

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

SUPERIOR COURT

(FILED: May 18, 2015)

TRACEY BARROS

:

v.

:

PM/11-5771

:

STATE OF RHODE ISLAND

:

:

DECISION

KRAUSE, J. Tracey Barros presents this Court with an application for post-conviction relief (PCR). Ten years ago he confessed to having shot Deivy Felipe to death in his parked car. At an unsuccessful pretrial suppression hearing and again at trial, Barros testified that his confession was not only involuntary, it was also false. The jury rejected his testimony and convicted him of first degree murder, conspiracy to commit murder, and two firearm offenses. As mandated by statute, Barros was sentenced to two consecutive life terms for committing murder with a gun. His appeal, which focused principally on the circumstances surrounding his confession, was denied. State v. Barros, 24 A.3d 1158 (R.I. 2011).

In his PCR application, Barros persists in his claim that the detectives tricked him into giving an involuntary false confession. This time, however, he does not fault this Court, the jury, or the Supreme Court for his predicament. Instead, he blames his trial and appellate attorneys from the Public Defender's office. He also seeks this Court's recusal from considering this PCR application.

The Suppression Hearing

The Supreme Court's decision contains a lengthy explication of the facts and circumstances surrounding the custodial interview of Barros, his subsequent statements,

and an in-depth analysis of the issues surrounding the confession. Only minimal reference to it is needed here.

At a two-day suppression hearing in May of 2007, eight witnesses, including the defendant, testified. Much of Barros' discussion with the police was not tape-recorded. Eventually, a twelve-minute taped statement was obtained. At the hearing, the defendant claimed that after he had been arrested earlier that night for unlawfully possessing a handgun, he was somehow able, through the rear of a police cruiser and in the darkness, to lip-read what the officers in another police cruiser were saying about the gun. He also testified that although his hands were handcuffed behind his back in the cruiser, he was able to extricate his ringing cell phone from a front jacket pocket, converse with his girlfriend, and tell her to call a lawyer.

At the police station he said the detectives wanted him to confess to the Felipe murder so that they could close out a cold case which they had wanted to blame on Barros' friend Tonea Sims, who had been shot and killed the previous night. He testified that the detectives promised that he would receive only a ten-year sentence for confessing to the murder.

Barros said that he was chained to the wall in an interview room for an entire day, left alone for hours, and deprived of food, water and bathroom breaks. He also testified that he told the police he didn't want to say anything until his attorney had arrived. He said that eventually he just gave up and confessed. Before taping his statement (which was bereft of any request for a lawyer), he said that the police had scripted his answers and told him to make it "sound good" on the recording. In that recorded statement, Barros said, among other things, that he shot Felipe seventeen times—that he "emptied

the clip” into him, a bogus response the police could not have supplied because they knew Felipe had been shot far fewer times.

The Providence detectives, as well as two ATF agents, contradicted all of the defendant’s self-serving assertions. They said that they had safeguarded Barros’ rights, that he was offered food, soda, water and restroom breaks. They testified that he never requested an attorney and were frankly surprised when Barros admitted killing Felipe. They flatly denied ever having told Barros, a chronic offender who had been arrested that night for his third gun offense, that he would only have to serve ten years for murdering a man as he sat in his car. Most assuredly, they said, they never coached or suggested to Barros what to say during the recording.

At the conclusion of the hearing, the Court considered all of the testimony and found that the State’s witnesses had told the truth and that Barros had lied. The motion to suppress was denied. On appeal, the Supreme Court agreed. Barros, 24 A.3d at 1180 (“[H]aving scrutinized the record in a *de novo* manner, we have reached the same conclusion as did the trial justice—*viz.*, that Mr. Barros’s confession was voluntary and was made after a knowing and intelligent waiver of his constitutional rights.”).

The first trial ended in a mistrial with the jury at an impasse. Before the second trial started six months later, trial counsel renewed the suppression motion, this time targeting the failure of the police to record all of the discussions with Barros, an omission which he said required suppression of the taped statement. Short of its outright exclusion, counsel sought instructions which admonished the jurors to look askance at the taped statement because the police had failed to record the entirety of the discussions leading up to the recording. This Court again denied the suppression motion and did not

offer the requested jury instructions. The Supreme Court, with one dissent, affirmed those rulings.

At the retrial, Barros testified and claimed, as he had during the initial suppression hearing and at the first trial, that the police had induced him to tell a false incriminatory tale. The jury rejected his testimony and convicted him of murdering Felipe and of all the ancillary charges.

The Post-Conviction Relief Claims

Barros now claims (in his Third Amended Petition) that the efforts of the Public Defender's Office at both the trial and appellate levels fell constitutionally flat. Those professed deficiencies include (1) not asking the Court to recuse itself after it had denied Barros' motion to suppress his statements; (2) failing to present expert testimony about false confessions; (3) failing during voir dire to make effective inquiry about jurors' views of false confessions; and (4) failing on direct appeal to argue that this Court had unfairly restricted trial counsel's voir dire. Barros also says that this Court should recuse itself from considering this PCR application. For the reasons set forth below, the Court finds no merit in any of those claims.¹

Waiver of Recusal Claims

Barros has waived every opportunity to request the Court's recusal in these PCR proceedings. His initial *pro se* application, filed on April 13, 2009, alleged no articulable grounds or basis for relief. It was not until present court-appointed counsel filed Barros' First Amended Petition on May 23, 2012 that any particularized basis was identified. That claim targeted only one ground: the alleged deficient representation by trial counsel

¹ The parties have agreed to forego oral argument and have submitted the matter to the Court for decision on the pleadings and the established record.

for failing to engage a false confession expert. No other claims were advanced. No recusal motion accompanied that First Amended Petition, nor for that matter did that First Amended Petition contain any suggestion that trial counsel had negligently failed to seek the Court's recusal during the trial proceedings.

The next day, on May 24, 2012, at Barros' request, a hearing was held during which PCR counsel lamented trial counsel's failure to consider presenting a false confession expert, and current counsel requested funds to hire one. The State objected, arguing that unless the expert's testimony would ultimately be admissible, public funds ought not to be expended. This Court agreed and indicated that since it was not likely that this type of testimony would have been allowed at trial, funding to hire such an expert to testify in the PCR proceedings should be withheld. The Court also expressed its doubts that trial counsel had been ineffective for not trying to present such testimony. (Tr. 17-22, May 24, 2012.)

At no time before or during that May 24, 2012 hearing did Barros ever seek the Court's recusal in this PCR action. It was not until April 2, 2014, almost two years later, in his Second Amended PCR Petition, that Barros criticized his trial attorney for not filing a recusal motion. And, it was only then, in bootstrap fashion, that PCR counsel realized that he could not pursue such a claim against Barros' trial counsel without making a similar recusal motion in this PCR action.

The short and dispositive impediment to the instant recusal motion is that the right to make it has clearly expired. It arrives some two years after a hearing essentially on the merits of this very PCR claim itself; indeed, a hearing which Barros himself sought.

Under such circumstances, this Court finds that Barros has waived his right to pursue recusal now.

“It is well-settled that a party must raise its claim of a [trial] court’s disqualification at the earliest possible moment after obtaining knowledge of facts demonstrating the basis for such a claim.” Apple v. Jewish Hosp. & Med. Ctr., 829 F.2d 326, 333 (2nd Cir. 1987); accord Johnson v. Commonwealth, 180 S.W.3d 494, 503 (Ky. Ct. App. 2005) (“A motion for recusal should be made immediately upon discovery of the facts upon which the disqualification rests. Otherwise, it will be waived.”) (quoting Bussell v. Commonwealth, 882 S.W.2d 111, 113 (Ky. 1994)); see Molina v. Rison, 886 F.2d 1124, 1131-32 (9th Cir. 1989) (finding petitioner waived opportunity to raise recusal issue in his federal habeas/post-conviction relief application); Hon. D. Duff McKee, *Disqualification of Trial Judge for Cause*, 50 Am. Jur. Proof of Facts 3d, 449 at § 22 (stating weight of authority requires that motion “must be brought on or at the earliest practical opportunity after counsel becomes aware of the grounds for such motion. These cases are clear that counsel cannot wait to test the judicial waters before deciding whether or not to advance a motion for disqualification.”).

In determining whether a recusal motion has been timely filed, courts typically consider: (1) the extent of the movant’s involvement in the proceeding, i.e. whether he has participated in a substantial manner in trial or pretrial proceedings; (2) whether recusal would result in a waste of judicial resources; (3) whether the motion was made after the entry of judgment; and (4) whether the movant can demonstrate good cause for the delay. In re Medrano Diaz, 182 B.R. 654, 658 (D.P.R. 1995); Apple, 829 F.2d at 334. Not one of those factors weighs in Barros’ favor.

Barros obviously fits the first category. He is the driving force behind this litigation. Secondly, there is no good reason to pass this PCR application to another justice who is unfamiliar with the record and the travel of this case. Indeed, pursuant to Rule 2.3(d)(4) of the Rhode Island Superior Court Rules of Practice, applications for post-conviction relief are to be submitted “for disposition by the justice who presided at the trial of the applicant.” See Pezzucco v. State, 652 A.2d 977, 979 (R.I. 1995) (holding that trial justice’s purported interest in upholding his own rulings is not a basis for recusal from post-conviction relief hearing).

A similar result obtains in federal trial courts. Rule 4(a) of the Federal District Court Rules governing § 2255 proceedings provides: “The original motion shall be presented promptly to the judge of the district court who presided at the movant’s trial and sentenced him, or, if the judge who imposed sentence was not the trial judge, then it shall go to the judge who was in charge of that part of the proceedings being attacked by the movant.” Justice Kennedy, referencing Rule 4(a), said in his concurrence in Liteky v. United States, “As a matter of sound administration, moreover, it may be necessary and prudent to permit judges to preside over successive causes involving the same parties or issues.” 510 U.S. 540, 562 (1994). See Polizzi v. United States, 926 F.2d 1311, 1320-21 (2d Cir. 1991) (“[T]he trial court’s ‘recollection and observation, checked against the record and memory of counsel, . . . may be a valuable aid to a § 2255 determination,’” (quoting Zovluck v. United States, 448 F.2d 339, 343 (2d Cir. 1971), cert. denied 405 U.S. 1043 (1972))).²

² Analogously, rehearing or retrying a matter after remand by an appellate court is normal practice. United States v. Howard, 218 F.3d 556, 566 (6th Cir. 2000) (noting that the Supreme Court has clearly accepted the long-standing practice of the same judge

Thirdly, and most tellingly, Barros' recusal motion in this PCR action arrives some two years after this Court—without objection by Barros and, indeed, at his very initiative and invitation—considered the merits of his request to engage a false confession expert. Lastly, Barros can provide absolutely no reason for waiting two years to make a recusal claim that he could have made at or before the May 24, 2012 hearing, much less a claim that he could have made in 2007 and 2008 before two separate trials but did not.

Accordingly, this Court finds that Barros has waived any opportunity to pursue a recusal request in this PCR action. Absolutely no explanation has been provided by Barros for the delay in making this motion. Sawyer v. Southwest Airlines Co., 145 F. App'x 238, 243 (10th Cir. 2005) (finding motion to disqualify untimely where there is no explanation for delay (citing Green v. Branson, 108 F.3d 1296, 1305 (10th Cir. 1997))). “Such delay in taking action surely results in a waste of judicial resources and can only be seen as [an] attempt to take a second bite of the proverbial apple, that is, to manipulate the judiciary in order to avoid the consequences of an adverse judgment.” In re Medrano Diaz, 182 B.R. at 658.

* * *

Quite apart from the waiver impediment, Barros' claim for recusal, both at this juncture and retrospectively at the trial level, is wholly baseless.

It is axiomatic that trial judges should recuse themselves if they are unable to render a fair or impartial decision. Mattatall v. State, 947 A.2d 896, 902 (R.I. 2008). It

continuing to handle the case after remand: “[I]t has long been regarded as normal and proper for a judge to sit in the same case upon its remand” and to sit in successive trials involving the same defendant, (quoting Liteky, 510 U.S. at 551)).

is, however, “an equally well-recognized principle that a trial justice has as great an obligation *not* to disqualify himself or herself when there is no sound reason to do so . . .” Kelly v. RIPTA, 740 A.2d 1243, 1246 (R.I. 1999) (citing State v. Clark, 423 A.2d 1151, 1158 (R.I. 1980)) (emphasis added).

The proponent of a recusal motion shoulders a “substantial burden” to prove the existence of judicial bias. In re Jermaine H., 9 A.3d 1227, 1230 (R.I. 2010). He must demonstrate the existence of facts such that it would be reasonable for members of the public, a litigant, or counsel to question the court’s impartiality. Id. The test and burden of proof, however, extends beyond that general proposition.

The Rhode Island Supreme Court has made clear that in order to support a recusal demand, “[t]he party seeking recusal bears the burden of establishing that the judicial officer possesses a personal bias or prejudice by reason of a preconceived or settled opinion of a character calculated to impair his or her impartiality seriously and to sway his or her judgment.” State v. Howard, 23 A.3d 1133, 1136 (R.I. 2011) (internal quotations and brackets omitted). Thus, the movant must demonstrate that the purported impartiality is “so extreme as to display clear inability to render fair judgment.” Liteky, 510 U.S. at 555; United States v. Howard, 218 F.3d 556, 566 (6th Cir. 2000).

Just as importantly, a court’s comments must be viewed in the context in which they were made. State v. McWilliams, 47 A.3d 251, 260 (R.I. 2012). In United States v. Ransom, 428 F. App’x 587 (6th Cir. 2011), Ransom complained about adverse credibility findings the trial court had made about his testimony a year earlier as a witness at his brother’s revocation hearing. The Court of Appeals held that those comments did not establish bias or prejudice warranting recusal, “especially when they are *viewed in the*

larger context of the [prior] hearing, which show[ed] both that the judge gave a thorough, well-reasoned, and fairminded explanation for his adverse credibility finding and that [the defendant] provided the judge with the factual predicate for his statements.” *Id.* at 591(emphasis added).

Here, this Court considered the testimony of eight witnesses, including the defendant, during a two-day suppression hearing. The testimony was divergent and the issues closely contested. The Court was, perforce, obligated to make definitive factual and credibility findings. In making that analysis, this Court said that “credibility decisions have to be made. The defendant offered testimony that I find not credible at all . . . I’m satisfied from what I have heard that the defendant lied to me in certain respects, and those lies and mendacious statements cast a very dim light on his credibility.” (Tr. 200, June 1, 2007.) Then, as reflected in the next several pages of that transcript, the Court assessed the conflicting evidence and testimony, made the requisite credibility findings, and ultimately denied the suppression motion.

On appeal, the Supreme Court, after its own *de novo* review of the record, agreed with this Court’s findings and rejected Barros’ claims:

“Based upon our own review of the record of the suppression hearing, we are fully satisfied as to the voluntary nature of defendant’s incriminating statements. *** There is absolutely no evidence in the record indicating that the investigators induced defendant to make the inculpatory statements that he made relative to his relationship with Mr. Sims and the criminal acts in which the two engaged; actually, it is clear from the record that those statements were unanticipated by the investigators.” *Barros*, 24 A.3d at 1181-82.

Accordingly, Barros does not, and cannot, now argue in this PCR application that this Court or the Supreme Court erroneously concluded that he had lied at the suppression hearing. Instead, as a last resort, he complains that because the Court did not state its

findings more gently, he is entitled to have the Court recuse itself from considering his PCR application. By the same token, he contends that recusal was necessary at trial. He is wrong on both counts.

The comments which Barros complains of were made in the restricted confines of a suppression motion hearing, where the trial judge is *required* to make credibility choices, because they “are essential to support his ultimate finding of voluntariness.” State v. Bojang, 83 A.3d 526, 534 (R.I. 2014). Indeed, it was precisely because the trial justice in Bojang had not made those determinations that the Supreme Court remanded the case and ordered the trial judge to undertake that responsibility.

In Kelly, after the jury had returned a verdict in favor of the defendants, the trial justice granted plaintiff’s motion for a new trial. In ruling on the motion, the judge found a portion of the defendant’s testimony not credible. The Rhode Island Supreme Court affirmed the trial justice’s recusal denial, stating:

“In the case at bar both defendants have failed to establish any personal bias or prejudice on the part of the trial justice. He reviewed the evidence subsequent to the rendition of a verdict in *Kelly I*. He commented on the evidence and weighed the credibility of witnesses as he was required to do on such a motion. The fact that he commented on the credibility of the [defendant] bus driver and the weight of the evidence in respect to liability did not establish any personal bias or lack of impartiality on his behalf.” 740 A.2d at 1246.³

³ The federal courts offer no assistance to Barros. In United States v. Pulido, 566 F.3d 52, 56 (1st Cir. 2009), Pulido challenged the impartiality of the district court because of a comment in a different, though related, case where the court had described him as “a thoroughly corrupt police officer.” Pulido claimed that the statement, which had been made prior to his own sentencing, required recusal. The First Circuit disagreed and, also citing Liteky, said, “This is not a close case” for recusal. Id. at 62. In Ransom, 428 F. App’x at 588, the trial court made adverse credibility findings about the defendant’s testimony a year earlier when Ransom had been a witness at his brother’s revocation hearing, indicating that Ransom was a crack addict without credibility. Those comments did not establish a sufficient bias or prejudice under Liteky warranting recusal. Id. at 592.

In McWilliams, no recusal was required where the same trial judge who had previously presided at McWilliams's bail and probation revocation hearing expressly found credible the victim of the robbery which was being tried. The Rhode Island Supreme Court said that in fulfilling his obligations at that hearing, the trial judge was "charged with *weighing the evidence and assessing the credibility of the witnesses.*" 47 A.3d at 260-61 (emphasis in original). As said by the First Circuit in United States v. Mirkin, 649 F.2d 78, 82 (1st Cir. 1981), where the defendant professed that an adverse ruling in his pretrial suppression motion demonstrated the trial judge's prejudice:

"Making credibility assessments is daily grist for a trial judge. In any case or proceeding in which the defendant testifies, the judge, almost as a reflex process, will form an opinion about the defendant's credibility. Such determination should not, of course, be based on bias or prejudice, but prejudice does not inevitably arise as a result of forming a credibility opinion. A judge often must make a finding about the defendant's credibility in a pretrial suppression hearing, but, to our knowledge, no court has held that this, without more, disqualified him from presiding at the trial." Mirkin, 649 F.2d at 82.

See also United States v. Lucas, 62 F. App'x 53, 58 (4th Cir. 2003) (fact that trial judge had found defendant's testimony not credible during a suppression hearing at his earlier trial was no basis to disqualify him from presiding at his second trial).

Assessing Barros' credibility was not, as he unwisely believes, bottomed on purposeful prejudicial remarks gratuitously offered by the Court. Rather, it was a factual determination that the Court was, by law, as the veteran trial attorneys knew full well, obligated to make in the context of a motion to suppress. Making such determinations on the basis of facts at a pretrial proceeding does not, as the United States Supreme Court has held, constitute a valid basis for recusal. Liteky, 510 U.S. at 555. As Justice Scalia wrote:

“The judge who presides at a trial may, upon completion of the evidence, be exceedingly ill disposed towards the defendant, who has been shown to be a thoroughly reprehensible person. But the judge is not thereby recusable for bias or prejudice, since his knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings, and are indeed sometimes (as in a bench trial) necessary to completion of the judge’s task. As Judge Jerome Frank pithily put it: ‘Impartiality is not gullibility. Disinterestedness does not mean child-like innocence. If the judge did not form judgments of the actors in those court-house dramas called trials, he could never render decisions.’ *Also not subject to deprecatory characterization as ‘bias’ or ‘prejudice’ are opinions held by judges as a result of what they learned in earlier proceedings.*” Id. at 550-551 (emphasis added).

To claim recusal just because the Court ruled, as it was required to do, by weighing evidence and assessing witness credibility at the suppression hearing—and without so much as identifying even a hint of the requisite antagonism or personal animus during the ensuing trial, in no way establishes, as Barros must, that this Court “possesse[d] a personal bias or prejudice by reason of a preconceived or settled opinion of a character calculated to impair [its] impartiality seriously and to sway [its] judgment.” Howard, 23 A.3d at 1136 (internal quotation omitted); accord United States v. Cowden, 545 F.2d 257, 265 (1st Cir. 1976).

All that occurred in this case was that the Court presided at a suppression hearing, which Barros demanded be convened, and offered a ruling on his motion—a ruling which was restricted to the evidence at *that* hearing. The Court did precisely what it was expected, nay, mandated, to do: Determine who was credible and who was not; decide who told the truth and who didn’t. The Court made those determinations. Recusal does not thereafter lie when a court fulfills its judicial obligations. Mattatall, 947 A.2d at 902-03.

Failure to File Partiality Motion

Barros faults trial counsel for not filing a recusal motion at trial. He theorizes that this Court must have formulated a fixed opinion of his credibility after denying his suppression motion, thereby jeopardizing his right to a fair trial. As discussed supra, he is mistaken, and any failure to make such a request cannot be deemed constitutionally deficient.

The benchmark for a claim of ineffective assistance of counsel is Strickland v. Washington, 466 U.S. 668 (1984), which has been adopted by our Supreme Court. Brown v. Moran, 534 A.2d 180, 182 (R.I. 1987); LaChappelle v. State, 686 A.2d 924, 926 (R.I. 1996). Whether an attorney has failed to provide effective assistance is a factual question which petitioner bears the “heavy burden” of proving. Rice v. State, 38 A.3d 9, 17 (R.I. 2012); see also Padilla v. Kentucky, 559 U.S. 356, 371 (2010) (holding that Strickland presents a “high bar” to surmount).

When reviewing a claim of ineffective assistance of counsel, the question is whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. Heath v. Vose, 747 A.2d 475, 478 (R.I. 2000). A Strickland claim presents a two-part analysis. First, the petitioner must demonstrate that counsel’s performance was deficient. That test requires a showing that counsel made errors that were so serious that the attorney was “not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” Strickland, 466 U.S. at 687; Powers v. State, 734 A.2d 508, 522 (R.I. 1999) (quoting Strickland, 466 U.S. at 687). The Sixth Amendment standard for effective assistance of counsel, however, is “very forgiving,” United States v. Theodore, 468 F.3d 52, 57 (1st

Cir. 2006) (quoting Delgado v. Lewis, 223 F.3d 976, 981 (9th Cir. 2000)), and “a defendant must overcome a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance and sound trial strategy.” Hughes v. State, 656 A.2d 971, 972 (R.I. 1995); accord Gonder v. State, 935 A.2d 82, 86 (R.I. 2007) (holding that a “strong (albeit rebuttable) presumption exists that counsel’s performance was competent”).

Even if the petitioner can satisfy the first part of the test, he must still pass another sentry embodied in Strickland: He must demonstrate that his attorney’s deficient performance was prejudicial. Thus, he is required to show that a reasonable probability exists that but for counsel’s unprofessional errors the result of the proceeding would have been different. Strickland, 466 U.S. at 694; accord Hazard v. State, 968 A.2d 886, 892 (R.I. 2009).

Before even considering the merits of Barros’ claim, the Court will address Strickland’s second prong, which requires a petitioner to demonstrate the prejudice of counsel’s alleged deficiency. After all, if Barros falters on *either* of Strickland’s prongs, that failure dooms a claim of ineffective assistance of counsel. Hazard, 968 A.2d at 892. “If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.” Strickland, 466 U.S. at 697; accord Grayson v. Thompson, 257 F.3d 1194, 1225 (11th Cir. 2001); Barbosa v. State, 44 A.3d 142, 146 (R.I. 2012).

Barros can demonstrate no prejudice if the case had proceeded to trial before a different judge. The result of the suppression hearing would have been unchanged, and even if recusal had occurred, it would not have altered or changed the evidence the jury

considered, because a second judge, following the law-of-the-case doctrine, would not have reheard that motion nor altered the ruling denying the motion to suppress.⁴ Barros' taped confession would have still been played, and the same evidence, including his unpersuasive testimony, would have been offered. Absent the probability of an altered result, the requisite element of prejudice is gone, and the claimed deficiency of counsel is gone with it.

Even so, Barros' claim is meritless. Returning to the first prong of Strickland, Barros cannot demonstrate any constitutional deficiency by trial counsel for not filing a partiality motion.

Here, as in McWilliams, “[i]t is significant that defendant has failed to bring to [this Court’s] attention even one incident that occurred during trial that could conceivably demonstrate any alleged bias and prejudice harbored toward him by the trial justice, or from which one could ‘reasonably infer . . . that he was unable to render an impartial decision in [the] case.’” 47 A.3d at 262 (quoting Cavanagh v. Cavanagh, 118 R.I. 608, 622, 375 A.2d 911, 917 (1977)). Put plainly, there were no grounds for trial counsel to have urged this Court’s recusal. To have acceded to such a barren, unsupported request would have done scant justice to Chief Justice Weisberger’s explicit admonition to avoid withdrawal when there is simply no sound reason for it. Kelly, 740 A.2d at 1246. No

⁴ State v. Presler, 731 A.2d 699, 705 (R.I. 1999) (Flanders, J. concurring). “The law-of-the-case doctrine ‘posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case,’” (quoting Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 815-16 (1988)); see State v. Graham, 941 A.2d 848, 856 (R.I. 2008) (“Under the law-of-the-case doctrine, after a ‘judge has decided an interlocutory matter in a pending suit, a second judge on that same court, when confronted at a later stage of the suit with the same question in the identical manner, should refrain from disturbing the first ruling.’”) (Citation omitted.)

basis existed at trial for trial counsel to urge such a partiality motion, as none such exists now.

False Confession Expert

Attempts to use psychologists and other clinicians to explain why suspects might offer false confessions have not gained compelling traction and high marks in state or federal courts. Although such expert testimony has occasionally been accepted, its use has been sporadic and more typically earmarked for cases in which a defendant, unlike Barros, has an identifiable mental or medical cognitive deficiency. See footnote 8, infra, at page 28. In general, however, the weight of authority has been decidedly against permitting a professional witness to tell a jury why a defendant might be inclined to lie to the police about his involvement in a criminal venture.⁵ David A. Perez, Comment, The (In)admissibility of False Confession Expert Testimony, 26 Touro L. Rev. 23 (2010). What Barros essentially asks this Court to do, in the context of a post-conviction relief application, is to decide whether Rhode Island should embrace such testimony. That broad invitation, however, is really not the issue. The pivotal question is whether trial counsel's *omission* to advance such expert testimony—when its admissibility was (and still is), at best, questionable—amounted to a constitutionally deficient misstep. It did not.

Nonetheless, this Court recognizes that in its May 12, 2014 bench decision denying Barros' motion for funds to hire such an expert, it was confronted with the

⁵ In Boyer v. Louisiana, the United States Supreme Court had a clear path to address the issue, but its initial grant of certiorari was jettisoned as improvidently granted, and the case was remanded for further consideration of speedy trial issues. 133 S. Ct. 1702 (2013) (mem.).

question of the admissibility of just that type of testimony. See State v. Morris, 744 A.2d 850, 855 (R.I. 2000) (defendant was properly denied public funds to hire an eyewitness identification expert because that expert's testimony would not have been admissible at trial); accord State v. Day, 898 A.2d 698, 707 (R.I. 2006). For the reasons stated in that May 2014 bench decision that such evidence would probably not have been allowed at Barros' trial, and for the several additional reasons set forth below, this Court finds that trial counsel was in no manner constitutionally deficient for not engaging a false confession expert.

At the outset, the Court notes that at an April 27, 2015 hearing, all three of Barros' trial attorneys testified that although they were aware of experts who could opine about false confessions, they each said that no consideration had been given to engaging one. Accordingly, cases which hold that counsel's tactical decisions generally do not invite a finding of deficiency are inapplicable here. E.g., Linde v. State, 78 A.3d 738, 747 (R.I. 2013). Query, in any event, whether trial counsel would have engaged such an expert even if they had entertained that option, as Assistant Public Defender DiLauro testified, "[T]here were things that Mr. Barros said during his interrogation that we know, in fact, were false. We didn't need an expert to point that out to us." (Tr. 41, Apr. 27, 2015.)

Notwithstanding the falsity of some aspects of Barros' confession, his recorded statement also contained significant truthful admissions. He conceded at the suppression hearing and at trial that he had been truthful when he acknowledged on tape that he knew and understood his Miranda rights and when he admitted that he unlawfully, for the third

time, possessed a firearm, a repeat offense which he knew would subject him to significant jail time.

As noted earlier, however, even if trial counsel had engaged a false confession expert, this Court would not have allowed the admission of such testimony. Several sensible reasons have been given for precluding an expert from offering a discourse about false confessions. In United States v. Adams, 271 F.3d 1236, 1245 (10th Cir. 2001), the Court identified some of them:

“We have said that ‘[t]he credibility of witnesses is generally not an appropriate subject for expert testimony.’ . . . There are a variety of reasons that evidence related to the credibility of a confession may be excluded. First, expert testimony which does nothing but vouch for the credibility of another witness encroaches upon the jury’s vital and exclusive function to make credibility determinations, and therefore does not ‘assist the trier of fact’ as required by Rule 702. . . . See also United States v. Call, 129 F.3d 1402, 1406 (10th Cir. 1997) (testimony concerning credibility is often excluded because it usurps a critical function of the jury, which is capable of making its own determinations regarding credibility). . . . Also, a proposed expert’s opinion that a witness is lying or telling the truth might be ‘inadmissible pursuant to Rule 702 because the opinion exceeds the scope of the expert’s specialized knowledge and therefore merely informs the jury that it should reach a particular conclusion’. . . . Yet another rationale for exclusion is that the testimony of impressively qualified experts on the credibility of other witnesses is prejudicial, unduly influences the jury, and should be excluded under Rule 403.”

Although Rhode Island has “been open to evidence of developments in science that would tend to assist the trier of fact,” State v. Wheeler, 496 A.2d 1382, 1388 (R.I. 1985), our courts have never invited a witness, much less an expert witness, to directly or inferentially comment on the credibility of another witness. State v. Tavares, 590 A.2d 867, 870 (R.I. 1991) (“[N]o witness, *expert or otherwise*, may testify that another witness is lying or faking.”) (emphasis added); accord State v. Haslam, 663 A.2d 902, 905 (R.I.

1995). And, most certainly, the Supreme Court has never criticized counsel for not having considered enlisting one. Chapdelaine v. State, 32 A.3d 937, 949 (R.I. 2011).

Many cases excluding such evidence have noted that not only would such testimony inevitably be prejudicial and unduly confusing, jurors are fully able to judge for themselves whether or not a confession has any indicia of reliability. In short, such determinations are not beyond the normal ken of jurors. In Rhode Island, for example, it has been ageless grist for jurors' mills to evaluate eyewitness identifications, despite the existence of sideline experts who profess that the factfinders need their assistance. State v. Porraro, 121 R.I. 882, 892, 404 A.2d 465, 471 (R.I. 1979); accord State v. Austen, ____ A.3d ____ (R.I. May 1, 2015) (No. 2013-77-A) at 14, n.11; State v. Werner, 851 A.2d 1093, 1099-1103 (R.I. 2004); State v. Martinez, 774 A.2d 15, 19 (R.I. 2001); State v. Sabetta, 680 A.2d 927, 932-33 (R.I. 1996); State v. Gardiner, 636 A.2d 710, 714 (R.I. 1994) (upholding exclusion on relevance grounds); State v. Gomes, 604 A.2d 1249, 1255-56 (R.I. 1992); see also Morris and Day, *supra*, at page 18 herein.

The same rationale that excludes eyewitnesses experts has been applied to exclude false confession experts. State v. Free, 798 A.2d 83, 95 (N.J. Super. Ct. App. Div. 2002) (holding that testimony by a false confession expert, like that of an eyewitness expert, was "unnecessary and inappropriate since the problems implicated were well within the knowledge of ordinary people"); State v. Davis, 32 S.W.3d 603, 609 (Mo. Ct. App. 2000) (disallowing testimony of false confession expert because it suffered the same inherent dangers of eyewitness identification experts); State v. Cobb, 43 P.3d 855, 869 (Kan. Ct. App. 2002) (criticizing the trial court's admission of false confession

testimony for the same reasons that the Kansas Supreme Court had earlier rejected eyewitness expert testimony).

Those and other courts have found that jurors simply don't need a psychologist to tell them why a suspect might lie to the police. Adams, 271 F.3d at 1246 (stating that why the defendant lied to the authorities was "precisely the type of explanation that a jury is capable of resolving without expert testimony"); Vance v. State, 383 S.W.3d 325, 344 (Ark. 2011) (upholding exclusion of false confession expert because his proffered testimony "was not beyond the ability of the jury to understand and draw its own conclusions"); People v. Walker, 930 N.Y.S.2d 347 (N.Y. App. Div. 2011) (similarly finding false confession expert's proffer was not beyond the ken of the average juror); Humphrey v. Riley, 731 S.E.2d 740, 745 (Ga. 2012) (stating that the "question of whether someone might be persuaded to give a false confession through persuasive interrogation techniques is 'not beyond the ken of the average juror,' and, therefore, the absence of expert testimony on that question would not be prejudicial"); Vent v. State, 67 P.3d 661, 670 (Alaska Ct. App. 2003) (Mannheimer, J. concurring) ("Dr. Leo's proposed testimony would not appreciably aid the jury because it was based on common sense rather than scientific expertise.").

What is gleaned from those and myriad other cases is that a defendant who challenges his confession at trial is provided with all the tools necessary to demonstrate his points to lay factfinders. In Cobb, the Kansas Court of Appeals said, "We find the reasoning of Davis and the Kansas cases regarding eyewitness identifications persuasive. The type of testimony given by [Dr.] Leo in this case invades the province of the jury and should not be admitted. Cross-examination and argument are sufficient to make the same

points and protect the defendant.” 43 P.3d at 869. The Davis Missouri court made that point in language directly applicable to Barros’ petition:

“Adapting the reasoning of the Supreme Court to this case, the fact that police interrogation may be persuasive or coercive does not leave defendant without protection if the trial court denies expert testimony on this topic. Cross-examination is an adequate tool to expose police conduct, and closing argument gives the defendant a forum to further develop his theory that interrogation techniques are coercive. The jury is capable of understanding the reasons why a statement may be unreliable; therefore, the introduction of expert testimony would be a superfluous attempt to put the gloss of expertise, like a bit of frosting, upon inferences which lay persons were equally capable of drawing from the evidence.

“The defendant had a full opportunity to cross-examine the police officers that interrogated him about their techniques. The jury heard testimony regarding the conditions of defendant’s interrogation, the length of time defendant was interrogated, the receipt and waiver of Miranda rights, and the content of the police questions and defendant’s statements. It was reasonable for the trial court to conclude that the jury could decide the issue of the statement’s reliability using its common knowledge. Consequently, the jury would not be aided by Dr. Leo’s testimony.” Davis, 32 S.W.3d at 609 (internal citations omitted).

Like Davis, Barros was not hindered from explaining and challenging the reliability of his statements. He apprised the jury of the circumstances surrounding the statements not only through other witnesses on direct and cross-examination, but also through his own testimony. In layman’s terms, the very principles that any false confession expert would have testified to, trial counsel emphatically argued to the jury. Indeed, the Supreme Court itself emphasized those very avenues in its affirmance of Barros’ conviction:

“[A] criminal defendant in Rhode Island is provided with ample procedural safeguards to ensure a fundamentally fair trial . . . In the context of a challenge to the voluntariness of a defendant’s inculpatory statements, . . . he or she is provided with the opportunity to present testimony regarding the circumstances of the interrogation; and, to the extent that his or her testimony about those circumstances differs from that

presented by witnesses for the prosecution, a defendant is also accorded ample opportunity to cross-examine those witnesses.” * * *

“Furthermore, we are satisfied that juries in this state routinely receive adequate instructions with respect to the voluntariness *vel non* of custodial interrogations—most notably because of our Humane Practice Rule, a rule which provides an important procedural safeguard with respect to the constitutional rights of criminal defendants. *See Dennis*, 893 A.2d at 261-62. Our Humane Practice Rules ‘requires that judge *and* jury make separate and independent determinations of voluntariness * * *.’ *Id.* at 262 (emphasis added). In other words, the Humane Practice Rule provides that any statement of a criminal defendant ‘may not serve as a basis for conviction unless *both* judge and jury determine that it was voluntarily made.’ *Id.* (emphasis in original). * * *

“[I]n Rhode Island’s adversarial system, it is the advocates who are to employ direct examination, cross-examination, closing argument, and other permissible means in order to seek to persuade the jurors as to the credibility (*vel non*) of witnesses (including the credibility of prosecution witnesses who testify about what transpired during a custodial interrogation). * * *

“We are persuaded that cross-examination remains an especially potent tool whereby the jury is provided with a meaningful basis upon which credibility assessments can be made; it is our belief that, when that tool is combined with effective direct examination and a well prepared closing argument, the jury is provided with an entirely sufficient basis for passing on the crucially important issue of credibility—an issue that is key to determinations of voluntariness.” 24 A.3d at 1165, 1167-68.

Dr. Richard A. Leo, Ph.D., J.D., a well-credentialed false confession theorist whose name is liberally sprinkled throughout these types of cases—and who is cited with deference by Barros’ own proposed credibility expert, Dr. Melissa B. Russano,⁶ has candidly acknowledged the shortcomings of the false confession studies: “It is therefore difficult, if not impossible, in some cases to authoritatively determine the underlying truth

⁶ Meisner, Hartwig and Russano, *The Need for a Positive Psychological Approach and Collaborative Effort for Improving Practice in the Interrogation Room*, 34 Law and Hum. Behav. 43-45 (2010); Evans, Compo and Russano, *Intoxicated Witnesses and Suspects: Procedures and Prevalence According to Law Enforcement*, 15 Psychol. Pub. Pol’y L. 194. Dr. Leo’s credentials are summarized in Vent, 67 P.3d at 667. His testimony was nonetheless excluded in that case.

or falsity of the confession.” Steven A. Drizin and Richard A. Leo, The Problem of False Confessions, 82 N.C. L. Rev. 891, 931 (2004) (citing Richard A. Leo & Richard J. Ofshe, The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation, 88 J. Crim. L. & Criminology 429, 431-32 (1998)). In State v. Rafay, 285 P.3d 83, 110-111 (Wash. App. 2012), pet. for review denied 299 P.3d 1171, cert. denied 134 S. Ct. 170 (2013), the Washington Court of Appeals upheld the trial court’s exclusion of Dr. Leo’s testimony, noting that he “has acknowledged that it is not currently possible even to estimate the incidence of police-coerced confessions or the number of resulting convictions. But it is undisputed that such confessions represent a miniscule sampling of all confessions.” 285 P.3d at 110-111. That court further quoted Dr. Leo’s concession that “[e]ven if an interrogation is [overtly] coercive, it still could produce a true confession. And so one can’t infer from the [interrogative] techniques that are used, . . . proper or improper, whether or not the confession is false.” Id. at 112.

A Michigan federal trial court, rejecting Dr. Leo’s proposed testimony, said that notwithstanding his expertise, “his theories are both unreliable and irrelevant to the facts of this case, and any limited probative value they might have is substantially outweighed by the potential dangers of undue prejudice and misleading the jury.” United States v. Deuman, 892 F. Supp. 2d 881, 886 (W.D. Mich. 2012). That court further explained:

“As Dr. Leo forthrightly admits, despite extensive research and review of false confession cases, his methodology cannot accurately predict the frequency and causes of false confessions. *See* Drizin & Leo, 82 N.C. L. Rev. at 931; *see also* *State v. Wooden*, No. 23992, 2008 WL 2814346, at *4 (Ohio Ct. App. July 23, 2008) (noting that Dr. Leo’s research ‘has not led to any concrete theories or predictors about when and why false confessions occur’). His theories cannot discern whether a certain interrogation technique, used on a person with certain traits or

characteristics, results in a predictable rate of false confessions. In addition, he has formulated no theory or methodology that can be tested Moreover, as Dr. Leo testified at the *Daubert* hearing, there is no way of knowing how frequently false confessions occur in the real world.

“The other side of the coin, of course, is that coercive interrogation techniques also result in true confessions, likely more frequently than false confessions. *See Wooden*, 2008 WL 2814346, at *4 (noting Dr. Leo’s testimony that ‘coercive techniques are also effective in inducing true confessions’) The impediment to more concrete analysis in this area is, as Dr. Leo explains, the absence of a reliable body of real-world data that can shed light on the extent of the problem of false confessions.” *Id.* at 886-87.⁷

Barros attempts to assure us that Dr. Russano “would not directly be commenting on whether [his] confession was true.” Brief at 9, n.7. Such assurances have proved ineffective and unattainable, however, because the very nature of such an expert’s testimony ineluctably trespasses upon the jury’s quintessential function of determining the trustworthiness and reliability of the evidence. *United States v. Jacques*, 784 F. Supp. 2d 59, 63 (D. Mass. 2011) (“Although Professor Hirsch offered reassurance that he would not directly opine on Defendant’s guilt or innocence, his proposed testimony amounted to just that.”); *United States v. Benally*, 541 F.3d 990, 995 (10th Cir. 2008) (finding expert’s false confession testimony not admissible because it inevitably would “encroach[] upon

⁷ *Accord People v. Polk*, 942 N.E.2d 44 (Ill. App. Ct. 2010) (agreeing with the Illinois trial court’s conclusion that Dr. Leo’s proposed testimony would have been of no assistance to a jury). Very recently, and largely for the same reasons that his testimony and that of other such experts have been rejected, Dr. Leo’s testimony was excluded in *Walker v. State*, No. CR-11-0241, 2015 WL 505356 (Ala. Crim. App. Feb. 6, 2015). *See Vent*, 67 P.3d at 670 (noting that one scholar had concluded that the study of false confessions was not “voodoo science” but that it was “not yet ready for ‘prime time’ either” (quoting Major James R. Agar, *The Admissibility of False Confession Expert Testimony*, 1999 Army Law 26, 42-43 (1999))). In *Riley v. State*, 604 S.E.2d 488, 494 (Ga. 2004), the Georgia Supreme Court noted the testimony of a psychologist who testified that “until a number of years go by and we know more, do more research” the false confession theory will not have “reach[ed] a verifiable . . . stage of scientific certainty.”

the jury's vital and exclusive function to make credibility determinations") (internal citations omitted); Commonwealth v. Hoose, 5 N.E.3d 843, 859-61 (Mass. 2014) (Although defendant's expert, whose testimony was excluded, "did not intend to opine either on the defendant's mental state during the police interview or on the veracity of [his] statements," she reviewed the defendant's statements and, nonetheless "opined on those false confession factors that were present in the defendant's case."); Commonwealth v. Alicia, 92 A.3d 753, 764 (Pa. 2014) (finding that general testimony by Dr. Leo regarding how certain interrogation techniques may induce false confessions "improperly invites the jury to determine that those particular interrogation techniques were used to elicit the confession in question").

In Davis, Dr. Leo had similarly been summoned to testify about interrogation techniques, how such techniques influence criminal suspects, and whether the techniques correlate to false confessions. In addition, he would have explained how and why false confessions occur and the principles to use to evaluate the reliability of a confession. 32 S.W.3d at 608. In refusing to permit the testimony, the Missouri court said:

"[S]uch testimony is inadmissible if it relates to the credibility of witnesses, for this constitutes an invasion of the province of the jury Dr. Leo testified as to a suspect's thought processes when interrogated under circumstances similar to the defendant's. Testimony that is *particularized to the circumstances* of the case is not generic credibility testimony; rather, *it is specific credibility testimony* that encroaches upon the jury's duty to determine the reliability of defendant's statement." (Emphasis added).

"Even when a witness does not literally state an opinion concerning the credibility of another witness, but his or her testimony would have the same 'substantive import,' such testimony is inadmissible." Haslam, 663 A.2d at 905.

Dr. Russano, according to Barros' proffer, would have explained the false confession theorem in the same impermissible fashion criticized in the above-referenced cases. Like Dr. Leo, she would have critiqued police interrogation techniques, explained the different types of false confessions, and identified the risk factors that she says lead to false confessions. She would have additionally discounted Miranda warnings as inadequate safeguards to avoid false confessions. Most tellingly, she would have identified "the presence of some risk factors regarding the interrogation of *Barros*." Br. at 9, n.7. The latter proffer, much less the rest of the offering, is precisely why such testimony should *not* be admitted, as it impermissibly trespasses upon the function of the jury. United States v. Antone, 412 F. App'x 10, 11 (9th Cir. 2011); Jacques, 784 F. Supp. 2d at 63.

Our cases are replete with caveats and admonitions that a witness may not offer an opinion concerning the truthfulness of the testimony of another witness. State v. Adefusika, 989 A.2d 467, 479 (R.I. 2010); State v. Tavares, 590 A.2d at 870. Here, Barros did testify and claimed that the police had lured him into making a false statement. The jury thus had a box seat from which to assess his claim that he was tricked into falsely confessing. Allowing an expert, who arrives on the stand with the gravity of authority, essentially to bolster such self-serving testimony and to advise the jury why someone in Barros' circumstances would confess falsely would be overwhelmingly prejudicial and would completely invade the jury's quintessential province of assessing credibility. Benally, 541 F.3d at 995.

Given the great number of cases rejecting such testimony, it can scarcely be said that trial counsel provided defective representation by not trying to wedge into the jury's deliberations expert advice on how to evaluate Barros' confession.⁸

Voir Dire of Trial Counsel

Barros also criticizes the voir dire efforts of trial counsel and complains that his inquiry of the venire was flawed because it did not sufficiently explore the area of false confessions. That criticism is wholly misplaced. It was the Court, not Barros' trial attorney, who refined the voir dire. No error can be assigned to trial counsel under such circumstances. See, Polk, 942 N.E.2d at 66-67 (upholding the trial court's precluding defense counsel from asking prospective jurors about their attitudes on false confessions).

Barros' trial counsel had ample latitude to impress upon the jurors that the defendant's case would focus on whether or not they would credit Barros' incriminating statements. He was not at all restricted from gaining the jurors' assurances that they

⁸ Many of the cases which Barros relies upon actually offer very little support. Several allowed expert testimony only because of a defendant's psychological defects, and not because those courts embraced the general credibility notions which Barros urges need expert explication. Miller v. State, 770 N.E.2d 763, 774 (Ind. 2002) (mental deficiency); Boyer v. State, 825 So.2d 418 (Fla. Dist. Ct. App. 2002) (debilitation from extended drinking); United States v. Vallejo, 237 F.3d 1008 (9th Cir. 2001) (severe language disorder); United States v. Hall, 93 F.3d 1337 (7th Cir. 1996) (identifiable personality disorder); United States v. Shay, 57 F.3d 126, 133-34 (1st Cir. 1995) (recognized mental disorder); Hannon v. State, 84 P.3d 320, 353 (Wyo. 2004) (low IQ). In those cases there was some room to allow expert testimony because it assisted jurors to understand mental disorders that raised questions regarding a defendant's cognitive voluntariness, medical topics which are typically outside the common knowledge and experience of lay jurors. Barros, on the other hand, suffered from none of those disorders which contributed to his decision to confess. See Benally, 541 F.3d at 996 (no medical disorder; experts excluded); accord Rafay, 285 P.3d at 111.

Even in cases of diminished mental capacity, courts have still excluded false confession proponents. Hoose, 5 N.E.3d at 862 (history of substance abuse, depression, brain injury and pain from recent suicide attempt); Flowers v. State, 208 S.W.3d 113 (Ark. 2005) (diminished IQ); Polk, 942 N.E.2d at 44 (low IQ).

would look carefully at the manner, means and circumstances of the defendant's statements before assigning any weight to them.

During voir dire, at pp. 45-47, 66 and 92, trial counsel said, with an intervening objection:

"MR. LOVOY: There is nothing linking him to the crime. The only evidence against Mr. Barros is the fact that he made a statement admitting to it. Now, Mr. Wagner, what do you think about that?

"A JUROR: Why would he make the statement if he didn't do it?

"MR. LOVOY: That's a question that I have. The question that many of you I'm sure have.

"Now, you're going to hear from Judge Krause that you have a duty to judge whether or not Tracey Barros has personally and voluntarily given up his right to remain silent and make a statement in this case, or whether or not it was coerced from him, whether or not pressure was put on him in order to have him make a statement. Now, Mr. Wagner, do you agree with me, sir, that a person charged with a criminal offense could have pressure put on him in order to force him to make a statement against his own interest?

"A JUROR: Some people maybe; but I wouldn't admit to anything I didn't do.

"MR. LOVOY: Okay. Anyone else feel like that? Okay.

"Now, in an interrogation room -- in this case you will hear that Mr. Barros was in an interrogation room for about ten hours, he was being questioned for a large part of that time by as many as three police officers, police officers, federal agents. Mr. Wagner, are you still steadfast in your belief?

"A JUROR: Yes.

"MR. LOVOY: Now, during this time period when Mr. Barros was in the police station in the interrogation room being questioned, there was a period, with the exception of ten or 12 minutes, that was unrecorded. We don't actually know what went on during that time period; and the result of this ten hours in the interrogation room, there was a 12 minute tape-recorded statement.

“MS. LARSEN: Your Honor, I object.

“THE COURT: I’m going to sustain the objection. I’m not going to have the case played out in a thumbnail fashion of factual renditions during voir dire. Set forth in Rule 24, very specific and particular issues are the subject of inquiry. This is not one of them.

* * *

“MR. LOVOY: Can you all promise Tracey Barros that you will be able to look at everything that happened prior to him making this statement and how it came to be that he was interrogated for this charge? Can you all promise me that?

“MR. LOVOY: Now, and, again, taking into account any pressures that were put to bear on him in order to have him waive his right to make a statement, now, when you sit in this case, you are the judges of the facts in this case. Judge Krause is the judge of the law. When you sit on this case, one of the things that you’re going to have to do, Judge Krause will tell you, as counsel alluded to earlier, you’re going to have to decide whether or not Tracey Barros freely and voluntarily gave up his rights. And if you decide that he did so, then you have to look at the statement itself and see whether or not the statement itself is reliable. Can you all promise me that you’ll do that?

* * *

“MR. LOVOY: Did you listen when I said you have a right to judge for yourself whether or not statements should be properly used against a defendant? You heard -- you heard the prosecutor ask you about whether or not a confession would be enough, if you believed it, to have you return a verdict of guilty. Would you promise the defendant that you would look into the circumstances surrounding as well as the contents of what the confession says as to whether or not you give it any reliability? Could you do that?”

Every replacement juror assured counsel that he or she had heard and understood counsel’s earlier inquiries. See United States v. Pimentel, 654 F.2d 538, 542 (9th Cir. 1981) (proper voir dire procedure to ask each replacement juror if they had any response to the questions already asked of the entire group). When the fourteen jurors had finally been seated, trial counsel pronounced his satisfaction with them. (Tr. at 120, 129.)

A defendant's right to a fair trial includes a guarantee that he will be judged by a panel of impartial, "indifferent" jurors. United States v. Orenuga, 430 F.3d 1158, 1162 (D.C. Cir. 2005) (internal citations omitted). That guarantee includes the right to be tried by jurors who are able to put aside any pre-existing biased impressions they may harbor and decide the case solely on the evidence produced during the trial. To that end, voir dire is the means by which to secure that right, "as it serves to screen out jurors whose personal views make them incapable of performing this function." Id.

The scope of voir dire is limned by Rule 24(a), Super. R. Cr. P., which allows examination of the venire to determine whether prospective jurors may be related to a party, have an interest in the case, or have formed an opinion or harbor a bias or prejudice in the action. State v. Lopez, 78 A.3d 773, 780 (R.I. 2013). Although latitude is allowed in the examination of potential jurors, there are limits. In discussing voir dire ground rules, the Lopez Court precluded defense counsel from questioning prospective jurors on the reliability of eyewitness identification and said:

"Although the trial justice may not hinder the attorneys' attempts to inquire into the objectivity of the prospective jurors, the scope of examination of prospective jurors . . . is within the sound discretion of the trial justice. . . . However, '[t]he exercise of [the trial justice's] discretion does not mean that [the trial justice] must permit every question *** that can be devised by an ingenious attorney. *** It is well settled that questioning during voir dire should not be 'argumentative, cumulative or tangential.'" Id. (internal quotations omitted).

Additionally, as occurred here and properly objected to, trial attorneys may not attempt to try the case during voir dire, nor may they attempt to elicit a commitment from jurors how they would react to hypothetical facts. State v. Holmquest, 243 S.W.3d 444, 451 (Mo. Ct. App. 2007); see State v. Hughes, 494 A.2d 85, 91 (R.I. 1985) (purpose of voir dire "is merely securing a competent, fair, and unprejudiced jury and not eliciting

evidence that can be used at trial”). Accordingly, counsel may not seek to predispose jurors to react a certain way to anticipated evidence or attempt to indoctrinate them regarding the existence of mitigating circumstances.

The inquiry also precludes counsel’s efforts to extract from jurors their potential positions or views on propositions of law, theories of proof, affirmative defenses, and premature viewpoints on professed evidence which has yet to be produced. Commonwealth v. Perea, 381 A.2d 494, 497 (Pa. Super. Ct. 1977), cited with approval in Hughes, 494 A.2d at 91. See State v. Johnson, 119 R.I. 749, 761, 383 A.2d 1012, 1019 (1978) (voir dire restricted regarding insanity defense); Orenuga, 430 F.3d at 1163 (rejecting defense counsel’s question regarding prospective jurors’ attitudes toward the defense of entrapment); Commonwealth v. Chandler, 460 N.E.2d 210, 211 (Mass. App. Ct. 1984) (efforts to limit the weight jurors might give to flight not appropriate for voir dire and should be reserved for jury instructions or argument); People v. Dunum, 537 N.E.2d 898, 964 (Ill. App. Ct. 1989), appeal denied 545 N.E.2d 118 (Ill. 1989) (refusing questions relating to the law of self-defense); State v. Frederiksen, 700 P.2d 369, 372 (Wash. Ct. App. 1985), review denied 104 Wash. 2d 1013 (Wash. 1985) (specific questions concerning jurors’ general attitudes about self-defense excluded); Jackson v. State, 881 So.2d 711, 714 (Fla. Dist. Ct. App. 2004) (precluding defense from extracting an advance commitment on what juror’s decision would be if no scientific evidence, DNA or fingerprints were produced); see Wharton’s Criminal Procedure §§ 419-420 (8th ed. 1991).

To the extent that this Court placed some restrictions on trial counsel’s inquiry, those limitations were entirely consistent with those holdings and the purpose of Rule

24(a). In any event, trial counsel was allowed to make a completely fair and reasonable inquiry of the jurors regarding Barros' custodial statements, and he made entirely clear to the panel that their assessment of the circumstances surrounding those statements would be the centerpiece of his case. Further, Barros was not in any way limited from that goal during a thorough cross-examination of the State's witnesses, his own testimony, and during counsel's closing argument. Additionally, the Court offered wide ranging witness credibility instructions, including one which included the Humane Practice Rule. Barros, 24 A.3d at 1167. That the jurors ultimately delivered an adverse verdict after a two-week trial is in no way a reflection of deficient efforts by trial counsel during voir dire.

Appellate Counsel

Lastly, Barros faults the Public Defender's appellate attorneys for not raising on direct appeal this Court's voir dire restrictions. Barros misconstrues the import of the Court's voir dire directives. The limitations were not as to the information sought but simply in the manner of asking. Moreover, any such refinements in no way hamstrung counsel's efforts to ensure that prospective jurors understood that they would need to focus on the circumstances surrounding the defendant's custodial statements.

In any event, it is settled that appellate counsel "need not (and should not) raise every nonfrivolous claim, but rather may select among them in order to maximize the likelihood of success on appeal." Page v. State, 995 A.2d 934, 943 (R.I. 2010), quoting Chalk v. State, 949 A.2d 395, 399 (R.I. 2008):

"This Court has further stated that, in order to satisfy both prongs of the Strickland analytical scheme with respect to a claim that counsel's omission of an issue constituted the ineffective assistance of appellate counsel, 'an applicant must demonstrate that the omitted issue was not only meritorious, but 'clearly stronger' than those issues that actually were raised on appeal.'" Id. at 943-44 (quoting Chalk, 949 A.2d at 399).

The key issue of Barros' appeal, and the one which prompted a number of *amicus* briefs, was not the failure of trial counsel to engage an expert witness or to quiz the prospective jurors about false confessions; rather, it was the failure of the police to record the entirety of the defendant's interview, as well as the voluntariness of his taped statement.

If Barros believes that the Supreme Court was unaware of the false confession issue or foreclosed from considering it, he is simply wrong. The Innocence Network from New York City filed a lengthy *amicus* brief, much of which was devoted to urging the Supreme Court to consider the false confession issue.⁹ Indeed, Barros' appellate counsel expressly embraced the false confession theory contained in that *amicus* filing. Reply Brief at pages 7-8.

In any event, this Court is not in the best position to assess the efficacy of appellate counsel. Whether or not appellate counsel's performance passes muster under the Strickland test is more appropriately left to the Supreme Court for its own *de novo* review. Page, 995 A.2d at 942.

* * *

For all of the foregoing reasons, Barros' application for post-conviction relief is denied.

⁹ Many of the citations within that brief refer to Dr. Leo's opinions, which, as noted herein, have been rejected by numerous courts.



RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE: **Barros v. State of Rhode Island**

CASE NO: **PM/11-5771**

COURT: **Providence County Superior Court**

DATE DECISION FILED: **May 18, 2015**

JUSTICE/MAGISTRATE: **Krause, J.**

ATTORNEYS:

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