lead to the undoing of hundreds of criminal convictions without any evaluation of whether the defendants involved received competent representation. [Exc. 14, 19] Such a ruling would, in the state's view, be poor public policy, especially given Judge Wood's findings that Sidell was representing other clients effectively at the time.

Nook argues the *per se* rule should be applied when the defendant, without his knowledge, is represented by someone not authorized to practice law. [At.Br. 6-9] All agree that the *per se* rule is applied when the ***24** person who is posing or masquerading as an attorney has not been admitted to practice by the bar, but that is not the situation here. Three cases cited by Nook are examples of this rule.

In *People v. Cox*, 146 N.E.2d 19 (Ill. 1957), there was no evidence that the imposter representing the 14-year-old defendant had ever been admitted to practice anywhere and the defendant and his mother were unaware of this fact until he (the make-believe attorney) was prosecuted for practicing law without a license. 146 N.E.2d at 20. [At.Br. 6]

In *People v. Washington*, 384 N.Y.S.2d 691 (N.Y. Sup. 1976), the *per se* rule was applied, but the person representing the defendant had never been admitted to the bar and was masquerading as an attorney. 384 N.Y.S.2d at 692. [At.Br. 7]

And in *Huckleberry v. State*, 337 So.2d 400, 403 (Fla. App. 1976), cited by Nook, the *per se* rule was applied, but the attorney was again an "imposter." [At.Br. 8-9] Huckleberry's "attorney" had never been admitted because he presented fraudulent records and transcripts to the bar association and lied under oath during the admission process. 337 So.2d at 402. In sum, the *Cox*, *Washington*, and *Huckleberry* decisions merely represent the rule that is applicable when an attorney has never been admitted to the bar and accordingly they add nothing to Nook's argument.

***25** Professor LaFave's discussion of the *per se* rule is instructive. He first discusses *United States v. Novak*, 903 F.2d 883 (2d Cir. 1990), where the *per se* rule was applied, but stresses that the situation was extreme since the defendant's lawyer had obtained his admission to the bar fraudulently and had then been disbarred. *Criminal Procedure*, §11.8(c) at p. 862. LaFave observes, "The [*Novak* court] stressed, however, that the case involved a "serious substantive flaw in licensure." *Id*. (quoting *Novak*, 903 F.2d at 888).

LaFave then states the *Novak* decision "did not challenge the usual rule that a subsequent disbarment or a current suspension does not establish *per se* ineffectiveness. So too, courts generally have refused to declare *per se* ineffective attorneys operating under personal difficulties (e.g. alcohol **abuse**, cocaine use, or psychological ailments) that might impact the attorney's performance." *Criminal Procedure*, §11.8(c) at p. 862-63.

Nook also discusses and relies on *Cantu v. State*, 897 S.W.2d 389 (Tex. App. 1994). [At.Br. 8] As Nook acknowledges, *Cantu* was reversed and overruled in *Cantu v. State*, 930 S.W.2d 594, 603 (Tex. Crim. App. 1996), where the court held that a suspended attorney is incompetent as a matter of law "if the reasons for the *discipline imposed* reflect so poorly upon the attorney's competence that it may reasonably be inferred that the attorney was incompetent." (Emphasis supplied.) The court then held that an ***26** attorney who was suspended for failing to respond to demands for information from a Texas grievance committee and on account of evidence of a pattern of failing to respond was not incompetent or ineffective as a matter of law. 930 S.W.2d at 603. In short, Texas did not ultimately invoke the *per se* rule, so the decision does not aid Nook. And even if *Cantu* did apply here, it is distinguishable. Sidell was not disciplined and Cantu's attorney, in contrast, had been suspended for misconduct at the time he was representing the defendant. 930 S.W.2d at 596.

Nook further relies upon *In re Johnson*, 822 P.2d 1317 (Cal. 1992), to support the application of a *per se* rule here. [At.Br. 6-7] Johnson's attorney had been suspended before Johnson's trial on account of having been convicted of one count of felonious lewd and lascivious conduct with a child under 14 years. 822 P.2d at 1319. When Johnson hired the attorney, he had already been suspended. [*Id*.] And the attorney had handed in his resignation to the California bar prior to Johnson's trial. *Id*.

The California court applied the *per se* rule because under California law, a resignation with charges pending results in an immediate transfer of the attorney to inactive status and the attorney's license is "irrevocably surrendered." *Johnson*, 822 P.2d at 1324. The court concluded that suspension alone did not establish incompetence as a matter of law, but ***27** that the resignation from the state bar with charges pending did. [*Id*.] Sidell was of course not convicted of anything, much less a crime, and did not tender his resignation to the bar with charges pending before he represented Nook.

Nook also relies on *People v. Hinckley*, 193 Cal. App. 3d 383 (Cal. App. 1987). [At.Br. 7] Prior to Hinckley's trial, the attorney who represented him had been involuntarily enrolled as an inactive member of the bar association and the bar association had taken over the attorney's practice. 193 Cal. App. 3d at 386. The take-over of the legal practice was based on findings that there was (1) cause to believe the attorney had "become incapable of devoting time and attention to, and providing the quality of service for, his law practice to protect the interests of his clients" and (2) cause to believe the attorney had "willfully and intentionally abandoned his law practice and failed to protect the interests of his clients." [*Id*.]

These facts are egregious. They are different both in kind and in degree from the circumstances here. Even it this court would apply a *per se* rule in a case like *Hinckley*, the decision is not a reason to apply a *per se* rule here. As Judge Devaney pointed out, Sidell's transfer to disability status was "truncated," retroactive, and related to his inability to defend himself in ***28** a civil lawsuit. [Exc. 18] And Sidell had represented clients effectively despite his mental illness. [Exc. 6]

3. Most courts would apply the Strickland/Risher standard here; to do so is not "rigid"

Nook argues that to apply the two-prong *Strickland/Risher* standard here would be a "rigid" and therefore mistaken decision. [At.Br. 11] He states that the "bulk of the cases" relied upon by Judge Devaney "had nothing to do with the disbarred or suspended attorney's actual ability to represent the client." [At.Br. 11] The state would observe at the outset that *Strickland/Risher* is normally applied when the offending attorney was a member of the bar at the time of the alleged ineffectiveness. *Criminal Procedure*, §11.8(c) at p. 862-63. Nook's discussion of the cases Judge Devaney relied upon is not persuasive.

Nook first states the judge was wrong to rely on *United States v. Stevens*, 978 F.2d 565 (10th Cir. 1992), and *United States v. Mitchell*, 216 F.3d 1126 (D.C. Cir. 2000, because these cases did not involve allegations leading to disbarment that were related to the capacity of the attorney at issue to practice law. [At.Br. 10-11] He similarly criticizes Judge Devaney for relying on *Waterhouse v. Rodrigues*, 848 P.2d 375 (2d Cir. 1988), because there was no allegation that the attorney was incapable of representing his client's. [At.Br. 11]

***29** Judge Devaney concluded that the situation presented by Nook's case was most like the situation presented by an attorney later suspended or disbarred for conduct predating the representation where defendants are required to show actual ineffectiveness. [Exc. 11-12] The cases (and others cited by the judge) listed above are correctly cited by Judge Devaney for the proposition that defendants must show actual ineffectiveness when an attorney has been disbarred for conduct predating a trial. *Stevens*, 978 F.2d at 567; *Mitchell*, 216 F.3d at 1132; *Waterhouse*, 848 F.2d at 378.

Judge Devaney also cited *United States v. Ross*, 338 F.3d 1054, 1056 (9th Cir. 2003), for the proposition that the *per se* rule should not be applied if an attorney has been admitted to the bar. [Exc. 13] Nook states there is no reason this court should follow the "seemingly rigid" standard of the Ninth Circuit's exemplified by the decision in *Ross*. [At.Br. 12]

Ross's attorney was suspended from the California bar before Ross's trial and had never been admitted to the federal bar. *Ross*, 338 F.3d at 1056. The *Ross* panel noted it had before declined to apply the *per se* rule in *United States v. Mouzin*, 785 F.2d 682 (9th Cir. 1986), and *United States v. Hoffman*, 733 F.2d 596 (9th Cir. 1984), when defense attorneys had been suspended during trial, and that a suspension before trial was "a distinction without a difference." *Ross*, 338 F.3d at 1056. The court said the suspension ***30** prior to Ross's trial did not make his trial inherently unfair and that it would be a "windfall" for Ross if the he could not "identify a single thing a licensed attorney would have done differently." *Id*.

In the state's view, adoption of the *per se* rule in the circumstances of *Ross* or the case at bar would be rigid. Application of *Strickland/Risher* to the circumstances gives the flexibility to right a wrong - true ineffectiveness - and at the same time avoids giving the defendant an undeserved windfall. If an attorney has been ineffective and a defendant has been prejudiced, that the defendant and his new attorney should be able to show it.

Nook also argues that Sidell was incapable of providing representation due to his mental illness. [At.Br. 12-13] If it were true that Sidell could not provide ineffective assistance, Nook should have at least attempted to establish this proposition. He elected not to even try to do so. [Exc. 85-86] More, this claim is belied by the record which shows that Sidell generally provided effective assistance to his clients. [Exc. 5-6]

4. The Alaska Constitution does not require the application of the per se rule in the circumstances here

Nook argues the *nunc pro tunc* order establishes Sidell's disability sufficiently such that the Alaska Constitution requires the application of the *per se* rule. [At.Br. 13-14] In rejecting this argument, ***31** Judge Devaney pointed out that the *Risher* court, considering the standard for evaluating effective assistance under the Alaska Constitution, had held that "the conduct of counsel must have contributed to the eventual conviction," and that since "effective assistance embodies the concept of materially

aiding in the defense, conduct or omissions which do not somehow contribute to a conviction by their failure to aid in the defense cannot constitute a constitutional deprivation of the assistance of counsel." [Exc. 16-17 (quoting *Risher*, 523 P.2d at 425) (footnotes from *Risher* omitted)]

As Judge Devaney further pointed out, the Alaska Supreme Court generally rejected an automatic reversal rule in *Risher*, stating:

> An automatic reversal due to error committed by attorneys would lead to no prospective prophylaxis as judges normally would have no way of knowing in advance that counsel will prove to be incompetent. Similarly, it may be assumed that no counsel will deliberately seek the notoriety of having his efforts labeled as incompetent, so that no curative effect will result from a subsequent reversal where the incompetence has not contributed to the conviction.

Risher, 523 P.2d at 425 n.19.

Judge Devaney went on to state that the factual disposition of Sidell's transfer to inactive disability status belied the assumption in *Risher* that no counsel will deliberately seek to have his efforts labeled incompetent. ***32** [Exc. 19] Judge Devaney concluded no curative effect would result from finding Sidell was incompetent as a matter of law. [*Id.*]

Nook has not discussed Judge Devaney's ruling. [At.Br. 13-14] His failure to discuss the decision is reason enough standing alone to affirm it. *Alto v. State*, 64 P.3d 141, 147 (Alaska App. 2003). Nook has not in any event shown that Judge Devaney's conclusion is erroneous.

Independent of Judge Devaney's analysis, the state would point out that while evidence of Sidell's mental illness was appropriately used to negate the claim his conduct in the malpractice lawsuit was willful, the relationship between mental illness and ineffectiveness is indirect. As has been shown, mental illness does not, standing alone, negate the strong presumption that an attorney is competent. *See Ylst*, 826 F.2d at 876.

Nook does argue that Nook's constitutional rights outweigh any administrative difficulties that might arise under a *per se* rule applied here. [At.Br. 14-15] He apparently refers to Judge Devaney's statement that Sidell was the OPA contract attorney in a high-volume court so that many cases would be affected by application of a *per se* rule.

In the state's view, the application of a *per se* rule would result in more than administrative difficulties. It could result in windfalls for persons who in fact received the effective assistance of counsel.

***33 II. NOOK IS NOT ENTITLED TO RELIEF ON ACCOUNT OF HIS REQUESTS TO SUBSTITUTE ANOTHER ATTORNEY FOR SIDELL**

Nook lists nine instances in which he expressed dissatisfaction with Sidell, and also identifies some requests he made that another attorney be substituted for Sidell. [At.Br. 16-18] He also states that this court noted in the direct appeal that Sidell did not preserve two points of error, but admits the points did not amount to plain error. [At.Br. 18-19]

Nook concludes it is unfair that Sidell has been relieved of the civil judgment entered against him while he will remain in jail the rest of his life. [At.Br. 19] The state emphatically disagrees. Nook had no right to reject Sidell as his attorney. As this court stated in *Mute v. State*, No. A-7397, 2001 WL 21218 at *4 (Alaska App., January 10, 2001) (unpublished), dissatisfaction with an attorney does not entitle one to a change of attorney. *See also Moore v. State*, 123 P.3d 1081, 1088 (Alaska App. 2005); *Monroe v. State*, 752 P.2d 1017, 1020 (Alaska App. 1988) (citing *Morris v. Slappy*, 461 U.S. 1, 13-14 (1983)).

And if there were grounds to show Sidell had actually been ineffective, then his post-conviction attorney would at least have attempted to show them. Nook and his attorney chose not to attempt to show Sidell was ineffective. [Exc. 1; R. 85-86] It is reasonable to assume Nook and his ***34** attorney chose that option because they had no case because Sidell had represented Nook effectively.

***35** *CONCLUSION*

This court should affirm the denial of post-conviction relief to Nook.

Footnotes

1 The correct name of the petitioner is Steven Nook, not Stanley Nook. *See Nook v. State*, No. A-7837, 2004 WL 1336268 at *1 (Alaska App., June 16, 2004) (unpublished). The caption of the case should reflect this fact. Stanley Nook is the name of the victim, the person that Steven Nook was convicted of murdering.

2 Dr. Sperbeck's first name is David. [Exc. 43-45] Nook mistakenly calls him “Aaron.” [At.Br. 3] (Aaron Sperbeck is a lawyer.

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