

Not To Be Published:

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION**

MITCHELL RAY LANGEL,

Petitioner,

vs.

JERRY BURT, Warden,

Respondent.

No. C05-0017-MWB

**ORDER REGARDING
MAGISTRATE’S REPORT AND
RECOMMENDATION ON
PETITIONER’S WRIT OF HABEAS
CORPUS**

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I. INTRODUCTION

A. Procedural Background

Before the court is a petition for a writ of habeas corpus, filed pursuant to 28 U.S.C. § 2254. Petitioner, Mitchell Ray Langel, is an inmate at the Anamosa State Penitentiary, Anamosa, Iowa. On November 22, 1999, Langel was convicted, following a bench trial, of attempted murder and willful injury. He was sentenced to a term of imprisonment of 25 years on the attempted murder conviction and ten years on the willful injury conviction, with the sentences to be served concurrently.

Langel filed a direct appeal in which he contended that: (1) the evidence was insufficient to support the trial court's findings of guilt; (2) the trial court abused its discretion in denying his motion for new trial; and (3) the trial court abused its discretion in excluding comments by a prosecution expert witnesses that the case should have been plea bargained. The Iowa Court of Appeals denied his direct appeal on April 11, 2001. *See State v. Langel*, No. 99-1930, 2001 WL 355821, at *4 (Iowa Ct. App. Apr. 11, 2001). Langel subsequently filed an application for postconviction relief that was denied. He appealed the denial of postconviction relief, contending that: (1) his trial counsel was ineffective in failing to require the trial court to engage in a colloquy to ensure that the waiver of his right to a jury trial was knowing, intelligent, and voluntary; and (2) that his trial counsel was ineffective in failing to argue that he acted in self-defense. The Iowa Court of Appeals denied his postconviction appeal on August 11, 2004. *See Langel v. State*, 690 N.W.2d 697 (table opinion), 2003 WL 355821, at *4 (Iowa Ct. App. Apr. 11, 2001).

Petitioner Langel then filed a petition for writ of habeas corpus pursuant to 28

U.S.C. § 2254. In his petition, Langel challenges his conviction on the following grounds: (1) that his trial counsel was ineffective in failing to require the trial court to engage in a colloquy to ensure that the waiver of his right to a jury trial was knowing, intelligent, and voluntary; and (2) that his trial counsel was ineffective in failing to argue that he acted in self-defense. The petition was referred to United States Magistrate Judge Paul A. Zoss pursuant to 28 U.S.C. § 636(b)(1)(B). Judge Zoss filed a Report and Recommendation in which he recommended denial of both Langel's petition and issuance of a certificate of appealability. Langel has filed objections to the Report and Recommendation. The court, therefore, must now undertake the necessary review of Judge Zoss's recommended disposition of Langel's petition for a writ of habeas corpus.

B. Factual Background

In his Report and Recommendation, Judge Zoss made the following findings of fact:

Langel has a history of mental health problems, including a diagnosis of bipolar disorder in 1989, for which he was hospitalized. In November 1998, Langel's mother became concerned by Langel's behavior. She obtained a court order authorizing Langel's involuntary commitment to a psychiatric facility. (*See* Doc. No. 16, p. 10, citing Trial Tr. at 416, 428) On November 19, 1998, Langel's mother called the Linn County Sheriff's Office and advised officers she believed Langel intended to commit suicide, and that he was in his apartment with a shotgun. Linn County Sheriff's Deputies went to Langel's apartment to serve him with the civil commitment papers. Officers from the Cedar Rapids Police Department were present at the scene to assist the deputies.

When they arrived, Langel refused to answer the door or respond to the officers. The officers, as well as Langel's friends and relatives, made numerous efforts to talk with Langel and get him to come out of the apartment but Langel

refused to do so. When it began to get dark, Langel made a comment that “things will happen” after dark. After several hours of attempting to talk with Langel, police officer Philip Peters and a sheriff’s deputy entered a crawlspace in the attic above Langel’s apartment to establish surveillance. They discovered an access door from the attic into Langel’s bedroom and decided to enter the apartment to obtain better surveillance. They lowered a ladder from the crawlspace into the bedroom (*see* Trial Tr. at 73-74), and Peters descended into the bedroom, followed by the deputy. The apartment was dark, and Langel detected the officers’ presence, apparently from seeing light from the officers’ flashlights. Peters heard Langel yell, “I told you not to send your people in here,” and “I know you’re back there.” (Trial Tr. at 159)

Peters testified he had to make a choice at this point regarding what to do next. He believed that if the officers attempted to go back up the ladder and Langel came into the bedroom with a gun, it would be difficult for them to defend themselves. He knelt down and opened the bedroom door, and immediately saw Langel, who was sitting on a couch in the living room. (Trial Tr. at 160-61) Langel appeared to be holding a can of pop in one hand and a magazine in the other hand. Peters did not see a firearm, and he did not see Langel make any movements. (Trial Tr. at 162, 164)

Peters, who was dressed all in black, drew his handgun and approached Langel, shining the flashlight on Langel’s face. About two-thirds of the way down the hallway, Peters’s knees buckles and he stumbled, he believes because he had been in a squatting position for several minutes. When Peters stumbled, his flashlight went off. He stood back up and turned the flashlight back on, and as he did so, he heard a loud blast and felt an impact on his face. (Trial Tr. at 163, 165) Langel had fired a single shotgun blast which hit Peters in the face, blinding him in one eye. Other officers placed Langel under arrest, and he was charged with attempted murder and willful injury. Later analysis showed the bulk of the shotgun pellets had hit Peters’s gun and his hand, with fewer of the shotgun

pellets hitting the rest of Peters's body and his face.

Langel retained attorney Alfredo Parrish to represent him. Mr. Parrish filed notice that Langel would assert the affirmative defense of diminished capacity, and Langel was evaluated by his own retained psychologist and by a psychologist for the State. During pretrial preparations, one of Mr. Parrish's associates discussed the jury selection process with Langel, and talked with him about what types of jurors Langel would like to have on his jury. (PCR Tr. at 17-18) On the morning of trial, September 17, 1999, Mr. Parrish first presented Langel with the idea of waiving a jury and trying the case to the court. According to Langel, he was confused about what to do. Mr. Parrish told him had discussed the matter with another attorney, and had noted the fact that the trial judge formerly was a defense attorney and had defended a couple of diminished capacity cases. According to Langel, Mr. Parrish stated he was confident that a bench trial would be in Langel's best interests. In addition, Mr. Parrish consulted with another defense attorney, Leon Spies, who had represented Langel on other matters in the past, and Mr. Spies agreed a bench trial was appropriate in this case. (PCR Tr. at 19-23) At Langel's PCR trial, he testified he trusted Mr. Spies, and "if Mr. Spies thought it was a good idea and Mr. Parrish thought it was a good idea, [he] was fine with it." (PCR Tr. at 23)

Langel agreed ("perhaps somewhat hurriedly," as noted by the PCR court) to waive a jury and try the case to the court. The following record was made at the beginning of the trial:

THE COURT: We are on the record in the Iowa District Court for Linn County in case number FECR 28421, State of Iowa versus Mitchell Ray Langel. The matter is set for trial this morning, and the Court is advised by counsel that counsel for the Defendant wishes to make a record before the jury is present.

You may proceed, Mr. Parrish.

MR. PARRISH: Thank you, Your Honor. May it

please the Court and Mr. Vander Sanden. At this time, Your Honor, I have had some discussions with my client about the trial of this matter, and it's our desire to waive a jury trial and try the case to the Court. But what we would like to do is make some record with regard to Mr. Langel's consent to that matter for the Court for the purposes of making a record to see that he fully understands the waiver and the effect of that waiver, Your Honor. Would you like me [to] do it from here or would you like him to come forward?

THE COURT: He may come forward and we'll place him under oath.

MR. PARRISH: Thank you, Your Honor.

(Trial Tr. at 7) Langel was sworn, and the following colloquy took place between Langel and Mr. Parrish:

Q [By Mr. Parrish] State your name and spell both your first and your last name for the record please.

A My name is Mitchell Ray Langel. M I T C H E L L. Langel, L A N G E L.

Q How old are you?

A 32.

Q Where did you go to school?

A I completed my Bachelor of Arts degree in economics at the University of Iowa.

Q What year was that?

A 1991.

Q You're presently on medications as you sit here today, is that correct?

A Correct.

Q Have I asked you about the medication?

A Yes, you have.

Q Did you take your medication this morning before you left the jail?

A No. Last night would be the last time I took it. I take it at night.

Q Approximately what time last night?

A Nine o'clock.

Q And explain to the Court what that medication is?

A It's Haldol.

Q And what was the amount of medication that you took last night if you can recall?

A Five milligrams.

Q And explain the effect of – the Haldol has on you once you take it?

A It just – It's an antipsychotic and makes me kind of tired and relaxes me.

Q As you sit here today, did you understand all of the discussions I had with you about waiver of the jury trial?

A Yes, I did.

Q Were both your mother and father here for that discussion?

A Yes, they were.

- Q Tell us for the record who your – what his name is and where he is in the courtroom, point him out to me please.
- A His name is Charles Langel. He’s right there in the front row (indicating).
- Q Tell us what your dad is wearing?
- A He’s wearing a blue jacket, blue and white pin-striped shirt.
- Q Did he have an opportunity with the deputies’ permission to come up and sit by us when we were discussing this?
- A Yes, he did.
- Q Okay. And tell me who else was here during that discussion?
- A My mother and Matthew Dake.
- Q And – Okay. And where is your mom seated?
- A Right there in the front row (indicating).
- Q What is she wearing?
- A Kind of a khaki blazer and a dark-colored shirt.
- Q Okay. And what’s your mom’s name?
- A Lennora Steinbronn.
- Q And who is the other gentleman

who was here?

A Matthew Dake.

Q And who is Matthew Dak?

A He's also my attorney.

Q He's an associate in my farm [sic], is that correct?

A Yes, that's correct.

Q And you met with Mr. Dake a couple times over the weekend, is that correct?

A Yep.

Q Now, I want to ask you with regard to the – Well, strike that. Are you on any other type of medication other than Haldol at the present time?

A No, I'm not.

Q Did you have breakfast this morning?

A Yes, I did.

Q What did you have for breakfast?

A Cereal and toast.

Q Okay. Did you have anything to drink this morning?

A Milk.

Q All right. You understand that by waiving a jury trial that one person, that is the Judge, would make a decision with regard to all

the factual issues in this case? Do you understand that?

A Yes, I do.

Q Did I explain that to you?

A Yes, you did.

Q Did I explain to you also the fact that all the legal issues in this case would be decided by the same Judge who would make – who would be the fact-finder in the case?

A Yes, you did.

Q All right. Did I explain to you also by waiving the jury trial twelve people would no longer participate in this case at all? Do you understand that?

A Yep.

Q And that means that with the twelve jurors you understand that all twelve would have to agree before there would be a conviction in your case? Do you understand that? Did I explain that to you?

A Yep.

Q Do you understand that?

A Yep.

Q Did I explain to you that if one juror disagrees with the other eleven jurors that the State would not have a unanimous verdict and,

consequently, could not get a conviction against you in this case?

A Yes.

Q Okay. Do you understand and have I explained to you in the past and also today the charge that you are presently facing?

A Yes.

Q Do you realize the charge is an attempted murder charge?

A Yes, I do.

Q And do you understand in Iowa if there is a conviction on attempted murder cases, it's an 85 percent crime, meaning you would have to serve 85 percent of the sentence before you are entitled to parole of any sort? Or release of any sort. You understand that?

A Yes, I do.

Q Now, you also understand that with a jury trial you would have an opportunity to voir dire the jury. We have an opportunity to ask them questions about their feelings; basically the issue in this case, the diminished capacity; also their relationship with law enforcement officers; all of this type of thing? You understand that?

A Yes.

Q Did I explain that to you where you could fully understand that?

A Yes.

Q Do you have any questions about the right you are giving up and waiving a jury trial?

A No, I don't.

Q Do you wish to waive the jury trial in this case?

A Yes, I do.

Q Is this waiver upon advice of counsel and also being done voluntarily because you have had an opportunity to think through this case and also meet with your parents concerning this case?

A Yes.

Q Is that correct?

A That is correct.

Q And at this time what is your desire with regard to whether or not you waive the jury trial in this case and not go forth with a jury trial?

A I would like to waive the jury trial.

MR. PARRISH: Your Honor, I have no further questions in this matter.

(Trial Tr. at 8-14)

The prosecutor did not cross-examine Langel on the issue of his jury waiver. The court accepted Langel's waiver

of his constitutional right to a jury trial, and the case proceeded to trial to the court. (Trial Tr. at 14) The court took a recess, and when court reconvened, the following colloquy took place between counsel and the court:

THE COURT: We are back on the record in State v. Langel following our morning recess. We had earlier this morning made a record about Defendant's waiver of his right to a jury trial in the matter.

Mr. Parrish, has the Defendant and have you signed the written waiver of jury trial?

MR. PARRISH: Yes, Your Honor. I have reviewed the waiver given to me and reviewed it with Mr. Langel, explained it to him again and I have put my signature on it, and also Mr. Langel has put his signature on it.

THE COURT: Thank you. The record will show that the Court has received the waiver of jury trial signed by Defendant and his counsel, and this will be filed in the court file with the Clerk of Court.

One additional matter to place on the record concerning waiver of jury trial is the State's consent. Mr. Vander Sanden, does the State consent or resist Defendant's waiver of his right to jury trial?

MR. VANDER SANDEN: The state consents, Your Honor.

THE COURT: Very well. . . .

(Trial Tr. at 16-17)

Trial proceeded to the court. Langel presented a defense of diminished capacity. The court found Langel guilty on both counts and sentenced him to twenty-five years on the attempted murder count and ten years on the willful injury count, with the sentences to be served concurrently.

Report and Recommendation at 2-10.¹ Upon review of the record, the court adopts all of Judge Zoss's factual findings.

II. LEGAL ANALYSIS

A. Standard Of Review

1. Standard of review of report and recommendation

Pursuant to statute, this court's standard of review for a magistrate judge's report and recommendation is as follows:

A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate [judge].

28 U.S.C. § 636(b)(1). Similarly, Federal Rule of Civil Procedure 72(b) provides for review of a magistrate judge's report and recommendation on dispositive motions and prisoner petitions, where objections are made, as follows:

The district judge to whom the case is assigned shall make a de novo determination upon the record, or after additional evidence, of any portion of the magistrate judge's disposition to which specific written objection has been made in accordance with this rule. The district judge may accept,

¹The factual findings in Judge Zoss's Report and Recommendation, except where stated otherwise, were taken from the state court opinions on Langel's direct appeal, his post-conviction relief hearing, and his appeal from the denial of post-conviction relief. The state court's findings of fact are presumed to be correct in the absence of clear and convincing evidence to the contrary. See 28 U.S.C. § 2254(e)(1); *Liggins v. Burger*, 422 F.3d 642, 649 (8th Cir. 2005); *Cox v. Burger*, 398 F.3d 1025, 1028 (8th Cir. 2005); *Perry v. Kemna*, 356 F.3d 880, 882 (8th Cir.), cert. denied, 125 S. Ct. 657 (2004); *King v. Bowersox*, 291 F.3d 539, 540 (8th Cir. 2002), cert. denied, 537 U.S. 1093 (2002).

reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate judge with instructions.

FED. R. CIV. P. 72(b).

The Eighth Circuit Court of Appeals has repeatedly held that it is reversible error for the district court to fail to conduct a *de novo* review of a magistrate judge’s report where such review is required. *See, e.g., Hosna v. Groose*, 80 F.3d 298, 306 (8th Cir.) (citing 28 U.S.C. § 636(b)(1)), *cert. denied*, 519 U.S. 860 (1996); *Grinder v. Gammon*, 73 F.3d 793, 795 (8th Cir. 1996) (citing *Belk v. Purkett*, 15 F.3d 803, 815 (8th Cir. 1994)); *Hudson v. Gammon*, 46 F.3d 785, 786 (8th Cir. 1995) (also citing *Belk*), *cert. denied*, 518 U.S. 1025 (1996). Because objections have been filed in this case to Judge Zoss’s legal conclusions, the court must conduct a *de novo* review.

2. General standards for § 2254 relief

Section 2254(d)(a) of Title 28, as amended by the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996 governs Langel’s petition.

Section 2254(d)(1) defines two categories of cases in which a state prisoner may obtain federal habeas relief with respect to a claim adjudicated on the merits in state court. Under the statute, a federal court may grant a writ of habeas corpus if the relevant state-court decision was either (1) “contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States,” or (2) “involved an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States.”

Williams v. Taylor, 529 U.S. 362, 404-05 (2000) (quoting 28 U.S.C. § 2254(d)(1)).² In

²Section 2254(d)(2) also allows a writ of habeas corpus to issue if the state court decision “was based on an unreasonable determination of the facts in light of the evidence
(continued...)

this instance, Langel seeks habeas relief under the second category. An “unreasonable application” of Federal law by a state court can occur in two ways: (1) where “the state court identifies the correct governing legal rule from the [Supreme] Court’s cases but unreasonably applies it to the facts of the particular state prisoner’s case”; or (2) where “the state court either unreasonably extends a legal principle from [Supreme] Court precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply.” *Id.* at 407. It is not enough that the state court applied clearly established federal law erroneously or incorrectly—the application must additionally be unreasonable. *Id.* at 411; *see Bell v. Cone*, 535 U.S. 685, 694 (2002) (“an unreasonable application is different from an incorrect one.”).

3. *Standards for ineffective assistance of counsel claims*

The Sixth Amendment guarantees a criminal defendant the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). In the Report and Recommendation, Judge Zoss outlined the two-prong criteria employed in determining the effectiveness of counsel, which was enunciated by the United States Supreme Court in *Strickland*. To prevail on a claim of ineffective assistance of counsel, a habeas petitioner must demonstrate that (1) “counsel’s representation fell below an objective standard of reasonableness;” and (2) “the deficient performance prejudiced the defense.” *Id.* at 687; *Furnish v. United States of America*, 252 F.3d 950, 951 (8th Cir. 2001) (stating that the two-prong test set forth in *Strickland* requires a showing that (1) counsel was

²(...continued)

presented in the State court proceedings.” 28 U.S.C. § 2254(d)(2); *see cf. Sexton v. Kemna*, 278 F.3d 808, 811 (8th Cir.), *cert. denied*, 537 U.S. 886 (2002). Langel does not seek habeas relief on this ground.

constitutionally deficient in his or her performance and (2) the deficiency materially and adversely prejudiced the outcome of the case); *Garrett v. Dormire*, 237 F.3d 946, 950 (8th Cir. 2001). Trial counsel has a “duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” *Strickland*, 466 U.S. at 691. Indeed, “counsel must exercise reasonable diligence to produce exculpatory evidence[,] and strategy resulting from lack of diligence in preparation and investigation is not protected by the presumption in favor of counsel.” *Kenley v. Armontrout*, 937 F.2d 1298, 1304 (8th Cir. 1991). However, there is a strong presumption that counsel's challenged actions or omissions were, under the circumstances, sound trial strategy. *Strickland*, 466 U.S. at 689; *Collins v. Dormire*, 240 F.3d 724, 727 (8th Cir. 2001) (in determining whether counsel's performance was deficient, the court should “indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . .”) (citing *Strickland*). With respect to the “strong presumption” afforded to counsel's performance, the Supreme Court specifically stated:

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. 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.”

Strickland, 466 U.S. at 689 (citations omitted).

To demonstrate that counsel's error was prejudicial, thereby satisfying the second prong of the *Strickland* test, a habeas petitioner must prove that “there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* The court will now turn to Langel’s assertions of error upon which he bases his ineffective assistance of counsel claims, as well as Judge Zoss’s conclusions with respect to those claims, followed by this court’s analysis of Langel’s objections to the legal conclusions reached by Judge Zoss.

B. Objections To Report And Recommendation

As noted above, Langel contends that his counsel’s performance was deficient in two ways: (1) that his trial counsel was ineffective in failing to require the trial court to engage in a colloquy to ensure that the waiver of his right to a jury trial was knowing, intelligent, and voluntary; and (2) that his trial counsel was ineffective in failing to argue that he acted in self-defense.

With respect to his first claim, Judge Zoss found that:

Like the PCR court, the undersigned finds Langel’s objection that his waiver colloquy was conducted by his attorney rather than by the court is form over substance. Langel evidenced both orally and in writing that he understood the difference between a jury trial and a bench trial, and his waiver was voluntary, knowing, and intelligent. Mr. Parrish recommended the bench trial as a tactical matter, and Langel accepted the recommendation. The court finds Mr. Parrish’s performance was not ineffective, and Langel has failed to show

otherwise. Further, and more importantly here, Langel has failed to show the decision of the state court was contrary to Supreme Court precedent, or involved an unreasonable application of clearly-established federal law. Accordingly, Langel's claim for relief on this issue should be denied.

Report and Recommendation at 20.

Judge Zoss further recommended the denial of Langel's second claim, explaining that:

As the PCR court noted and the PCR appellate court affirmed, "The self-defense claim was not compelling, in counsel's opinion, because the officers, relatives and friends had been pleading with Mr. Langel for hours to put his gun down and come out of the apartment. . . . Counsel's decision not to assert a weaker, alternative defense was a decision of trial strategy well within the range of competence." Langel PCR, 2004 WL 1812730 at *3. Although there were other trial strategies available, including assertion of the defense of self-defense, the court finds Langel's trial counsel was not ineffective in deciding to concentrate on the strongest of Langel's defenses, and not to go forward with a self-defense theory. Mr. Parrish's performance was not "deficient," as defined by the Supreme Court in *Strickland*; that is, he did not make an error that was so serious as to deprive Mr. Langel of "counsel" as guaranteed by the Sixth Amendment. See *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064. Langel's claim on this issue should be denied.

Report and Recommendation at 22.

Petitioner Langel does not object to a specific finding or legal conclusion of Judge Zoss's Report and Recommendation. Instead, Langel generally reasserts the arguments that were contained in his brief in support of his petition with respect to his claim that his trial counsel was ineffective in failing to require the trial court to engage in a colloquy to

ensure that the waiver of his right to a jury trial was knowing, intelligent, and voluntary. Langel makes no objection to Judge Zoss’s Report and Recommendation with respect to his second claim, that his trial counsel was ineffective in failing to argue that he acted in self-defense. It thus appears as though Langel does not take issue with the legal standards used by Judge Zoss in analyzing his petition—specifically, the use of the standards enunciated in *Strickland*—but instead his objections center around the ultimate legal conclusions reached by Judge Zoss employing those standards with respect to his first claim. The court will analyze Langel’s objections from this perspective.

C. Analysis of Langel’s Claims

1. Waiver of right to jury trial

Langel asserts that his counsel was ineffective in failing to require the trial court to engage in a colloquy to ensure that the waiver of his right to a jury trial was knowing, intelligent, and voluntary. In his objections to Judge Zoss’s Report and Recommendation, Langel asserts that the fighting issue is whether Langel knowingly, intelligently, and voluntarily waived his right to a jury trial. Judge Zoss found that Langel’s waiver was voluntary, knowing, and intelligent. Report and Recommendation at 20.

The Sixth Amendment of the United States Constitution guarantees an accused the right to counsel in all critical stages of the prosecution and the right to a trial by jury. U.S. CONST. amend. VI. To be valid, a defendant’s waiver of this right must be voluntary, knowing, and intelligent, and the defendant must be competent to waive the jury right. *See Patton v. United States*, 281 U.S. 276, 312-13 (1930). The Eighth Circuit Court of Appeals has held that “[t]he purpose of the ‘knowing and voluntary’ inquiry. . . is to determine whether the defendant actually does understand the significance and consequences of a particular decision and whether the decision is uncoerced.” *Mann v.*

Thalacker, 246 F.3d 1092, 1098 (8th Cir. 2001) (quoting *O'Rourke v. Endell*, 153 F.3d 560, 567-68 (8th Cir. 1998)). Once a waiver is effectuated, the burden is on a habeas corpus petitioner to demonstrate that the waiver of the jury trial right was *prima facie* invalid. *Sowell v. Bradshaw*, 372 F.3d 821, 832 (6th Cir. 2004); *Milone v. Camp*, 22 F.3d 693, 704 (7th Cir. 1994). Determination of whether a jury trial waiver was invalid depends on the factual circumstances of the case. *See Adams v. United States ex rel. McCann*, 317 U.S. 269, 278 (1942); *Lott v. Coyle*, 261 F.3d 594, 615 (6th Cir. 2001). On habeas review, a state court's determination that a petitioner's jury trial waiver was valid is a finding of fact entitled to a presumption of correctness pursuant to § 2254(e)(1) unless the petitioner can overcome this presumption by clear and convincing evidence. *Spytma v. Howes*, 313 F.3d 363, 371 (6th Cir. 2002).

Here, review of the record shows that Langel was informed of his constitutional right to a jury trial, that a trial by jury would involve having twelve members of the community hear the evidence and decide whether he was guilty or innocent, and that, if he waived this right, a judge would decide whether he was guilty or innocent. “[W]hether there is an intelligent, competent, self-protecting waiver of jury trial by an accused must depend upon the unique circumstances of each case.” *Adams*, 317 U.S. at 278. The court concludes from its review of the record that Langel’s waiver of his jury trial right was valid. It is undisputed that Langel consulted with his attorney before waiving this right. It is also undisputed that Langel was informed by his counsel that he had a constitutional right to a jury trial, that the jury would be composed of twelve community members who would decide his guilt or innocence, and that, if he waived his right to a jury trial, a judge would decide his guilt or innocence. It is also undisputed that Langel signed a waiver of trial by jury form.

Based on the court’s review of the record, it concludes that Langel has not

overcome the presumption of correctness concerning the Iowa court's decision that his jury trial waiver was valid by clear and convincing evidence. Accordingly, the court concludes that Langel has not demonstrated that there is a reasonable probability that, but for his counsel's alleged error, the result of the proceeding would have been different. The Iowa Court of Appeals's decision denying Langel's challenge to the voluntariness of his jury trial waiver was a reasonable application of clearly established federal law as determined by the United States Supreme Court, and resulted from a decision based on a reasonable determination of the facts in light of the evidence. Therefore, Langel's objection to this portion of Judge Zoss's Report and Recommendation is **overruled** and the court accepts Judge Zoss's Report and Recommendation regarding Langel's first claim for relief.

2. Claim of self-defense

Langel also asserts that his counsel was ineffective in failing to argue that he acted in self-defense. For the reasons detailed above, Judge Zoss recommended that this claim also be denied. With respect to Langel's second claim for relief, no objections have been filed, and it appears to the court upon review of Judge Zoss's findings and conclusions, that there is no ground to reject or modify them. Therefore, the court **accepts** Judge Zoss's Report and Recommendation regarding defendant Langel's second claim for relief.

III. CERTIFICATE OF APPEALABILITY

Langel must make a substantial showing of the denial of a constitutional right in order to be granted a certificate of appealability on these issues. *See Garrett v. United States*, 211 F.3d 1075, 1076-77 (8th Cir.), *cert denied*, 531 U.S. 908, 121 S. Ct. 254, 148 L. Ed. 2d 184 (2000); *Mills v. Norris*, 187 F.3d 881, 882 n.1 (8th Cir. 1999); *Carter v. Hopkins*, 151 F.3d 872, 873-74 (8th Cir.), *cert. denied*, 525 U.S. 1007, 119 S. Ct. 524, 142 L. Ed. 2d 435 (1998); *Ramsey v. Bowersox*, 149 F.3d 749 (8th Cir. 1998), *cert.*

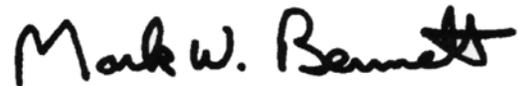
denied, 525 U.S. 1166, 119 S. Ct. 1083, 143 L. Ed. 2d 85 (1999); *Cox v. Norris*, 133 F.3d 565, 569 (8th Cir. 1997), *cert. denied*, 525 U.S. 834, 119 S. Ct. 89, 142 L. Ed. 2d 70 (1998). “A substantial showing is a showing that issues are debatable among reasonable jurists, a court could resolve the issues differently, or the issues deserve further proceedings.” *Cox*, 133 F.3d at 569. Langel has failed to make such a substantial showing. Therefore, with respect to these claims, the court shall not grant a certificate of appealability pursuant to 28 U.S.C. § 2253(c)(3).

IV. CONCLUSION

The court accepts Judge Zoss’s Report and Recommendation. Therefore, Langel’s petition for a writ of habeas corpus is **dismissed**. The court further orders that no certificate of appealability shall be issued for any of Langel’s claims.

IT IS SO ORDERED.

DATED this 25th day of May, 2006.



MARK W. BENNETT
CHIEF JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA