STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

KENT, SC. **SUPERIOR COURT**

(FILED: March 7, 2018)

GERARDO MARTINEZ,	:	
	:	
Petitioner,	:	
	:	
v.	:	**Case No. KM-2013-0095**
	:	
STATE OF RHODE ISLAND,	:	
	:	
Respondent.	:	

DECISION

MONTALBANO, J. This matter is before the Court for decision following a hearing on the application of Gerardo Martinez (Petitioner or Martinez) for postconviction relief. Petitioner claims that he did not receive effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution, and article I, section 10 of the Rhode Island Constitution. The Court exercises jurisdiction pursuant to G.L. 1956 §§ 10-9.1-1 and 10-9.1-2.

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Facts and Travel

The facts underlying this case are set forth in *State v. Martinez*, 59 A.3d 73 (R.I. 2013) and are incorporated by reference herein. On September 13, 2005, Martinez committed the appalling, brutal murder of Lindsay Ann Burke. To this day, he does not deny doing so. *See* Application for Post Conviction Relief (Application); *see also Martinez*, 59 A.3d at 94. On January 26, 2007, in K1-2005-0570A, a jury convicted Martinez of first-degree murder and driving a motor vehicle without the consent of the owner. *See* Application; *Martinez*, 59 A.3d at

82. The jury further found that the murder was committed with both aggravated battery and torture of Ms. Burke.[1] *Martinez*, 59 A.3d at 83.

The trial justice then held a presentence hearing at which Martinez's defense counsel, Mark L. Smith, Esq. (Attorney Smith or trial counsel), presented the testimony of Ronald M. Stewart, M.D. (Dr. Stewart), a clinical and forensic psychologist. *Id.* Dr. Stewart diagnosed Martinez with post-traumatic stress disorder, chronic major depressive disorder, panic disorder, and alcohol abuse disorder. *Id.* Dr. Stewart testified that Martinez was contrite about his crime. *Id.* Ultimately, Dr. Stewart opined that Martinez could be rehabilitated and would not be a recidivist. *Id.* His opinion was rendered notwithstanding the fact that Martinez had a "lengthy history as a violent domestic abuser." *Id.* at 93; *see also id.* at 83.

Nevertheless, the trial justice found that any mitigating factors applicable to Martinez were outweighed by "his lack of true remorse or acceptance of responsibility . . . ." *Id.* at 84. The trial justice characterized the evidence of Martinez's medical conditions as a "shallow attempt[] to blame others" for the "vile, heinous[,] and completely unnecessary[,] unjustified slaying." *Id.* at 83. Citing the minutes of "horror" and the "inordinate number of wounds" Martinez inflicted on Ms. Burke while she was still alive and able to feel them, the trial justice agreed with the jury that the murder involved torture and aggravated battery. *Id.* at 84. The trial justice believed Martinez's potential for rehabilitation to be "extremely poor." *Id.* Accordingly, and noting his likely futile desire to deter societal domestic violence, the trial justice sentenced Martinez to life imprisonment without the possibility of parole for Ms. Burke's murder. *Id.* The Rhode Island Supreme Court affirmed the conviction and imposition of that sentence. *Id.* at 95.

[1] When a jury finds that either of these two elements is present, the trial justice may impose a sentence of life imprisonment without the possibility of parole. G.L. 1956 § 11-23-2.

On February 6, 2013, Petitioner filed the instant Application seeking vacation of his conviction and a new trial. As grounds for such relief, Petitioner raises several issues. Petitioner claims that his trial counsel was ineffective by (1) failing to obtain qualified experts to testify on Petitioner's behalf; (2) failing to present a diminished-capacity defense; (3) failing to present any defense to the jury; (4) failing to adequately prepare for a speedy trial, failing to adequately cross-examine State witnesses, and failing to have Petitioner timely evaluated and diagnosed; (5) failing to obtain a forensic pathologist to aid the defense in cross-examining the State's pathologist and failing to allow Petitioner to testify; and (6) failing to take defense strategy in the direction promised to Petitioner and his family, thus not presenting the jury with evidence that the Petitioner suffered from Post-Traumatic Stress Disorder (PTSD). Petitioner also contends that his appellate counsel was ineffective by not properly raising or arguing all issues.

Petitioner's counsel provided a summary of the issues set forth in the petition for postconviction relief—narrowing them down to three. *See* Pet'r's Mem. in Supp. of Pet. for Post-Conviction Relief (Pet'r's Mem.) at 22-23. First, Petitioner asserts that his trial counsel failed to provide effective assistance guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and article I, section 10 of the Rhode Island Constitution when he failed to secure experts to testify on Petitioner's behalf at trial. *Id.* at 22. Secondly, Petitioner alleges that his trial counsel was ineffective in failing to pursue the defense of diminished capacity "as promised to the defendant and his family[2]," and that a diminished capacity defense should have been used regarding murder in the first degree with specific intent. *Id.* Lastly, Petitioner contends that his trial counsel failed to provide effective assistance of counsel because

[2] With regard to alleged promises as to trial strategy made by trial counsel to the Petitioner and his family, there is no meaningful discussion or legal briefing thereof, and the record of the evidentiary hearing in this matter includes no reference to this issue in either the State's direct examination of Attorney Smith or in the Petitioner's cross-examination of Attorney Smith.

trial counsel did not put forth a defense for the jury to consider in their deliberations in violation of Petitioner's Sixth and Fourteenth Amendment rights.

Central to these overlapping claims is one issue: whether trial counsel was ineffective by deciding to forego a defense of diminished capacity.[3] The gravamen of Petitioner's argument is that his trial counsel should have presented such a defense because it would have negated the requisite intent for first-degree murder. Attorney Smith's decision not to do so, according to Petitioner, resulted in Petitioner's first-degree murder conviction. Consequently, Petitioner maintains that he was denied his constitutional right to effective assistance of counsel in violation of the Sixth and Fourteenth Amendments of the United States Constitution.

Upon instituting these postconviction relief proceedings, Petitioner was afforded court-appointed counsel. *See* § 10-9.1-5. Two attorneys withdrew from representing Petitioner. Eventually, on April 1, 2015, Kenneth C. Vale, Esq. (appointed counsel) entered his appearance on behalf of Petitioner. However, Mr. Vale, too, moved to withdraw on November 3, 2015. "After a thorough and conscientious examination," appointed counsel found the issues raised by Petitioner in his Application "to be wholly frivolous, without merit, and neither supported by existing law, nor by a good faith argument for the extension, modification, or reversal of existing law." (Mot. to Withdraw.)

[3] Petitioner's only claims not related to this issue—those of inadequate preparation for a speedy trial and ineffective assistance of appellate counsel—were not pressed, briefed, or discussed. The Court was not presented with any evidence in furtherance of either of those claims and therefore will not address them. *Cf. State v. Florez*, 138 A.3d 789, 798 n.10 (R.I. 2016) (considering an appellate issue to be waived when there is no meaningful discussion or legal briefing thereof because "[i]t is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones" (quoting *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990))). The remaining claims are at least tangentially related to the main issue, and thus they will be considered subsumed therein. *See* § 10-9.1-6(a) ("In considering the application [for postconviction relief] the court shall take account of substance regardless of defects of form.").

In support thereof, appointed counsel submitted an extensive *Shatney* "no-merit" memorandum detailing his efforts to pursue Petitioner's claims and why those issues lack merit.[4] Appointed counsel first outlined Petitioner's allegations, enumerated above, which amount to a claim "that he received ineffective assistance of counsel because he disagrees with strategic choices made by defense counsel." (Mem. in Supp. Mot. to Withdraw 7.) Specifically, Petitioner disagrees with "[trial] counsel's decision to utilize Dr. Stewart as a defense witness at the sentencing hearing to testify on the issue of [Martinez's] potential for rehabilitation—rather than presenting a diminished[-]capacity defense at trial." *Id.* Appointed counsel then discussed trial counsel's representation of Petitioner, concluding that "[f]rom a thorough and objective review of this file, it is abundantly clear that Attorney Smith was more than adequately prepared to try this case[.]" *Id.* at 8. Appointed counsel included a list and description of precisely each

[4] In *Shatney v. State*, 755 A.2d 130 (R.I. 2000), our Supreme Court adopted the following procedure under which court-appointed counsel may be allowed to withdraw from representing a postconviction relief applicant:

> "[U]pon notice to the applicant, counsel for an applicant may request permission from the court to withdraw, based upon an assessment that the application has no arguable merit. To do so, however, appointed counsel must file with the court and serve upon the applicant a motion to withdraw accompanied by a 'no-merit' memorandum that details the nature and extent of his or her review of the case, lists each issue the applicant wished to raise, and explains why in counsel's professional opinion those issues and any others that he or she may have investigated lacked merit. The court then must conduct a hearing with the applicant present. If, based upon its review of counsel's assessment of the potential grounds for seeking post-conviction relief and of any other issues that the applicant wishes to raise, the court agrees that those grounds appear to lack any arguable merit, then it shall permit counsel to withdraw and advise the applicant that he or she shall be required to proceed pro se, if he or she chooses to pursue the application." *Id.* at 135.

motion, argument, and decision trial counsel made before, during, and after the trial. *See id.* at 8-11.

At that point, appointed counsel stated the requirements of *Shatney* and affirmed his compliance therewith. *See id.* at 12-13; *see also Shatney*, 755 A.2d at 135, 136-37. His efforts were substantial and culminated in his professional opinion that Petitioner's Application was frivolous and lacked merit. *See* Mem. in Supp. Mot. to Withdraw 13-14. Nevertheless, appointed counsel proceeded to discuss his research validating such a conclusion. After setting forth the standard of review for ineffective assistance of counsel claims, appointed counsel undertook a lengthy, thorough analysis of case law and the issues raised by Petitioner. *See id.* at 14-73.

Ultimately, appointed counsel believed that trial counsel made a sound strategic decision in employing Martinez's mental health diagnoses to seek leniency at sentencing, rather than as a defense at trial. *Id.* at 53, 61, 63. Appointed counsel also professed that he found Petitioner's claim that trial counsel was ineffective in failing to call an expert witness to be meritless, as it was not supported by the record. *Id.* at 67. Finally, appointed counsel opined that it was wise for trial counsel to advise Martinez not to testify given his unapologetic remarks at sentencing. *Id.* at 72-73. In conclusion, appointed counsel asserted that "Attorney Smith's representation was in no way ineffective, deficient, or prejudicial . . . ." *Id.* at 76. After all, even the trial justice had commended Attorney Smith for his excellence in defending Martinez. *Id.* at 73.

Following a hearing on December 15, 2015, this Court granted appointed counsel's motion to withdraw, entering an order to that effect on April 7, 2016. Once a court permits an appointed attorney to withdraw from representing a postconviction relief applicant, it was the normal course of procedure for the court to "advise the applicant that he or she shall be required

to proceed pro se, if he or she chooses to pursue the application." *Shatney*, 755 A.2d at 135.[5] Ordinarily, pursuant to § 10-9.1-6(b), the court could then summarily dismiss the meritless application without an evidentiary hearing, '"so long as an applicant is provided with an opportunity to respond to the court's proposed dismissal."' *Tassone v. State*, 42 A.3d 1277, 1285 (R.I. 2012) (quoting *Brown v. State*, 32 A.3d 901, 909 (R.I. 2011)); *see also Shatney*, 755 A.2d at 133 (stating that "the post-conviction relief statute provides that the court may dismiss an application on the pleadings if, after reviewing the application, the answer or motion, and the record, the court determines that it lacks merit" (citing § 10-9.1-6(b))).

Here, however, the Court was faced with another requirement. In *Martinez*—Petitioner's appeal to the Rhode Island Supreme Court—the Court emphasized, "We cannot overstate the gravity of a sentence of life imprisonment without the possibility of parole. It 'is the most severe sentence authorized by Rhode Island law.'" 59 A.3d at 90 (quoting *State v. Carpio*, 43 A.3d 1, 13 (R.I. 2012)). For that same reason, our Supreme Court pronounced a new rule in *Tassone*: "In light of the severity of this sentence, we hold, therefore, that from this point forward, an

[5] In *Shatney*, the Supreme Court remanded the case to the Superior Court for the appointment of new counsel. 755 A.2d at 136. If the newly appointed counsel were to agree that the postconviction relief application lacked merit, then counsel would be required to follow the newly established procedure calling for a "no-merit" memorandum and a motion to withdraw. *Id.* The Supreme Court further instructed:

> "The court shall then conduct a hearing with the applicant present and, after affording the applicant and the attorney an opportunity to be heard on whether any arguable basis exists to proceed with the application, the court shall either (1) agree to allow appointed counsel to withdraw and advise the applicant to proceed pro se based upon the court's assessment that counsel's position appears to be justified, or, (2) if the court does not agree that the application appears to be meritless, it shall deny the motion to withdraw and direct that counsel proceed with the application or, alternatively, (3) grant the withdrawal request and appoint new counsel to do so." *Id.* at 136-37.

evidentiary hearing is required in the first application for postconviction relief in all cases involving applicants sentenced to life without the possibility of parole." 42 A.3d at 1287; *see also Davis v. State*, 124 A.3d 428, 428-29 (R.I. 2015) (mem.).[6] Accordingly, given that Petitioner was sentenced to life imprisonment without the possibility of parole and that this is his first application for postconviction relief, this Court held an evidentiary hearing on the merits of Petitioner's ineffective assistance of counsel claims.[7]

The following facts were adduced at the three-day evidentiary hearing beginning on July 31, 2017. Attorney Smith has been litigating in Rhode Island since 1973. He has handled close to 1000 criminal cases, trying close to 300. (Hr'g Tr. 44, 45.) Approximately one-quarter of the cases he has handled involved capital crimes, and he tried about one-half of those. All in all, Attorney Smith testified that he had tried at least forty murder cases prior to this one. In each case, he was called upon to make strategic decisions about the best possible defense. In this case, grasping the "extremely difficult" nature of the facts, Attorney Smith's decision-making was influenced accordingly. Hr'g Tr. 46:3-23.

Attorney Smith learned of the difficult facts of the case through discovery. He reviewed everything—each and every document—he received from the State. Attorney Smith received a

[6] At the time this Court held its evidentiary hearing, our Supreme Court had not yet decided *Motyka v. State*, 172 A.3d 1203 (R.I. 2017). There, the Court held that "*Shatney v. State*, 755 A.2d 130 (R.I. 2000)[] shall be deemed abrogated and inapplicable in any case involving both an initial application for postconviction relief and an applicant who has been sentenced to life without the possibility of parole." *Id.* at 1208. Nonetheless, because this Court held a three-day evidentiary hearing and appointed new counsel to represent the Petitioner after his former attorney's motion to withdraw was granted, this Court is satisfied that it is in full compliance with the procedure set forth in *Motyka*.

[7] The Court appointed William V. Devine Jr., Esq. (hearing counsel) to represent Petitioner at the hearing. *See Shatney*, 755 A.2d at 137 (allowing the Superior Court, after granting an attorney's motion to withdraw as a result of his or her no-merit memorandum and a hearing thereon, to appoint new counsel to proceed with the application). The Court also granted Petitioner's request for funds to hire a forensic expert in the field of forensic psychology. *See* § 10-9.1-5.

large group of photographs which showed the result of that fateful day. He testified that "[w]ithout question" the pictures factored into the decisions he made going forward regarding how to best defend Petitioner. *Id.* at 47:23-48:1. The graphic photographs told the whole story.[8] The altercation had begun in the living room when Petitioner punched Ms. Burke in the nose, as evidenced by the blood droplets on the couch and in a circular pattern on the floor. *See* State's Exs. B & J. Attorney Smith could tell that Ms. Burke then moved to the bathroom due to the bloody tissues in the bathroom wastebasket. *See* State's Ex. C. It was also evident that Ms. Burke suffered the fatal blow while she was on the toilet because of the "huge massive hemorrhage" on the floor and the transfer stain on the toilet. *See* Hr'g Tr. 51:3-5; *see also* State's Ex. F. The blood in front of the toilet and the two arcs of blood on the wall indicated that she had moved after her jugular vein was severed. *See* State's Ex. G. The picture of Ms. Burke's new love interest that had been in her pocketbook in the living room was found in the bathroom sink, showing that Petitioner had been in a fit of rage and jealousy. *See* State's Ex. D. After he killed Ms. Burke, Petitioner put her in the bathtub and covered her with a blanket and stuffed animal. *See* State's Exs. H & I.

Attorney Smith analyzed the information he received and tried to determine how to "soften" the impact of the photographs on the jury. Hr'g Tr. 55:9-13. He testified that he felt the whole case would be over as soon as the pictures were shown. *Id.* In that regard, he tried to come up with the best approach for the jury to understand how this brutal killing took place. *Id.* at 55:13-16. In Attorney Smith's opinion, a defense that Petitioner suffered from PTSD would not go over well with the jury. *Id.* at 55:16-56:2. Further complicating the matter was the confession video Petitioner recorded after the murder. *See* State's Ex. M. In the video,

[8] The testimony of criminologist Walter Williams at Petitioner's trial also helped Attorney Smith in arriving at the assessment he recounted at the present hearing.

Petitioner appeared calm, cool, and collected while apologizing for killing Ms. Burke and making excuses for doing so; he then went to the bank and withdrew money. *See* Hr'g Tr. 56:17-25.

Consequently, Attorney Smith needed to find some other way to convince the jury that the killing was second-degree murder rather than first-degree murder. There was no question that Petitioner killed Ms. Burke—he admitted as much on videotape. Attorney Smith's only goal was to secure a second-degree murder conviction for his client. *Id.* at 57:14-16. He believed that the best defense to accomplish this goal was that the murder was a crime of passion, not premeditated. *Id.* at 57:10-13. Attorney Smith would attempt to demonstrate to the jury that Petitioner was a "very jealous" man, that Ms. Burke was "foolish enough" to keep a photograph in her purse of the new object of her affection, and that Petitioner snapped when he found the picture. *Id.* at 56:2-8, 60:24-61:6. The confession video Petitioner recorded after the murder and the purported suicide note Petitioner penned before attempting to take his own life both had language that could help Attorney Smith make such an argument: Petitioner "snapped" when he found out that Ms. Burke had lied to him and cheated on him, and he could not deal with the feeling that he had been "f***ed over" yet again. *See* State's Exs. M & N.

While Attorney Smith considered the crime of passion argument to be Petitioner's best possible avenue to convince the jury that a second-degree murder conviction was appropriate in this case, he was also extremely concerned that the diminished-capacity defense was going to present significant risk to the Petitioner if presented to the jury. However, that is not to say that Attorney Smith failed to consider a diminished-capacity defense in this case. When Attorney Smith first met with Petitioner—before Petitioner had been indicted and thus before they had received discovery—he instructed Petitioner to sign a medical release form. Thereafter,

Attorney Smith sent requests for medical records to three of Petitioner's medical providers. *See* Pet'r's Exs. 2, 3 & 4. Although he did not start to develop a theory of defense right away, Attorney Smith gathered and reviewed the medical records because he knew "they were important." Hr'g Tr. 9:8-11. Once he received discovery and "got [his] arms around the evidence," he began to think about the best way to go about defending Petitioner. *Id.* at 10:24-11:13.

At some point, Attorney Smith considered employing the services of an expert witness. He first needed to discuss with a psychiatrist whether a defense of diminished capacity was a viable one. To that end, he spoke with Dr. Stewart. Attorney Smith does not recall when he first engaged Dr. Stewart, but Dr. Stewart was hired sometime after October 2006. *See* Pet'r's Exs. 5, 6 & 7. Attorney Smith and Dr. Stewart had a conversation regarding whether it would be worthwhile to utilize a forensic psychiatrist in Petitioner's defense. Attorney Smith testified that he "believe[d]" he received a report from Dr. Stewart before the trial. Hr'g Tr. 16:16-18. In fact, Attorney Smith received two reports from Dr. Stewart—one dated March 12, 2007 and the other dated April 9, 2007. *See* Pet'r's Exs. 9 & 10. The two different reports addressed guilt and mitigation, respectively. *See id.* Clearly there were two reports with two dates, both addressed to Attorney Smith after the trial had concluded. However, Attorney Smith met with Dr. Stewart in person to discuss the case before trial. They discussed what Attorney Smith was attempting to do, and Attorney Smith provided Dr. Stewart with the records from Petitioner's other medical providers. According to Attorney Smith, they "definitely" had "significant" conversations before trial which factored into Attorney Smith's decision not to use Dr. Stewart in the defense-in-chief. Hr'g Tr. 25:15-19, 35:20-36:1.

Attorney Smith had a significant concern about having Dr. Stewart testify at trial. He was concerned that evidence from the State showing Petitioner's previous abuse of Ms. Burke, as well as his abusive relationships with his ex-wife and ex-girlfriend, would be admissible. The testimony of Dr. Stewart would have opened the door for this evidence to be admitted at trial. Attorney Smith explained his concern as follows: If Dr. Stewart's opinion was based on X history, the prosecutor could cross-examine him as to whether his opinion would change if he knew about facts Y and Z. *Id.* at 26:3-11. In that way, the fact that Petitioner was assaultive not only to Ms. Burke on multiple occasions, but also physically and sexually abusive in other relationships, would be heard by the jury even if Dr. Stewart answered the prosecutor in the negative. *Id.* at 26:12-23. Attorney Smith testified that he "would be a fool" to allow such evidence to come in that way—it would have been "suicide" for Petitioner's case. *Id.* at 26:23-27:8.

Consequently, approximately one month to six weeks before Petitioner's trial began in January 2007, Attorney Smith made the decision not to use an expert psychiatrist or put forth a diminished-capacity defense at trial. *Id.* at 17:5-12. Rather, he would use Dr. Stewart's opinion for mitigation at sentencing. The most influential factor in his decision was the basic evidence against Petitioner. *Id.* at 17:13-23. Also as part of his decision-making process, Attorney Smith spoke with Robert Mann. Mr. Mann is a highly respected criminal defense attorney who has tried difficult forensic psychiatric cases, so he understood exactly what the dilemma was. *Id.* at 65:5-17. Mr. Mann advised Attorney Smith that, in his opinion, the evidence of Petitioner's prior domestic violence against Ms. Burke and other women was such that impeachment of the expert psychiatrist could be devastating. *Id.* at 17:24-18:5. Thus, based on his experience, Mr.

Mann suggested that evidence of Petitioner's mental health diagnoses would be put to better use as mitigation in the sentencing phase of the case. *Id.* at 18:5-10, 65:18-19.

Despite Attorney Smith's pretrial efforts to exclude evidence of Petitioner's history of domestic violence, some of that evidence was nevertheless admitted at trial pursuant to Rule 404(b) of the Rhode Island Rules of Evidence (Rule 404(b)).[9] Nonetheless, Attorney Smith testified that even in hindsight, such an outcome still would not have changed his decision not to have Dr. Stewart testify at trial because then the evidence would have been presented to the jury twice and would serve as reinforcement of Petitioner's prior bad acts. *Id.* at 28:1-12. In addition, Attorney Smith was successful in excluding certain Rule 404(b) evidence through motions in limine; Dr. Stewart's testifying would have made those previously off-limit topics ripe for cross-examination. *Id.* at 63:18-64:23. Lastly, if Attorney Smith were to have used the psychiatric evidence at trial—and the jury nonetheless rejected the lesser-included offense and found Petitioner guilty of first-degree murder—the trial justice would have been less likely to weigh it favorably at sentencing since the jury had already heard and rejected it. *Id.* at 65:20-24. Instead, Attorney Smith believed the psychiatric evidence would have a greater mitigating effect if the trial justice were to hear it for the first time at sentencing. *Id.* at 65:25-66:1. Consequently, even though Dr. Stewart prepared a report concluding that, in his expert opinion,

[9] Rule 404(b) provides:

> "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or to prove that defendant feared imminent bodily harm and that the fear was reasonable." R.I. R. Evid. 404(b).

Petitioner could not have formed the requisite intent to be guilty of first-degree murder, Attorney Smith made a strategic decision before the trial not to use that testimony. *See* Pet'r's Ex. 10.

It was not only Attorney Smith's conversations with Dr. Stewart that led to the conclusion not to use him in the defense-in-chief, it was the basic evidence itself. Attorney Smith's only strategic objective was to obtain a second-degree murder conviction, and he decided that the best avenue to accomplish this objective was with a "crime of passion" argument. Hr'g Tr. 37:8-24. Using medical evidence to attempt to negate Petitioner's intent would not have assisted Attorney Smith in his pursuit of that strategy in his closing argument. *Id.* at 37:25-38:2, 38:11. His trial strategy was based on Petitioner's nature and the on-and-off relationship he had with Ms. Burke. Attorney Smith described Ms. Burke as the "moth who wanted to fly close to the flame"; she had found a new, incarcerated paramour but continued the status quo with Petitioner, despite the previous abuse she incurred at his hands. *Id.* at 38:12-39:12. As Attorney Smith described it, the problem with that strategy was that the altercation began in the living room before fatally and tragically ending in the bathroom—it was "more than a mere moment." *Id.* at 39:12-18, 56:8-12. Attorney Smith thought his argument would be discredited, and the jury confused, by telling the jury that just in case it did not believe that the murder was a crime of passion in the heat of the moment, there was medical evidence proving that Petitioner had been mentally ill at the time he killed Ms. Burke. *Id.* at 39:18-40:4. It was necessary for Attorney Smith to pick one trial strategy and pursue it, and that is precisely what he did.

In an attempt to portray Attorney Smith's strategic decision as the wrong one, Petitioner offered the testimony of Helen Sheehan. Ms. Sheehan was Petitioner's psychotherapist from April 4, 2005 until September 12, 2005. The general theme of their eighteen therapy sessions

was Petitioner's depression. Petitioner's biggest concerns were his separation from his children and his troubles with the court system. He talked about his anger toward others, but Ms. Sheehan testified that he seemed mostly sad and helpless. *Id.* at 80:8-12. When he first began treatment, Petitioner described his issues to be anxiety and panic attacks, suffering losses, including a stillborn child, not seeing his children often and enduring abuse while growing up. Ms. Sheehan treated him with cognitive behavioral therapy (CBT).[10]

At his second-to-last therapy session on August 29, 2005, Petitioner presented feeling helpless and angry. *See* Pet'r's Ex. 11. He relayed to Ms. Sheehan that he had gotten into an argument with his girlfriend because she was late; in response, Petitioner threw her clothes and knocked her jewelry off the bureau. *Id.* Ms. Sheehan next held a therapy session with Petitioner two weeks later—the day before Ms. Burke's murder. He was experiencing anger and embarrassment as a result of being called a liar. *Id.* According to Ms. Sheehan, Petitioner's Global Assessment of Functioning score of sixty indicated he was "functioning pretty well" that day. *See id.*; Hr'g Tr. 79:12-15. Ms. Sheehan never treated Petitioner again.

Petitioner's final witness at the hearing was John P. Parsons, Ph.D. (Dr. Parsons). Dr. Parsons was qualified as an expert in psychology. Dr. Parsons completed a forensic evaluation of Petitioner between October 17, 2016 and February 4, 2017, meeting him five times at the maximum security facility of the ACI. Each visit lasted two to three and one-half hours. Dr. Parsons explained that a forensic evaluation entails reviewing the patient's records and securing as much collateral information as possible before reaching a conclusion. Hr'g Tr. 87:6-17.

[10] The underlying premise of CBT is that everyone has internal dialogues. The aim of CBT is to teach the patient to engage in positive internal dialogues by reinforcing that not everything is black and white, by talking about rational versus irrational thoughts and reactions, learning ways to ground oneself, and developing coping skills and mechanisms. Hr'g Tr. 76:25-77:10.

The first step in Dr. Parsons' evaluation was speaking with Petitioner's hearing counsel. From that conversation, Dr. Parsons learned that Petitioner's presenting problem was that he was imprisoned at the ACI and wanted postconviction relief. Next, at the first meeting with Petitioner, Dr. Parsons' goal was to learn as much as possible about Petitioner. Dr. Parsons interviewed Petitioner, who recounted his recollection of the crime and his history. He also conducted general psychological testing. The third step in the forensic evaluation required Dr. Parsons to start working through the records to determine if Petitioner's statement matched his history. Thereafter, Dr. Parsons held more interviews with Petitioner and reviewed voluminous documentation. Most important were the crime scene analysis, the police reports, the autopsy report, the Petitioner's ninety-minute videotaped interview with detectives from the Warwick Police Department in Concord, New Hampshire, and the videotape of Petitioner's self-recorded confession.[11] *Id.* at 97:2-13. As a result, Dr. Parsons' initial diagnosis was that Petitioner suffered from PTSD with dissociative symptoms and panic disorder. *Id.* at 98:1-3. Finally, Dr. Parsons drafted his report. *See* Pet'r's Ex. 13.

In drafting his report, Dr. Parsons had access to Petitioner's records from two previous treatment providers. The records from Petitioner's psychotherapist, Ms. Sheehan, whom he had begun seeing in January 2005, indicated that he was prescribed psychotropic medications. *See* Pet'r's Ex. 12. Dr. Parsons also reviewed Ms. Sheehan's psychotherapy notes. *See* Pet'r's Ex. 11. He found it revealing that Petitioner was participating in CBT, which was traditionally used

[11] Dr. Parsons did not view either of the two videos until after he completed his report, although he did have the transcripts beforehand. He did not receive the recording of Petitioner's interview with the police until the week before the instant hearing, and the videotape of the confession was not available for him to view until immediately preceding the commencement of the hearing, in this Court's chambers. Notwithstanding, the videos did not change Dr. Parsons' initial diagnostic opinion; in fact, they further solidified it. *See* Hr'g Tr. 97:14-98:12, 115:21-117:8, 118:9-120:6, 120:21-121:6.

with trauma victims. According to Dr. Parsons, the issue with CBT is that it requires the patient to relive his or her traumatic experiences. Hr'g Tr. 104:18-24. Such re-experiencing can trigger panic attacks, and Petitioner noted this happening in his interviews with Dr. Parsons. *Id.* at 104:25-105:7.

Also, before drafting his report, Dr. Parsons reviewed Dr. Stewart's report addressing Petitioner's apparent incapacity to form intent at the time of the murder. *See* Pet'r's Ex. 9. It was important to Dr. Parsons to have access to a previous forensic evaluation. In the report, Dr. Stewart, a physician, had discussed Petitioner's psychotropic medications and his brain damage from multiple head traumas. Dr. Parsons "[f]or the most part" agreed with Dr. Stewart's assessment. Hr'g Tr. 109:12-13.

Where the two doctors differed was in their diagnoses. While Dr. Stewart had also diagnosed Petitioner as suffering from PTSD, Dr. Parsons further concluded that Petitioner's PTSD was marked by dissociative symptoms. The dissociative symptoms manifested themselves in the flashbacks Petitioner experienced. *Id.* at 110:6-12. According to Dr. Parsons, Petitioner's dissociation was more pronounced because of the severity of the traumas he endured over many years. *Id.* at 110:13-24. In Dr. Parsons' expert opinion, Petitioner's PTSD with dissociative symptoms so impaired him that he lacked the intent to murder Ms. Burke. *Id.* at 114:2-7, 114:16-20. Dr. Parsons testified to a reasonable degree of psychological certainty that—given the severity of Petitioner's illness, the volume and frequency of traumatic events he had endured, and the combination of his over-consuming psychotropic medications and his lack of sleep on the day of the murder—when Petitioner saw the pictures of Ms. Burke's new love interest, he experienced a flashback to the prior losses in his life and dissociated. *Id.* at 114:24-115:7.

Subsequent to the close of the three-day evidentiary hearing, counsel for the State and Petitioner's hearing counsel submitted post-hearing memoranda. The State electronically filed its memorandum on January 31, 2018. Petitioner's hearing counsel electronically filed his memorandum on February 19, 2018.

II

Standard of Review

Postconviction relief is a statutory remedy '"available to any person who has been convicted of a crime and who thereafter alleges . . . that the conviction violated the applicant's constitutional rights . . . ."' *Higham v. State*, 45 A.3d 1180, 1183 (R.I. 2012) (quoting *DeCiantis v. State*, 24 A.3d 557, 569 (R.I. 2011)); *see* § 10-9.1-1(a)(1). "In this jurisdiction an application for postconviction relief is civil in nature." *Ouimette v. Moran*, 541 A.2d 855, 856 (R.I. 1988); *see also* § 10-9.1-7 ("All rules and statutes applicable in civil proceedings shall apply . . . ."). Therefore, "an applicant for postconviction relief must bear 'the burden of proving, by a preponderance of the evidence, that [such] relief is warranted' in his or her case." *Hazard v. State*, 64 A.3d 749, 756 (R.I. 2013) (quoting *Anderson v. State*, 45 A.3d 594, 601 (R.I. 2012)); *see also Mattatall v. State*, 947 A.2d 896, 901 n.7 (R.I. 2008).

III

Analysis

When evaluating allegations of ineffective assistance of counsel, the Rhode Island Supreme Court has adopted the standard set forth by the Supreme Court of the United States in *Strickland v. Washington*, 466 U.S. 668 (1984). *See Brown v. Moran*, 534 A.2d 180, 182 (R.I. 1987); *Rice v. State*, 38 A.3d 9, 14 n.7 (R.I. 2012); *see also Reyes v. State*, 141 A.3d 644, 654 (R.I. 2016). The "exacting" *Strickland* test is two-pronged. *Perkins v. State*, 78 A.3d 764, 767

(R.I. 2013). "Applicants are required to demonstrate that: (1) 'counsel's performance was deficient in that it fell below an objective standard of reasonableness,' . . . and (2) 'that such deficient performance was so prejudicial to the defense and the errors were so serious as to amount to a deprivation of the applicant's right to a fair trial.'" *Tassone*, 42 A.3d at 1284-85 (quoting *Lynch v. State*, 13 A.3d 603, 605-06 (R.I. 2011); *Bustamante v. Wall*, 866 A.2d 516, 522 (R.I. 2005)). If an applicant for postconviction relief does not make both showings, '"it cannot be said that the conviction or . . . sentence resulted from a breakdown in the adversary process that renders the result unreliable."' *Simpson v. State*, 769 A.2d 1257, 1266 (R.I. 2001) (quoting *Strickland*, 466 U.S. at 687). Our Supreme Court has instructed that counsel's performance should be considered "in its entirety, and 'when that performance is deficient in a number of respects, then the possibility is greater that an accumulation of serious shortcomings prejudiced the defendant to a sufficient degree to meet the *Strickland* requirement.'" *Hazard*, 64 A.3d at 756 (quoting *Brown v. State*, 964 A.2d 516, 528 (R.I. 2009)). Thus, "the benchmark issue 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.'" *Bustamante*, 866 A.2d at 522 (quoting *Toole v. State*, 748 A.2d 806, 809 (R.I. 2000)).

A

Performance Prong

Establishing that counsel's performance was constitutionally deficient '"requires [a] showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed . . . by the Sixth Amendment."' *Reyes*, 141 A.3d at 654 (alteration and omission in original) (quoting *Bido v. State*, 56 A.3d 104, 110-11 (R.I. 2012)). In examining the first prong of *Strickland*, our Supreme Court "requires that scrutiny of counsel's performance be highly

deferential, and 'every effort [must] 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.'" *Tassone*, 42 A.3d at 1285 (alteration in original) (quoting *Lynch*, 13 A.3d at 606). In that sense, "mere tactical decisions, though ill-advised, do not by themselves constitute ineffective assistance of counsel." *Toole*, 748 A.2d at 809. This is so because:

> "Under the reasonably competent assistance standard, effective representation is not the same as errorless representation. . . . Even the most skillful criminal attorneys make errors during a trial. The myriad of decisions which must be made by defense counsel quickly and in the pressure cooker of the courtroom makes errorless representation improbable, if not impossible. This is particularly so since the determination of whether there have been errors is made by a court far removed from the heat of trial combat and with the time necessary to make a reasoned judgment. Thus, a choice between trial tactics, which appears unwise only in hindsight, does not constitute constitutionally-deficient representation under the reasonably competent assistance standard. To state and prove a claim under this standard, a defendant must allege and demonstrate that his counsel's error clearly resulted from neglect or ignorance rather than from informed, professional deliberation." *State v. D'Alo*, 477 A.2d 89, 92 (R.I. 1984) (internal quotation marks omitted) (quoting *United States v. Bosch*, 584 F.2d 1113, 1121 (1st Cir. 1978)); *see also Rice*, 38 A.3d at 18 .

After all, "'[e]ffective' does not mean successful." *D'Alo*, 477 A.2d at 91 (quoting *State v. Desroches*, 110 R.I. 497, 501, 293 A.2d 913, 916 (1972)). Counsel's performance, therefore, "must be assessed in view of the totality of the circumstances and in light of 'a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" *Hazard v. State*, 968 A.2d 886, 892 (R.I. 2009) (quoting *Heath v. Vose*, 747 A.2d 475, 478 (R.I. 2000)).

Petitioner argues that Attorney Smith's decision not to present a diminished-capacity defense at trial was an '"error[] so serious that counsel was not functioning as the counsel

guaranteed . . . by the Sixth Amendment."' *Reyes*, 141 A.3d at 654 (omission in original) (quoting *Bido*, 56 A.3d at 110-11). In order to succeed on his claim of constitutionally-deficient performance by his trial counsel, Petitioner must show that Attorney Smith's decision '"fell below an objective standard of reasonableness."' *Tassone*, 42 A.3d at 1284 (quoting *Lynch*, 13 A.3d at 605). At issue, then, is whether it was objectively unreasonable for Attorney Smith to employ Dr. Stewart's testimony as mitigation during the sentencing phase of the trial instead of during the guilt phase of the trial in an attempt to disprove the specific intent necessary to commit first-degree murder.

Murder is defined as "[t]he unlawful killing of a human being with malice aforethought." Sec. 11-23-1. Malice aforethought, which "consists of an 'unjustified disregard for the possibility of death or great bodily harm and an extreme indifference to the sanctity of human life[,]'" is an element of both first- and second-degree murder. *State v. Parkhurst*, 706 A.2d 412, 421 (R.I. 1998) (quoting *State v. McGranahan*, 415 A.2d 1298, 1302 (R.I. 1980)); *see also State v. Mattatall*, 603 A.2d 1098, 1105 (R.I. 1992). Murder in the first degree includes "[e]very murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing . . . ." Sec. 11-23-1. Any murder that is not statutorily defined as first-degree is murder in the second degree. *Id.* The Rhode Island Supreme Court has instructed that "if the state proceeds on a theory of an intent to kill and the duration of the intent to kill is questionable, an instruction on both first- and second-degree murder should be given." *Parkhurst*, 706 A.2d at 421 (citing *State v. Fenik*, 45 R.I. 309, 315, 121 A. 218, 221 (1923)). Of which degree a defendant is convicted depends upon the duration of the intent to kill: "Murder in the first degree requires the state to prove beyond a reasonable doubt a premeditated intent to kill of more than a momentary duration in the mind of the accused, . . . whereas if the formation of

the intent to kill is merely momentary, the offense is murder in the second degree." *Id.* (citing *State v. Grabowski*, 644 A.2d 1282, 1285 (R.I. 1994)).

At Petitioner's trial, the State theorized that Petitioner intended to kill Ms. Burke, and the duration of the intent to kill was questionable; the trial justice thus instructed the jury on both first- and second-degree murder. *See id.* at 422. Given that Petitioner unquestionably committed the murder, Attorney Smith's ultimate goal was a second-degree murder conviction, requiring the jury to find that "the formation of the intent to kill [was] merely momentary." *Id.* at 421. To that end, Attorney Smith's theory of defense was that Petitioner "snapped" when he learned that Ms. Burke had a new man in her life—he could not handle feeling "f***ed over" yet again. *See* State's Exs. M & N. Petitioner's videotaped confession contained his statement that "rage filled me in a split second." *See* State's Ex. M. Attorney Smith tried to show the jury that the State had not proven that the murder was premeditated. *See Parkhurst*, 706 A.2d at 421. He cross-examined the State's witnesses to that effect. *See* Ex. K (Trial Tr.) at Vol. I 180:7-182:12; Vol. II 345:4-348:17, 352:8-20, 356:16-370:25, 372:12-373:21, 514:4-516:16; Vol. IV 802:3-804:4.[12] Furthermore, Attorney Smith dedicated his closing argument to painting the evidence in that light, even conceding murder in the second degree. *Id.* at Vol. IV 885:24-901:7. The jury, however, disagreed, convicting Petitioner of first-degree murder.

[12] Our Supreme Court has explained: "In determining whether a trial counsel's performance was effective, no evidence is more probative than the trial transcript, for through the transcript a trial justice hearing [an application] for postconviction relief can observe, albeit second-hand, what actually happened as far as the trial counsel's actions are concerned." *D'Alo*, 477 A.2d at 91; *see also Tassone*, 42 A.3d at 1286 (finding that "the absence of a transcript, coupled with the lack of an evidentiary hearing, precluded the court from conducting an adequate, independent review of trial counsel's actions and from 'look[ing] at the entire performance of counsel'" (alteration in original) (quoting *Brown*, 964 A.2d at 528)). In that regard, in addition to holding an evidentiary hearing, this Court has read and analyzed the trial transcript.

According to Petitioner, a defense of diminished capacity would have successfully accomplished Attorney Smith's objective of avoiding a first-degree murder conviction. "Under a diminished-capacity defense, a defendant submits that, although he is responsible for the prohibited act, 'his mental capacity may have been diminished by intoxication, trauma, or mental disease so that he did not possess the specific mental state or intent essential to the particular offense charged.'" *Washington v. State*, 989 A.2d 94, 101 (R.I. 2010) (quoting *State v. LaCroix*, 911 A.2d 674, 679 (R.I. 2006)). In other words, "[w]hen a defendant alleges diminished capacity, he concedes his responsibility for the act, but claims that he is less culpable due to his mental condition." *LaCroix*, 911 A.2d at 679 (citing *State v. Correra*, 430 A.2d 1251, 1253 (R.I. 1981)). Thus, when the particular offense charged is first- or second-degree murder, a successful diminished-capacity defense serves to reduce the defendant's culpability to voluntary manslaughter. *See State v. Amazeen*, 526 A.2d 1268, 1271-72 (R.I. 1987); *State v. Hockenhull*, 525 A.2d 926, 929-30 (R.I. 1987). However, "[a] claim of diminished capacity will negate the specific intent charged only if the intoxication [or trauma or mental disease] is found to be 'of such a degree as to completely paralyze the will of the [defendant], take from him the power to withstand evil impulses and render his mind incapable of forming any sane design.'" *LaCroix*, 911 A.2d at 679 (third alteration in original) (quoting *State v. Edwards*, 810 A.2d 226, 235 (R.I. 2002)).

In Dr. Stewart's March 12, 2007 report, he found that "[a]round the time of the incident, [Petitioner's] mental status was extremely impaired to the extent that he lacked the capacity to form intent. Nor in that moment was he capable of appreciating the disastrous consequences of his actions." Pet'r's Ex. 10 at 1. Dr. Stewart cited Petitioner's PTSD resulting from the abuse he suffered as a child; his combat experiences; his losses throughout life; the multiple traumas he

endured to his head; his overdose on his psychotropic medication before the murder; and his severe panic attacks. *Id.* at 9-10. As a result, Dr. Stewart stated that "[Petitioner's] loss of control and lashing out at his girlfriend may constitute an episode of gross irrationality, but not an act of deliberate harm." *Id.* at 9. Dr. Stewart professed, "In my opinion, [Petitioner] cannot be considered fully blameworthy and legal mitigation may be worthy of consideration in this case." *Id.* at 1. In conclusion, therefore, Dr. Stewart opined that "[f]rom a medical and psychiatric perspective, it is more than reasonable to consider a reduced charge as criminal intent can not [*sic*] be ascribed to a person thus afflicted." *Id.* at 10.

In reviewing Attorney Smith's decision to forego using Dr. Stewart's opinion at trial, this Court "must strive 'to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.'" *Tassone*, 42 A.3d at 1286 (quoting *Lynch*, 13 A.3d at 606). Again, Attorney Smith did not receive Dr. Stewart's report until after trial; however, he testified that he had discussions with Dr. Stewart about these very issues. Clearly, Attorney Smith had the above information available to him. Nevertheless, he decided not to use it. Instead, he used the information found in the second report prepared by Dr. Stewart, dated April 9, 2007 at the sentencing phase of Petitioner's trial. *See* Pet'r's Ex. 9. Therein, Dr. Stewart recited the same findings and opinions as contained in his earlier report. *See* Pet'r's Exs. 9 & 10. In the end, however, Dr. Stewart focused on Petitioner's capacity to be rehabilitated. *See* Pet'r's Ex. 9 at 10. This was the information Attorney Smith found most valuable as a result of his conversations with Dr. Stewart before trial. Because Attorney Smith did not think Dr. Stewart would convince the jury that the Petitioner's mental status was extremely impaired to the extent that he lacked the capacity to form the specific intent to kill Ms. Burke—or that his testimony would go over well with the jury—Attorney Smith made a strategic

decision to use Dr. Stewart's opinion with regard to Petitioner's capacity to be rehabilitated for the purpose of mitigation at sentencing instead. This Court finds that Attorney Smith's tactical decision in this regard was reasonable "in view of the totality of the circumstances." *Hazard*, 968 A.2d at 892 (quoting *Heath*, 747 A.2d at 478).

The decision whether to call a witness or not is a tactical one. The *Strickland* Court cautioned against subjecting trial counsel's actions to intensive scrutiny with regard to considering an ineffective assistance of counsel claim. 466 U.S. at 669 ("Judicial scrutiny of counsel's performance must be highly deferential."). "[A] court must distinguish between tactical errors made as a result of ignorance and neglect and those arising from careful and professional deliberation." *D'Alo*, 477 A.2d at 92 (citing *Bosch*, 584 F.2d at 1121). "Thus, a choice between trial tactics, which appears unwise only in hindsight, does not constitute constitutionally-deficient representation under the reasonably competent assistance standard." *Bosch*, 584 F.2d at 1121.

Even assuming that Petitioner is correct that a diminished-capacity defense would have successfully negated the requisite intent for first-degree murder, he has failed to prove ineffective assistance of counsel. Certainly, effective representation does not equate to successful representation. *See D'Alo*, 477 A.2d at 91. Attorney Smith chose and vigorously pursued a particular trial strategy—the one that he thought gave his client the best chance of success. The Court does not view his strategic decision as an erroneous one, but even if it was, "mere tactical decisions" do not amount to ineffective assistance of counsel. *Toole*, 748 A.2d at 809. It is well settled that trial counsel is entitled to "highly deferential" scrutiny from this Court "in light of 'a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" *Tassone*, 42 A.3d at 1285; *Hazard*, 968 A.2d at 892 (quoting *Heath*, 747 A.2d at

478); *see also Reyes*, 141 A.3d at 654-55. In that light, the Court's review of Attorney Smith's trial strategy will not be distorted by the 20/20 vision of hindsight. *See Lynch*, 13 A.3d at 606; *D'Alo*, 477 A.2d at 91.

Furthermore, the Rhode Island Supreme Court has already encountered a similar fact pattern in reviewing an ineffective assistance of counsel claim. *See Page v. State*, 995 A.2d 934 (R.I. 2010). In *Page*, the applicant for postconviction relief was sentenced to life imprisonment without the possibility of parole for what the trial justice referred to as "the most atrocious, barbaric killing imaginable." *Id.* at 937. The applicant's trial counsel had initially considered employing a diminished-capacity defense, but based upon a psychiatrist's damning evaluation, the trial counsel did not present any psychiatric or psychological testimony at trial because he believed that such testimony "could not help [his] client." *Id.* at 938. Given the "formidable evidence of guilt"—in the form of the applicant's incriminating statements and the gruesome photographs of the victim's "brutally beaten body"—the trial counsel believed that "the best strategy would be *to focus on sentencing*." *Id.* at 939. It was the trial counsel's hope that "the trial justice would manifest some degree of leniency towards [the applicant] at sentencing." *Id.* Following the postconviction relief hearing, the hearing justice rejected the applicant's claim of ineffective assistance of his trial counsel because the "trial counsel had faced overwhelming physical evidence and had been left with no realistic trial strategy." *Id.* at 939-40. The hearing justice was satisfied that trial counsel had conducted a reasonable investigation into the possible defense of diminished capacity before deciding against it due to the psychiatrist's assessment. *Id.* at 940. In reviewing the hearing justice's decision, the Supreme Court found no error in the determination that the trial counsel's choice not to present a diminished-capacity defense was "an appropriate strategic decision." *Id.* at 944. The Court was thus "unable to conclude that the

postconviction relief hearing justice erred in holding that counsel's performance was reasonable and, as such, did not run afoul of even the first prong (deficiency) under the *Strickland* test." *Id.* at 945.

In this case, Attorney Smith made a nearly identical strategic decision. Unlike the psychiatrist in *Page, see id.* at 938, Dr. Stewart indeed provided what was potentially a helpful opinion regarding Petitioner's lack of intent due to diminished capacity. Nevertheless, Attorney Smith was faced with equally damaging evidence against Petitioner: Petitioner had made incriminating statements, and the crime scene and photographs were so disturbing that Attorney Smith believed the case would be over as soon as they were shown to the jury. *See id.* at 939. In *Page,* as a result of the "horrendous" evidence, the trial counsel's "ultimate goal" was obtaining leniency for the applicant at sentencing; Attorney Smith's objective in this case was the same. *Id.* at 940. And this Court, as did the hearing justice in *Page*, finds that employing Dr. Stewart's testimony at sentencing was "an appropriate strategic decision." *Id.* at 944.

In '"look[ing] at the entire performance of counsel,"' the Court is satisfied that Petitioner received effective assistance of counsel. *Tassone,* 42 A.3d at 1286 (alteration in original) (quoting *Brown*, 964 A.2d at 528). The Court cannot conclude that Attorney Smith's performance '"was deficient in that it fell below an objective standard of reasonableness . . . ."' *Id.* at 1284 (quoting *Lynch*, 13 A.3d at 605-06); *see also Page*, 995 A.2d at 945. This Court is satisfied that Attorney Smith's trial performance certainly fell within the wide range of reasonable professional assistance to which Petitioner was entitled. *Id.* In fact, this Court believes that Petitioner received the best representation he could have asked for. Accordingly, Petitioner has not satisfied the first prong of the *Strickland* test.

B

Prejudice Prong

Because of Petitioner's failure to prove that Attorney Smith's representation was constitutionally deficient, the Court need not—and will not—address the second prong of the *Strickland* standard. *See Page*, 995 A.2d at 945 (declining to consider the second *Strickland* prong (prejudice) when "counsel's performance was reasonable and, as such, did not run afoul of even the first prong (deficiency) under the *Strickland* test"); *see also Tassone*, 42 A.3d at 1284-85 (quoting *Bustamante*, 866 A.2d at 522) (requiring under the prejudice prong a showing '"that such deficient performance was so prejudicial to the defense and the errors were so serious as to amount to a deprivation of the applicant's right to a fair trial"'). Nevertheless, this Court notes that in no way was Petitioner's conviction a result of Attorney Smith's representation, and Attorney Smith's performance did not prejudice Petitioner. It is clear to this Court that Petitioner received a fair trial and effective assistance of counsel; that was all the process he was due. The jury simply followed the horrifying evidence of Ms. Burke's senseless slaying. Petitioner has no one to blame but himself for his life imprisonment without the possibility of parole sentence—a '"just result"' for his vile, heinous crime. *Bustamante*, 866 A.2d at 522 (quoting *Toole*, 748 A.2d at 809).

IV

Conclusion

In not presenting a diminished-capacity defense at trial, and by presenting instead a crime of passion defense in an attempt to convince the jury that in this case the appropriate conviction was for second-degree murder, Attorney Smith made a strategic decision that constituted the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments of the

United States Constitution, and article I, section 10 of the Rhode Island Constitution. Petitioner has utterly failed to meet his burden of proving his several interrelated claims of ineffective assistance of counsel. Petitioner's Application for Post Conviction Relief is therefore denied.

Counsel shall submit an appropriate order for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**Gerardo Martinez v. State of Rhode Island**
CASE NO:	**KM-2013-0095**
COURT:	**Kent County Superior Court**
DATE DECISION FILED:	**March 7, 2018**
JUSTICE/MAGISTRATE:	**Montalbano, J.**

ATTORNEYS:

For Petitioner:	**William V. Devine, Jr., Esq.**
For Defendant:	**Gina K. Lopes, Esq.**