

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

SUPERIOR COURT

[Filed: April 8, 2019]

KEVIN STOREY

:

v.

:

C.A. No. PM-2015-1250

:

STATE OF RHODE ISLAND

:

:

DECISION

McGUIRL, J. Before the Court is Petitioner Kevin Storey’s (Petitioner) application for postconviction relief (Application). Petitioner asserts that his attorney rendered constitutionally ineffective assistance of counsel. Jurisdiction is pursuant to G.L. 1956 § 10-9.1-1.

I

**Facts and Travel**

The pertinent facts herein are taken from the Supreme Court case *State v. Storey*, 102 A.3d 641 (R.I. 2014). On October 27, 2009, Petitioner’s then wife, Danielle Saleeba (Ms. Saleeba), awoke to Petitioner shaking her shoulders and demanding to know why she had not told him that David Liese, the general manager at the restaurant where she was employed, had been working with her the previous night. According to Ms. Saleeba, the Petitioner then struck her on the head with an open palm and began choking her by pushing both hands down on her throat. She managed to break the Petitioner’s hold, only to have Petitioner stick his fingers down her throat. Next, Ms. Saleeba attempted to get off the bed but was struck on her left temple by Petitioner with either his fist or his elbow.

At trial, Ms. Saleeba indicated that she had “blood squirting out the side of [her] head.” Petitioner informed her eldest son, who saw Ms. Saleeba emerge from the bedroom, that his mother had “hit her head on the computer desk.” Furthermore, Ms. Saleeba later testified that when she looked in the mirror in the bathroom at her wound, she saw a “big gaping hole” on her temple that “looked like a fountain coming out the side of [her] head.” Petitioner then drove Ms. Saleeba to the hospital, during which time he repeatedly told her, “[t]he next time I’m going to kill you.” She received twenty-four stitches along her left temple.

Several days later, Ms. Saleeba informed her mother about what had happened and spent the night at her mother’s house with her children. The next morning, Ms. Saleeba went to the East Providence Police station where written statements were completed and photographs of Ms. Saleeba were taken.

The Petitioner was tried by a jury in March 2012 in Providence County Superior Court on two counts of violating G.L. 1956 § 11-5-2: one count of assault with a dangerous weapon and one count of felony assault resulting in serious bodily injury. The jury returned a verdict on March 30, 2012, convicting Petitioner of assault with a dangerous weapon (Count 1), acquitting him of assault and battery resulting in serious bodily injury (Count 2), but convicting him instead on Count 2’s lesser-included offense of simple assault and battery.

Petitioner subsequently appealed the decision of the Superior Court, arguing the trial justice erred by (1) denying his motions for judgment of acquittal and new trial; (2) not allowing him to cross-examine complaining witness concerning custody issues involving her son; and (3) imposing an illegal sentence. The Supreme Court denied Petitioner’s appeal and affirmed the judgment of the Superior Court on November 24, 2014.

On March 27, 2015, Petitioner filed a *pro se* application for postconviction relief arguing his sentence and conviction are in violation of the United States and Rhode Island Constitutions. This Court appointed counsel for Petitioner, who then investigated Petitioner's claims and filed a corresponding memorandum in support of the Application. In July 2016, this Court conducted a Postconviction Relief evidentiary hearing (PCR hearing) on Petitioner's Application. A Decision is herein rendered.

## II

### Standard of Review

“[T]he remedy of postconviction relief is available to any person who has been convicted of a crime and who thereafter alleges either that the conviction violated the applicant's constitutional rights or that the existence of newly discovered material facts requires vacation of the conviction in the interest of justice.” *DeCiantis v. State*, 24 A.3d 557, 569 (R.I. 2011) (quoting *Page v. State*, 995 A.2d 934, 942 (R.I. 2010)) (further citation omitted); *see also* § 10-9.1-1. Postconviction relief applications are civil in nature and thus, are governed by all applicable rules and statutes governing civil cases. *Ferrell v. A.T. Wall*, 889 A.2d 177, 184 (R.I. 2005). Thus, “[a]n applicant for such relief bears ‘[t]he burden of proving, by a preponderance of the evidence, that such relief is warranted’ in his or her case.” *Brown v. State*, 32 A.3d 901, 907 (R.I. 2011) (citing *State v. Laurence*, 18 A.3d 512, 521 (R.I. 2011)).

## III

### Analysis

Petitioner asserts five theories in support of his Application: (1) that his attorney rendered constitutionally ineffective assistance of counsel when she failed to present certain witnesses and further investigate medical treatment received by Ms. Saleeba; (2) that the conviction for assault

with a dangerous weapon and simple assault are inconsistent verdicts; (3) that the charges of assault with a dangerous weapon and felony assault were without probable cause as there was an error of law categorizing his hands as a deadly weapon; (4) that because there was no probable cause to bring the charges of assault with a dangerous weapon and felony assault, Petitioner's counsel should have filed a motion under Superior Court Rules of Criminal Procedure 9.1; and (5) that Petitioner's counsel neglected to object to the Court's decision regarding a note the Court received regarding the jurors' request for clarification on Petitioner's "hands" as it relates to a dangerous weapon.

After investigation, Petitioner's postconviction relief counsel narrows the scope of the assertions alleging that Petitioner's trial counsel should have called certain witnesses, specifically Hospital staff, that a medical expert should have been consulted regarding the injury to the victim's head and to testify about the significance of the lack of injury from the alleged strangulation. In response, the State asserts that Petitioner has not shown that the alleged ineffective assistance of counsel prejudiced him.

## A

### **Ineffective Assistance of Counsel**

The United States Supreme Court case, *Strickland v. Washington*, 466 U.S. 668, 687 (1984), which our Supreme Court has adopted, is the benchmark decision when the court is faced with a claim of ineffective assistance of counsel. *Navarro v. State*, 187 A.3d 317, 325 (R.I. 2018); *LaChappelle v. State*, 686 A.2d 924, 926 (R.I. 1996). A *Strickland* claim entails a two-prong test, and a petitioner must satisfy both requirements to prevail. First, a petitioner must prove that counsel's performance was deficient in such a way that counsel's errors 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; *Neufville v. State*, 13 A.3d 607, 610 (R.I. 2011). Second, a petitioner must show that, even if counsel’s performance was deficient, the attorney’s shortcomings “prejudiced” [petitioner’s] defense. *Strickland*, 466 U.S. at 687.

## 1

### First Prong

A petitioner claiming ineffective assistance of counsel must overcome a heavy burden in proving his claim. *See Rice v. State*, 38 A.3d 9, 18 (R.I. 2012); *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010). Review of such a claim should be highly deferential of counsel’s performance 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.” *See Tassone v. State*, 42 A.3d 1277, 1285 (R.I. 2012) (quoting *Lynch v. State*, 13 A.3d 603, 606 (R.I. 2011)). Furthermore, “[i]t is well established that tactical decisions by trial counsel, even if ill-advised, do not by themselves constitute ineffective assistance of counsel.” *Rice*, 38 A.3d at 18 (quoting *Vorgvongsa v. State*, 785 A.2d 542, 549 (R.I. 2001)) (further citation omitted). “Thus, a choice between trial tactics, which appears unwise only in hindsight, does not constitute constitutionally deficient representation under th[is] . . . standard.” *Id.* (quoting *State v. D’Alo*, 477 A.2d 89, 92 (R.I. 1984)).

Here, the Court is satisfied that Petitioner’s trial counsel’s decision not to call certain witnesses at trial—including his ex-girlfriend, his neighbor, and medical professionals from Rhode Island Hospital—was a reasonable, tactical decision made by counsel at that time. *See United States v. Bosch*, 584 F.2d 1113, 1121 (1<sup>st</sup> Cir. 1978) (holding “[t]o state and prove a claim under this standard, [an applicant] must allege and demonstrate that his counsel’s error clearly ‘resulted from neglect or ignorance rather than from informed, professional deliberation’”). Trial

counsel deemed certain witnesses, Petitioner's ex-girlfriend and neighbor, irrelevant to the case at hand as neither was present during or immediately after the assault. *See Brown v. State*, 964 A.2d 516, 533-34 (R.I. 2009). Moreover, trial counsel further testified that Petitioner wanted his parents and marriage counselor called as witnesses. However, trial counsel again believed that Petitioner's parents "didn't witness anything; they weren't relevant and [ ] strategically [ ] wouldn't help." (PCR Hr'g Tr. 26:10-12, July 19, 2016.) Furthermore, trial counsel made a tactical decision by not presenting the parents because she believed that their testimony may appear "self-serving" and the jury may "feel bad for [Petitioner's] parents. They were quite elderly." *Id.* at 29:3-5; *see Rivera v. State*, 58 A.3d 171, 181 (R.I. 2013).

The Court is further satisfied that trial counsel's decision not to call a medical witness from Rhode Island Hospital to testify to Ms. Saleeba's demeanor, the location of the Petitioner during the medical evaluation, and whether a domestic violence evaluation was conducted, was not ineffective counsel. Rather, trial counsel's decision to refrain from calling Hospital personnel was made in an effort to limit the extent of injuries to those identified in the medical records. Importantly, the records indicated "[n]eck non-tender" which counsel recognized as advantageous to her "general strategy [ ] to minimize [the choking] as much as possible . . ." *Id.* at 10:25-11-1; 7:22-23. Subsequently, counsel indicated that she did not present medical testimony "because [she] was afraid that a doctor might get up and say it's entirely possible that there would be no marks there, people bruise differently." *Id.* at 8:1-3. *See Bustamante v. A.T. Wall*, 866 A.2d 516, 523 (R.I. 2005) (holding that attorney's failure to call character witnesses on behalf of Petitioner was tactical decision which did not constitute ineffective assistance of counsel).

Indeed, by relying strictly on the medical records, counsel was able to present an alternative narrative of the events in question. Specifically, counsel believed the records provided a plausible and beneficial narrative for Petitioner because the records indicated that Ms. Saleeba “hit [her] head on a desk” after a “mechanical fall.” *Id.* at 35:9-11. Counsel later testified at Petitioner’s PCR hearing that she relied on the medical records because:

“without the doctor there, [medical records] [ ] was all the jury saw, and it gave me the opportunity to argue, as I believe I did in closing, that if someone of [Petitioner’s] size and weight had been actually engaged in choking someone the way it was described, there certainly would have been marks and it certainly would have been tender.” *Id.* at 11:10-16.

Moreover, counsel indicated that admitting medical reports from Rhode Island Hospital, via agreement of the parties, rather than calling Hospital personnel to testify, was a strategic decision in order to minimize the severity of the injuries suffered by Ms. Saleeba to the jury. Counsel stated that “jurors, they believe doctors. Also, the doctor could give an in-depth medical opinion describing exactly the wounds in this case, the number of stitches—it was eleven—the depth of the wound itself, much more effectively than a lay person.” *Id.* at 34:10-14. Further, counsel did not call the Emergency Room doctor that treated Ms. Saleeba because she believed that the prosecution could “get into a long, slow cross [exam]” which counsel was afraid could reveal to the jury that “the laceration [on Ms. Saleeba’s face] was, that it just didn’t go through one layer of skin or two, it went through three layers of skin . . . .” *Id.* at 12:20-23. Clearly, counsel made an informed strategic decision to limit exposure of Ms. Saleeba’s injuries to the jury and prevent cross-examination of potential medical witnesses by the prosecution. *See Linde v. State*, 78 A.3d 738, 747 (R.I. 2013).

Counsel for the Petitioner made a similar strategic evaluation when deciding not to call an expert witness to the stand to testify to the injuries sustained by Ms. Saleeba. In regards to the

bruising, counsel believed that an expert medical witness would have allowed the prosecution a chance to “stand up and say, ‘Doctor, can you tell me, there are no bruises, are there?’ ‘No.’ ‘And it’s entirely possible for [Ms. Saleeba] not to have bruises?’ ‘Yes.’” *Id.* at 12:1-3. Moreover, counsel believed that any beneficial testimony from a possible expert regarding the lack of redness around victim’s neck evidencing strangulation would be outweighed by the prosecution’s ability to cross-examine the proposed expert on the severity of the laceration. *See Rice*, 38 A.3d at 17-18 (finding that trial counsel’s strategic reasoning for not procuring a medical expert was tactical in nature and not objectively unreasonable).

Furthermore, this Court is unpersuaded by Petitioner’s contention that counsel’s assistance was ineffective because she failed to utilize an investigator to interview Hospital personnel to allow her to make informed decisions regarding trial tactics. Specifically, Petitioner asserts that an investigation should have been conducted to determine Ms. Saleeba’s demeanor upon arrival at Rhode Island Hospital and during the duration of her stay. This Court believes that counsel’s decision not to investigate further was reasonable when assessed in the light of all the circumstances of the case as the information sought by the Petitioner was contained within the medical report, which was already entered as a full exhibit by stipulation. *See Chapdelaine v. State*, 32 A.3d 937, 949 (R.I. 2011) (held that Petitioner failed to demonstrate counsel’s alleged failure to investigate for the purpose of obtaining an expert fell below an objective standard of reasonableness). This report contained observations from Hospital staff, indicating Ms. Saleeba was “awake, alert, and oriented” but also was “anxious [and] crying.” (State PCR Ex. 1, at 12). Moreover, the report indicates that “[n]o evidence of abuse noted.” *Id.* Further relevant information regarding Ms. Saleeba’s intake was adequately developed from her own testimony which may have been cross-examined by counsel contemporaneously. The Court is satisfied that



Petitioner’s trial counsel rendered effective assistance in light of the weight of evidence against Petitioner. Moreover, the Court acknowledges trial counsel’s entry into the case occurred after the matter was placed on the trial calendar due to Petitioner’s dissatisfaction with “at least two prior lawyers.” *Id.* at 5:20-21.

This Court will not “meticulously scrutinize an attorney’s reasoned judgment or strategic maneuver in the context of a claim of ineffective assistance of counsel.” *Rice*, 38 A.3d at 17. Here, the Court is satisfied that counsel effectively investigated, weighed, and determined the appropriate course of action to take using her breadth of defense experience. Accordingly, Petitioner’s representation fell within the constitutional bounds guaranteed by the Sixth Amendment.

## 2

### **Second Prong**

The second prong of a Strickland analysis requires that an applicant “demonstrate ‘prejudice emanating from the attorney’s deficient performance such as to amount to a deprivation of the applicant’s right to a fair trial.’” *Chum v. State*, 160 A.3d 295, 299 (R.I. 2017) (quoting *Lipscomb v. State*, 144 A.3d 299, 309 (R.I. 2016)). In order to establish prejudice, petitioner must establish “to a reasonable probability, that ‘but for counsel’s unprofessional errors, the result of the proceeding would have been different.’” *Barbosa v. State*, 44 A.3d 142, 146 (R.I. 2012) (quoting *Rodriguez v. State*, 941 A.2d 158, 162 (R.I. 2008)). Thus, even if counsel’s tactical decision was objectively unreasonable, petitioner must show that the tactical error was so prejudicial it amounted “to a deprivation of the [petitioner’s] right to a fair trial.” *Hazard v. State*, 64 A.3d 749, 756 (R.I. 2013). “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694. This, too, is an

objective inquiry, which requires consideration of “the totality of the evidence before the judge or jury.” *Id.* at 695.

Even if Petitioner’s counsel’s performance were constitutionally deficient and her representation fell below an objective standard of reasonableness, Petitioner would still need to be able to meet the prejudice prong under *Strickland*. *See id.* (“The [applicant] must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”). Petitioner, however, has failed to establish that any of the issues raised *supra* would have changed the outcome of his criminal trial and has failed to demonstrate prejudice emanating from counsel’s alleged deficient performance such as to amount to a deprivation of Petitioner’s right to a fair trial. Rather, this Court is confident that the testimony of Ms. Saleeba regarding the nature of the assault combined with medical records, indicating a severe facial laceration, provided ample evidence for the jury to return a guilty verdict. In light of the State’s evidence against Petitioner, this Court concludes that Petitioner failed to show how his counsel’s alleged inadequate or judgment calls created a reasonable probability that the outcome at trial would have differed.

Furthermore, Petitioner was convicted on the lesser-included offense of Count 2, simple assault and battery, rather than assault and battery resulting in serious bodily injury. Had testimony of Hospital staff been elicited, it is quite possible that evidence of a permanent mark or more significant injury may have been heard by the jury. The tactical decision by counsel to rely on the medical record as an exhibit, rather than the testimony of Rhode Island Hospital personnel, prevented further inquiry by the State of possible injuries or the presence of permanent marks on Ms. Saleeba’s body. Accordingly, even assuming *arguendo* Petitioner’s counsel’s performance was constitutionally deficient, this Court is satisfied that there is a

reasonable probability that the result of the proceeding would have been no different. *See Barros v. State*, 180 A.3d 823, 829 (R.I. 2018).

## **B**

### **Petitioner's Other Assertions**

In addition to the ineffective counsel assertion, the Petitioner contends that (1) the conviction for assault with a dangerous weapon and simple assault are inconsistent verdicts; (2) there was an error of law categorizing his hands as a deadly weapon; therefore, the charges of assault with a dangerous weapon and felony assault were brought absent probable cause; (3) Petitioner's counsel should have filed a motion under Superior Court Rules of Criminal Procedure 9.1, because there was no probable cause to bring the charges of assault with a dangerous weapon and felony assault; and (4) Petitioner's counsel neglected to object to the Court's decision regarding a note the Court received regarding the jurors' request for clarification on Petitioner's "hands" as it relates to a dangerous weapon.

## **1**

### **Res Judicata**

Section 10-9.1-8 codifies the doctrine of *res judicata* within the postconviction relief context. This section provides in pertinent part:

"All grounds for relief available to an applicant at the time he or she commences a proceeding under this chapter must be raised in his or her original, or a supplemental or amended, application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds that in the interest of justice the applicant should be permitted to assert such a ground for relief." Sec. 10-9.1-8.

Our Supreme Court has consistently held that *res judicata* bars the relitigation of issues previously raised and addressed in a prior postconviction relief proceeding. *Hall v. State*, 60 A.3d 928, 930 (R.I. 2013). Furthermore, “a judgment on the merits in the first case not only is conclusive with regard to the issues that were actually determined but also precludes reconsideration of all other issues that might have been raised in the prior proceeding.” *Price v. Wall*, 31 A.3d 995, 1000 (R.I. 2011) (quoting *Carillo v. Moran*, 463 A.2d 178, 182 (R.I. 1983)). This principal has been extended to preclude the relitigation of substantially identical issues in a postconviction relief setting that have previously been ruled upon in an applicant’s direct appeal. *Carillo*, 463 A.2d at 182 (citing *Thornley v. Mullen*, 115 R.I. 505, 507, 349 A.2d 158, 159 (1975)). Regardless, a limited and narrow exception to this otherwise absolute bar exists which provides that issues which were “‘finally adjudicated or not so raised’ may nonetheless be the basis for a subsequent application for postconviction relief if the court finds it to be ‘in the interest of justice.’” *See Mattatall v. State*, 947 A.2d 896, 905 (R.I. 2008) (citing *Ramirez v. State*, 933 A.2d 1110, 1112 (R.I. 2007)).

## i

### **Inconsistent Verdicts**

Here, Petitioner had the opportunity during his direct appeal to raise his claims that his conviction of assault with a dangerous weapon and simple assault are inconsistent verdicts but failed to do so. *See Storey*, 102 A.3d at 643. Instead, Petitioner unsuccessfully appealed the trial justice’s denial of his motion for judgment of acquittal and motion for new trial.<sup>1</sup> *See id.*

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<sup>1</sup>As mentioned previously, Petitioner’s initial appeal asserted that the trial justice erred by (1) denying his motions for judgment of acquittal and new trial; (2) not allowing him to cross-examine complaining witness concerning custody issues involving her son; and (3) imposing an illegal sentence by confusing the evidence constituting the basis for the Petitioner’s conviction on each count.

Accordingly, Petitioner’s claim of inconsistent verdicts was not raised on direct appeal and is thus barred by *res judicata*. See *Hall*, 60 A.3d at 932 (holding that Petitioner’s failure to raise issue of alleged improper jury instruction on direct appeal barred similar claim in application for postconviction relief). Moreover, this Court is confident that relief notwithstanding the failure to raise his claims would not be “in the interest of justice.” See *Mattatall*, 947 A.2d at 905; see also *Ferrell v. A.T. Wall*, 971 A.2d 615, 621 (R.I. 2009) (stating that the phrase “interest of justice” has yet to be definitively construed as it is used in § 10-9.1-8 and it can only be defined upon a review of the facts of a particular case). Rather, the evidence adduced at trial indicates there is nothing inconsistent regarding the verdicts as Count 1 involved the Petitioner using his hands as a dangerous weapon by applying pressure to Ms. Saleeba’s neck, and Count 2 involved the Petitioner’s assault to the victim’s left temple with his hand or elbow. See *Lynch v. State*, 86 A.3d 390, 391 (Mem.) (R.I. 2014) (finding that interest of justice is a “very limited and narrow exception” to the *res judicata* bar). Accordingly, the assaults do not constitute the “same act or transaction” and are, therefore, sufficient to support their own independent sentences as was imposed by the Court. *State v. Scanlon*, 982 A.2d 1268, 1277-78 (R.I. 2009).

## ii

### **Error of Law**

Additionally, the claimed error of law in categorizing Petitioner’s hands as a dangerous weapon and its related probable cause was raised and addressed in Petitioner’s direct appeal. Specifically on appeal, the Petitioner claimed there was no evidence that he “used his hands in a manner that was likely to produce bodily harm” or that he “in fact possessed the physical capability of using his hands in such a way . . .” *Storey*, 102 A.3d at 648. Previously, our Supreme Court has held “the use of hands alone may constitute an assault with a dangerous

weapon” when said hands are “employed in such a manner as to be likely to produce substantial bodily harm . . . .” *State v. Zangrilli*, 440 A.2d 710, 711 (R.I. 1982).

Here, the trial justice heard testimony from the victim and properly categorized the Petitioner’s placement of his hands on the victim’s throat as likely to produce bodily harm. Moreover, in upholding the trial justice’s denial of Petitioner’s motions for acquittal and a new trial, our Supreme Court found “sufficient evidence was produced at trial to support a finding that defendant used his hands “in such a manner . . . likely to produce substantial bodily harm.”” *See Storey*, 102 A.3d at 648 (quoting *Zangrilli*, 440 A.2d at 711). Accordingly, this Court finds no error in the law applied but further notes that Petitioner’s claim was addressed directly on appeal and may not be raised subsequently in the instant action.

### iii

#### **Failure to Object to Charges**

Petitioner next claims that trial counsel should have filed a motion under Superior Court Rules of Criminal Procedure 9.1, because there was no probable cause to bring the charges of assault with a dangerous weapon and felony assault. Rule 9.1 provides:

“A defendant who has been charged by information may, within thirty (30) days after he or she has been served with a copy of the information, or at such later time as the court may permit, move to dismiss on the ground that the information and exhibits appended thereto do not demonstrate the existence of probable cause to believe that the offense charged has been committed or that the defendant committed it. The motion shall be scheduled to be heard within a reasonable time.” Super. R. Crim. P. 9.1.

The Court is satisfied that this assertion was not raised on direct appeal and is thus barred by the doctrine of *res judicata*. Moreover, the Court finds that the “interest of justice” would not be served by allowing this issue to be raised as the overwhelming evidence in the case indicates ample probable cause to bring the charges. Specifically, the severity of the injuries and the fact

that Ms. Saleeba was a “willing victim” who “had a job, wasn’t addicted to anything and was well spoken” gives this Court no pause in deciding that probable cause was sufficient to bring charges of assault with a dangerous weapon and felony assault. (Tr. at 30:9-14). Accordingly, Petitioner’s assertion that trial counsel should have filed a motion under Rule 9.1 is of no moment.

#### **iv**

#### **Failure to Object to Note**

Finally, this Court is unpersuaded by Petitioner’s contention that his trial counsel rendered ineffective assistance by failing to object to the trial justice’s decision regarding a “note” from the jury related to Count 1. The note from the jury to the trial justice sought clarification on Petitioner’s hands as it relates to a dangerous weapon, and the trial justice responded with language from Count 1. Moreover, the Court is satisfied that this assertion was not raised on direct appeal and is thus barred by the doctrine of *res judicata*. Even assuming the issue was not subject to *res judicata*, the Court is satisfied that this claimed deficiency falls well within the bounds of competent representation and is mindful that review is highly deferential towards counsel’s performance. *See Tassone*, 42 A.3d at 1285. Furthermore, Petitioner fails to provide the reasoning behind this contention in any of his papers, and this Court will not read any such reasoning into an otherwise benign question by the jury. *See Drew v. State*, 198 A.3d 528, 530 (R.I. 2019).

#### **IV**

#### **Conclusion**

For the reasons stated herein, Petitioner failed to satisfy his burden in proving by a preponderance of the evidence that he is entitled to postconviction relief. Specifically, Petitioner

has failed to present sufficient evidence to overcome the heavy burden imposed via the two-prong analysis imposed by *Strickland*. Accordingly, Petitioner's Application is hereby denied.

Counsel shall submit an appropriate judgment and order for entry.





**RHODE ISLAND SUPERIOR COURT**

*Decision Addendum Sheet*

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**TITLE OF CASE:** Kevin Storey v. State of Rhode Island

**CASE NO:** PM-2015-1250

**COURT:** Providence County Superior Court

**DATE DECISION FILED:** April 8, 2019

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

**ATTORNEYS:**

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