STATE OF RHODE ISLAND

PROVIDENCE, SC. **SUPERIOR COURT**

GARY TASSONE	:	
	:	
v.	:	**C.A. No. PM-2000-4624**
	:	**(Associated with P1-1994-3384A)**
STATE OF RHODE ISLAND	:	

(FILED: October 22, 2021)

DECISION

CARNES, J. Before this Court is Gary Tassone's (Petitioner) application for postconviction relief (Application) challenging his jury conviction for first degree murder. Petitioner was sentenced to a term of life without the possibility of parole. Petitioner now requests this Court grant his Application and enter an order overturning his conviction. This matter is before this Court pursuant to G.L. 1956 chapter 9.1 of title 10.

I

Facts and Travel

A recitation of facts underlying Petitioner's murder conviction appear in the Rhode Island Supreme Court case of State *v. Tassone*, 749 A.2d 1112 (R.I. 2000). Further facts may be gleaned from a reading of the Superior Court case of *Tassone v. State of Rhode Island*, No. PM 00-4624, 2010 WL 231449 (R.I. Super. Jan. 13, 2010)[1]; and the Rhode Island Supreme Court case of *Tassone v. State of Rhode Island*, 42 A.3d 1277 (R.I. 2012). After Petitioner's conviction for first degree murder and sentence was affirmed by the Rhode Island Supreme Court, Petitioner filed an

[1] This particular action, related to Petitioner's original application for postconviction relief, was assigned to a different justice of the Superior Court due to the retirement of the trial justice who presided over the trial. For the sake of distinguishing the different phases of this case, this justice will be referred to as the original postconviction justice.

application for postconviction relief which was denied by the original postconviction justice in the Superior Court. Petitioner duly filed an appeal of said denial. The Rhode Island Supreme Court reversed and remanded to the Superior Court for the purpose of conducting an evidentiary hearing on said application.[2] The Court had the opportunity to cull further facts from a thorough review of the entire trial transcript[3]and the actual exhibits used at the trial which had been made available to Petitioner's attorney and the State prior to and during the hearing.[4]

This Court held an evidentiary hearing on May 16 and 17, 2018. Petitioner testified during that proceeding. The transcript of that hearing consists of 120 pages. Other facts are either introduced or are further developed herein.

The events that gave rise to Petitioner's convictions transpired beginning on June 30, 1994. The East Providence police discovered Kendra Hutter's (hereinafter Kendra or Ms. Hutter) body partially buried on Crescent Beach in Riverside, Rhode Island. Ms. Hutter had suffered numerous blows to the face, neck, and skull, resulting in a fractured skull, broken jaw, and brain lacerations. There were also indications that Ms. Hutter attempted to defend herself, as there were lacerations on her forearms and fingers. The medical examiner determined that Ms. Hutter did not die immediately after the vicious attack, but rather lay helpless and bleeding for as long as fifteen minutes.

[2] After the retirement of the original postconviction justice, the matter was assigned to the present justice for the purpose of conducting an evidentiary hearing and rendering a decision.

[3] The complete transcript encompasses 1153 pages heard before the original trial justice and a jury. Said hearings occurred on January 6, 7, 8, 14, 15, 16, 17, 21, 22, 23, 24, 27, and 28, 1997. A suppression hearing comprises a part of said transcript. As of the date of the instant Decision, it appears that page 146 is missing. The information from that particular page may be inferred from the context of the surrounding pages and does not appear to this Court to be material to the merits of this proceeding.

[4] The actual trial exhibits were brought to the courtroom for the evidentiary hearing.

The same day that the police found Ms. Hutter's body, her estranged husband, Christopher Hutter, with whom she had been living, reported her missing to the Pawtucket Police Department. Mr. Hutter reported that Ms. Hutter had left their home the previous night at approximately 9:00 p.m. and had left behind a card with the name "Gary" and a telephone number written on it. Ms. Hutter indicated that if her husband needed to reach her, he could do so at that number. On July 1, 1994, the East Providence Police Department sent two detectives to the address that corresponded with the telephone number on the card. There, the detectives found Petitioner, who admitted knowing Ms. Hutter and having planned a date with her on June 29, 1994, the night of her death. The detectives asked Petitioner to follow them back to the East Providence Police Department, which he admits he did in his testimony at the suppression hearing, (Trial Tr. 187:10-25), and also during his trial testimony. *Id*. at 1007:4-6.

The case file contains four statements admittedly signed by the Petitioner. The Petitioner admitted he signed said statements during a suppression hearing before trial and also during the trial. Petitioner also admitted to signing these statements during the evidentiary hearing. (Evid. Hr'g Tr. 12:3-16:4.)

A

Four Statements Signed by the Petitioner

There is no question that, at the time of Petitioner's trial, four statements had been taken. Petitioner admits that he read, reviewed, and signed each statement. Said statements were utilized during the suppression hearing, the trial, and the evidentiary hearing on May 16 and 17, 2018. Given that the contents of each statement differ, they are considered by their respective times and dates.

1

Statement #1 at 1955 Hours on July 1, 1994

This statement consists of three pages containing eleven paragraphs. It contains the signatures of Detective Corporal Arthur Clark (Clark) taking the statement, Detective Corporal Kenneth Bilodeau (Bilodeau) as a witness, as well as the Petitioner. The statement indicates that Petitioner knew a person named Kendra who lived in Pawtucket. After describing Kendra, the statement indicates that they went on two dates. One was on June 12 and the other on June 15, 1994. After describing the initial dates with Kendra, the statement indicates the dates changed to a meeting date on June 5 and a second date on June 8, 1994. The statement continues that on June 22, 1994 they met again. The statement describes the dates on June 5 and June 22. The statement next indicates an agreement to meet Kendra on June 29, 1994, but Kendra called and cancelled, and that was the last time Petitioner heard from her.

This statement goes on to describe that another friend named Yolan [*sic*] and Petitioner had been to the same beach where Kendra was found on two occasions. The statement further indicates that Petitioner got a call the previous day from someone named Chris around 4:00 p.m. asking if he knew where Kendra was. The statement indicates Petitioner called back ten minutes later and told Chris that he had plans for that night with Kendra, but she cancelled them.

The final paragraph indicates, "[a]fter reading this the first time we met in June, Yolan [*sic*] knew where the beach was but we had to ask people directions where the playground was." The statement ends indicating that after they walked back from the playground, they "laid a blanket down on the beach near the end of the street that [they] had parked on."

2

Statement #2 at 10:45 p.m. on July 1, 1994

This is a one-page statement containing the signatures of Bilodeau as taking the statement and Clark as a witness. There is a signature of Petitioner as well. The statement contains six brief paragraphs. The statement begins, "At this time I would like to add a few things to the statement I have just given to Det. Cpl. Clark." The statement thereafter indicates that Petitioner did see Kendra on the night of Wednesday, July 29, 1994. The statement indicates Petitioner picked up Kendra at her house in Pawtucket around 9:10 p.m., and she got into his red "Chry." New Yorker. After getting gas, the statement indicates Petitioner and Kendra drove to Riverside, parked, and "walked down the beach . . . and had intercourse." The statement indicates Petitioner said they were only there for "20 minutes" then walked back to Petitioner's car. After driving around with Kendra, the statement indicates that Petitioner let her out at her home in Pawtucket at about 11:15 – 11:20 P.M." and thereafter Petitioner drove back to his house. The statement indicates Petitioner said this was the last time he saw Kendra. The statement purportedly contains a typographical error in the second paragraph with its reference to "Wednesday, 7-29-94." The date is really supposed to read 6/29/94. Clark testified to this at the suppression hearing (Trial Tr. 51:4-12) as well as Bilodeau at the suppression hearing. *Id*. at 119:1-22 and 160:3-4. This error was also explained again at trial before the jury by Clark. *Id*. at 426:10-427:3.

3

Statement #3 at 2400 Hours on July 1, 1994

This statement consists of two pages and seven short paragraphs. The statement contains the signatures of Bilodeau as taking the statement and Clark as a witness. There is a signature of Petitioner as well. The statement begins, "After speaking with Det. Bilodeau a short time ago[,] I

wish to state at this time that while I was at the beach in Riverside with Kendra [,] something else took place." The statement goes on to indicate the blanket Petitioner and Kendra used was white and not blue, and Petitioner and Kendra had sex together which was not forced as they had "liked each other and had done it before [that] time." The statement goes on to indicate Petitioner and Kendra spent "about an hour" on the beach and were having fun, and Petitioner got a shovel from his car and he and Kendra started building sandcastles. The statement continues to indicate that Petitioner said he had gotten sand in Kendra's face by accident, but she didn't get mad. Thereafter, the statement indicates that when he was approximately two feet from Kendra, and while Petitioner was holding the shovel, "Something jumped in the woods . . . and scared me. I didn't know if it was an animal or what." The statement next indicates that Petitioner stated, "I swung the shovel at the sound but hit Kendra in the face. She fell to the ground and was bleeding. I was scared I killed her. I used the shovel to cover her up with sand so nobody would know. I guess she was still alive because her hands came up and out of the sand. I took the blanket and the shovel and ran to my car. I then drove off and got onto Rt. 195 East toward Seekonk, Mass. Just over the state line I stopped my car and tossed out the blanket and shovel off the side of a small bridge. I then drove home." The statement goes on to indicate that Petitioner said, "I want you to know I did not plan this to happen to Kendra and it was an accident. She was a very nice person."

4

Statement #4 at 1030 Hours on July 2, 1994

This statement consists of three pages and sixteen paragraphs. The statement contains the signatures of Bilodeau as taking the statement and Clark as a witness. There is a signature of Petitioner as well. The statement begins, "Today Det. Bilodeau of the East Providence Police

Department spoke with me about this investigation. He read me my rights again and I then read the form. I signed because I understood my rights and wish to further speak with Det. Bilodeau."

The statement indicates that Petitioner was offered food and drink, but he declined, and that Petitioner was allowed to sleep until about 10:00 a.m. that day. The statement indicates that the Petitioner wished to continue "with what has been told to police at this time."

The statement indicates that Petitioner said when he was with Kendra on June 29, 1994, he was wearing a green golf shirt and gray stonewash jeans. It further indicates that Petitioner did not remember getting blood on his clothing and he placed "them" in a hamper in his basement for his mother to wash.

The statement indicates that Petitioner described Kendra's attire in detail. The statement indicates Petitioner and Kendra picked up some Dunkin Donuts coffee before going to the beach and that Petitioner tossed his cup near where he parked, while Kendra took her cup with her and it was left near where she was eventually buried.

The statement depicts that Petitioner made a statement about getting a blanket from his car to put on the sand and having sex with Kendra. The statement further indicates that Petitioner said, "We talked about doing something romantic. I suggested using my shovel. She said sure."

The statement further depicts that Petitioner said he took the shovel out of his trunk and took it and the blanket onto the beach. The statement indicates that Petitioner said he "wanted to do something special for Kendra," and he thereafter described making a circle in the sand around the blanket and having sex with Kendra. After finishing, the statement indicates that Petitioner said he "played around in the sand a bit more with the shovel." The statement next indicates that Petitioner said he was "scared by [a] crash in the woods and swung the shovel which hit Kendra in the head." The statement goes on to indicate that Petitioner next said, "I then buried her where

I had been digging. Again I think she was still alive because her hands came up and out of the sand. I was in [a] panic and scared to death. I wanted to get out of there and ran."

The statement next indicates that Petitioner told Bilodeau that he did not remove Kendra's watch and does not remember if she was wearing one that night.

In its final three paragraphs, the statement indicates:

> "I put both the shovel and the blanket in the trunk of my car. I then drove into East Providence and ended near the Showcase Theater in Seekonk, Mass. . I took the Rt. 195 West exit there and stopped on 195 West just before the bright lights on the state line. I stopped and threw the blanket and the shovel off the side of the road.
>
> "I would like Det. Bilodeau to do one thing for this investigation. I would like him to talk with the other women I have met by the ads. Yoland and Cindy. They will tell you what type of person I have been on these dates. Their information is in a brown address book in my bedroom on the second floor of my house at 31 Fairview Ave., Cumberland, RI.
>
> "Also I think [the] police should get a handgun out of my room because my mother would not want it in the house with her and I know because of these charges I should not have it. It is a .32 Cal. semi-auto[matic] pistol. It is in a locked video case in my bedroom. The key is in the bottom of a cup with pens near the address book I want you to get."

B

Petitioner's Testimony at the Suppression Hearing Before Trial

Petitioner's testimony at the suppression hearing covers pages 171 to 225 of the transcript. The salient portions are highlighted here. Petitioner admits he arrived at the police station at "roughly" 7:30 or 7:45 p.m. and gave a statement to the police. (Trial Tr. 174:18-22.) He testified that he followed police to the East Providence police station in his own vehicle. *Id*. at 187:10-13. Petitioner testified that he walked into the police station without officers forcing him or touching him in any way. *Id*. at 187:22-25. He testified that those were his words he gave to the East

Providence Police in Statement 1. Thereafter, police advised him of his *Miranda* rights, and he continued to talk to the police for a period of time. *Id*. at 197:4-198:1. He testified that he could not remember "offhand" if any detective told him, at any point in time, that he *had* to speak with them. *Id*. at 198:2-4. Petitioner testified that after receiving his rights, a second witness statement was prepared that he reviewed and signed. *Id*. at 200:13-23.

Petitioner thereafter goes on to testify that those words on the second witness statement were not his words. *Id*. at 200:24-201:5. Still, Petitioner testified that, at the conclusion of the second statement, he had an opportunity to read it and he signed it. *Id*. at 201:24-202:3. Petitioner claims he "was acknowledging what Detective Bilodeau told [him] before [he] signed it." *Id*. at 202:7-8. Thereafter, he was questioned whether there were any parts of the statement that he did not agree with, and he testified there were. *Id*. at 202:11-13.

Petitioner was asked to testify what he specifically told Bilodeau prior to signing the statement. *Id.* at 202:16-17. His response is best set forth verbatim.

"A. Where it says I did see Kendra on the night of Wednesday, 7-29-94. Before that, he was asking me, with me being up late at night, and with the changes in the other statement, would I not remember if I was with her that night or not. And I said I couldn't remember. And then, I mentioned to him, when I saw that where it says I did see her, I told him I can't remember if that was one of the nights or not. But he told me it has to be typed up where it's not questionable.

"Q. And that was Detective Bilodeau, you said?

"A. Yes, sir.

"Q. That certainly bothered you, that fact, didn't it?

"A. Why would it bother me?

"Q. That you were going to have to sign a statement that you knew were not your words?

"A. No. He was mentioning to me that I probably saw her that particular day, because he told me that while we were talking, it's procedure that he has to type up and that I should sign what we talked about.

"Q. So, is it your testimony here today that because of the procedure, you signed that statement?

"A. He told me, as them being experts, when I explained to him, as I'm an expert in my field, that I should follow along with them, that they know what they are doing.

"Q. And did you believe him when he told you that?

"A. Yes, I did.

"Q. And is it your testimony here today then that based upon that statement to you, you signed a statement which you knew to be false?

"A. Yes, I did.

"Q. And you put your name on that bottom of that document as your words, knowing that that was false?

"A. That is correct." *Id*. at 202:18-203-25.

The questioning next began to focus on the third statement which occurred at 2400 hours on July 1, 1994. The precise colloquy is instructive.

"Q. And, again, that is a witness statement signed by you, time 24:00, July 1, 1994, isn't that correct?

"A. That's correct.

"Q. And, again, sir, you were given an opportunity to review this statement before placing your signature on the bottom of that, isn't that correct?

"A. Yes, it is.

"Q. And, therein, you talk about the fact that you were with Kendra on a beach in Riverside and that you had sex with her on a blanket that was not forced, and that while you were on the beach with her having fun together, you got a shovel from your car and started building sand castles, do you not?

"A. I never talked about that." *Id*. at 206:10-23.

" * * *

"Q. Sir, where we last left off, I had begun to ask you some questions about a third statement, State's Exhibit Number 4, prepared at 24:00. Do you recall that?

"A. Yes, I do.

"Q. Sir, you were asked to sign the bottom of that document, is that correct?

"A. Yes, I was.

"Q. And you placed your signature on the bottom of that document?

"A. Yes, I did.

"Q. What did you think you were doing when you put your signature on that document?

"A. Doing exactly what Detective Bilodeau told me I was doing.

"Q. What was that?

"A. He explained to me, as during our conversation we had in the holding room at the time, that with my with being up late that evening, he wasn't sure if a dramatic incident happened that evening, because during the course of the day, I kept telling him he couldn't tell me what I didn't know about certain things, and then he explained that how he's the expert in these cases and explained about the home confinement suspended sentence, if I did what he mentioned, and I figured at that time I could end up going home. That's why I ended up signing it. I believed that – he had me believing that I did the crime.

"Q. Sir, after the portion where it says "I Gary Thomas Tassone . . ." and a phone number, do you see the words written ". . . voluntarily, without threats or promises, make the following statements"?

"A. Yes.

"Q. And is it fair to say that you saw it that night as well?

"A. Yes. He didn't threaten me or promise me anything. He was basically explaining how the system works to me.

"Q. And you made that statement?

"A. That's what he typed up, what he believed what happened that evening.

"Q. And what he believed was based upon what you had told him, isn't that correct?

"A. No. What he typed up what he believed what happened from all the evidence that they found at the scene that evening.

"Q. Is it your testimony here today then that Detective Bilodeau made up these words and put them in your mouth as your witness statement?

"A. He didn't put them into my mouth. He just wrote them up explaining what he believed – thought happened, and with him being an expert in this case, I end up signing it from everything that he explained to me that we talked about.

"Q. And you knew, sir, did you not, that when you signed that statement, you were acknowledging that those were your words?

" * * *

"A. I didn't acknowledge that they were basically my words. I wasn't thinking of that.

"Q. Sir, therein, there is a paragraph which reads "I swung the shovel at the sound, but hit Kendra in the face. She fell to the ground." The following paragraph reads "I guess she was still alive, because her hands came up out of the sand. I took the blanket and the shovel and ran to my car. I then drove off and got onto Route 195 East, towards Seekonk, Massachusetts. Just over the state line, I stopped my car and tossed out the blanket and shovel off the side of a small bridge." Do you recall seeing those words on this statement?

" * * *

"A. Yes, I did recall seeing that.

"Q. And are those your words?

"A. No, they're not.

"Q. You're saying that Detective Bilodeau made up those words and put them onto the statement?

"A. He mentioned to me he had to make it look as prospectable (sic) as it possibly can be, where it's not questionable. Otherwise, it could be worse for me off in the future, because an accident has happened, he stated to me.

"Q. My question to you, sir, is those words on that document that I just read to you are not your words, but the words of Detective Bilodeau; is that your testimony?

"A. Yes, sir.

"Q. Okay. And you are saying, as you testify here today, that the reasons why you signed or -- excuse me -- one of the main reasons why you signed that statement was that you were overtired and the situation had overcome you, essentially, is that correct?

"A. That's one of the reasons, yes." *Id*. at 207:6-210:25.

The Petitioner testified that after the conclusion of Statement #3, he was allowed to visit with his mother and then slept in a cell at the police station. *Id*. at 211:4-12.

Petitioner next testified about the statement he gave on July 2, 1994 at 1030 hours. He acknowledged his signature and initials on the document. *Id*. at 214:20-25. He testified that after speaking with detectives that morning, a written statement was prepared and he reviewed it. *Id*. at 215:4-8.

However, when asked if he signed the statement, Petitioner's precise words are important.

"Q. And did you sign it?

"A. I signed that statement, but I did not say anything that is on that statement, except for the food that was offered to me.

"Q. Referring to State's Exhibit Number 6 full, do you recognize that document?

"A. I recognize that document.

"Q. Did you sign each of those pages?

"A. Yes, I did.

"Q. Reviewing that statement, are any of the words on that statement your words? I'd like you to review the whole document please.

(Pause)

"A. Yes, some words are mine.

"Q. So the words that you say are not yours, do you know whose words those are?

"A. Detective Bilodeau's.

"Q. So, am I correct, then, that that statement would be a combination of both your words and Detective Bilodeau's words, in your mind?

"A. One paragraph on that statement is mine, yes.

"Q. And what paragraph would that be?

"A. The one where they offered me food and drink.

"Q. Okay. With the exception of that, everything else is the words that Detective Bilodeau made up, correct?

"A. Correct.

"Q. Sir, I'm going to direct your attention to the last paragraph of that statement, wherein it says that there's a hand gun that's in your house and that it is a 32 caliber semiautomatic pistol, which is in a locked video case in your bedroom. "The key is in the bottom of a cup with pens near the address book, and I want to you get it." Those are the words that Detective Bilodeau made up and put on that document, correct?

"A. No, it is not. Some of those words - - the sentence is not exactly the way I said it to him.

"Q. So now some of these words now are your words, correct?

"A. A couple of them in there are, yes.

"Q. Okay. I want you to look at the paragraph before that as well, the one wherein it says "I would like Detective Bilodeau to do one thing for this investigation, and that's to speak with other women, including Yolande and Cindy."

"A. I told him that he could, but I didn't ask him to.

"Q. Okay. Well, in there it says that their addresses are in a brown address book which is in your bedroom, does it not?

"A. Yes, it is.

"Q. So, again, those are not Detective Bilodeau's words. Those are what you told him about the addresses being in a book in your bedroom, isn't that correct?

"A. I need to read the sentence over again please.

"A. Those words are mine about the book, when we were talking during the evening the night before.

"Q. When you spoke to Detective Bilodeau and Clark on the morning of July 2, 1994, did you speak with them about the events surrounding the death of Kendra Hutter?

"A. Can you explain what you mean; did I speak with them? On how did I speak?

" * * *

"Q. On the morning of July 2, when you spoke with the detectives, did you speak at all with them about what had happened to Kendra Hutter on night she was killed?

"A. No, I didn't. They didn't tell me anything about how she died." *Id*. at 215:9-218:3.

C

Petitioner's Testimony at Trial

Petitioner testified at his trial in his own defense on January 27, 1997. His testimony at trial covers pages 1002–1057 of the transcript. With regard to the statements described above, Petitioner testified that most of the information he gave police at his house was put down on Statement #1. *Id*. at 1010:17-19. He testified he read and signed the statement. *Id*. at 1010:20-23. Once he signed the statement, Petitioner testified that Clark told him he was a suspect in a homicide, that there were discrepancies in the statement he just gave, and then gave him another rights form to read. *Id*. at 1011:1-4. During his testimony, Petitioner recounted the circumstances surrounding his signing of the third statement at 12:00 a.m. The precise questions and answers follow:

"Q. Okay. And there came a period in time, at 12:00 or shortly thereafter, you signed another statement, correct?

"A. Yes.

"Q. All right. And, when you signed that statement, did you realize what you were signing?

"A. After he explained it to me on how the system works, then I signed it, yes.

"Q. Did you realize what you were signing?

"A. I realized what I was signing, because I thought a dramatic accident could have happened, the way he explained it to me while in the interview room.

"Q. What do you mean you thought a dramatic accident could have happened?

"A. Well, during that time, which was around midnight, he mentioned to me, with myself being up a long time, is it possible I could remember if a dramatic accident could have happened and not remember.

"Q. Yes.

"A. And I told him I didn't know.

"Q. Okay. And so, then what happened?

"A. Afterwards, he felt that a dramatic accident has happened, and he'd type up the paperwork for what they feel has happened from the evidence they have collected at the crime scene, and most likely I will get home confinement or suspended sentence.

"Q. If you signed that piece of paper?

"A. Excuse me?

"Q. If you signed that statement?

"A. Yes.

"Q. And you signed the statement?

"A. Yes." *Id*. at 1021:6-1022:12.

Petitioner testified he was not handcuffed at all during his time up to then at the police station. *Id*. at 1023:11-13. After sleeping the night at the police station, Petitioner testified as to the circumstances when he awoke the next day. Again, the precise questions and answers appear below:

"Q. All right. And what happened then, when you were - - you woke up?

"A. When I woke up, Detective Bilodeau brought me to the interview room, and he told me that he had more papers he needs for me to sign; the papers he mentioned about last night.

"Q. Okay. And what did you do?

"A. I then read them, and I asked him - - I told him, I said "You didn't read me my rights again." He then informed me that it's just a formality, having me have it on the statement that I read my rights. All they need is the one from yesterday.

"Q. Oh, okay. So, then what happened?

"A. I then ended up asking them about taking them to the shovel off of 195 where it said that I through [*sic*] the shovel.

"Q. Okay. And then what happened?

"A. At that time, he told me again, because the night before, that they'd have to make it look as realistic as possible. This was around midnight he was saying this, the night before, so nothing can be questionable.

"Q. What did you understand that to mean?

"A. That they knew what they was doing, as experts in their field, saying I knew nothing about the law." *Id*. at 1023:23-1024:21.

Petitioner next testified that in addition to being tired, he had another problem when it came to reading. He went on to testify that when reading a lot of words or pages at a time, he had an inability to remember what he had previously read before that. *Id*. at 1025:18-25. He also testified that he had a problem with comprehension. *Id*. at 1026:1-2.

During his testimony on cross-examination, Petitioner described how police showed up at his house on July 1, 1994 before he was set to leave to bowl in a league. *Id*. at 1026:18-25. He testified he invited police into his house, spoke with them in the kitchen, and then "followed" them to the police station. *Id*. at 1027:3-1030:8.

Petitioner testified that he was in good physical health at that time, not taking any medication, and not under the influence of alcohol or anything else. *Id*. at 1030:19-25. Petitioner further testified that the police were "calm and cool" throughout the whole time they spoke to him and that he was not "[struck]" by any officer while at the police station. He also testified that police offered him food and drink while he was there. *Id*. at 1031:5-17. He further testified that he did not ask the police to allow him to rest. *Id*. at 1032:12-14. Petitioner admitted during his testimony that he was aware of the words on the four statements and he signed them as well as initialed them at the bottom of the pages. *Id*. at 1042:12-1043:4.

After the lunch recess at trial, the cross-examination continued. Petitioner testified that at the time he signed the midnight statement on July 1, 1994, he believed he was involved in a "dramatic accident" which was the death of Kendra. *Id*. at 1044:11-15. He testified that he

believed this because he was overtired and because "[t]he way Detective Bilodeau explained it to [him] about what possibly could have happened." *Id*. at 1044:16-22.

Petitioner also testified on cross-examination that when he woke up at the police station on that Saturday morning, he was "convinced [he] did the crime." *Id*. at 1047:4-7.

Petitioner also testified about the shovel used and the dynamics of the murder. The questions and answers are set forth exactly:

"Q. Do you recognize this shovel right here?

"A. No, I do not.

"Q. Do you remember speaking with the police in the midnight statement, and in that statement, specifically wherein it says "I guess she was still alive, because her hands came up and out of the sand. I took the blanket and the shovel and ran to my car. I then drove off and got on to Route 195 East towards Seekonk." Do you recall that portion of the statement?

"A. I remember reading it.

"Q. That would have been on July 1st of 1994 at about midnight or thereafter, correct?

"A. Yes.

"Q. What shovel were you referring to?

"A. I wasn't referring to any shovel. Those were his words from what he'd said he believed happened at the scene, and he - - from the evidence they collected, they had to make it look as real as it could possible.

"Q. When you say he, who are you referring to?

"A. Detective Bilodeau.

"Q. So, now, at midnight on July 1st of 1994, Detective Bilodeau was referring to a shovel discarded on the side of Route 195; is that your testimony?

"A. I don't know what he was referring to.

"Q. Wherein it says in the statement that the shovel was discarded on the side of Route 195, in the midnight statement of July 1st of 1995, was that referring to the shovel - - to a shovel discarded on the side of Route 195?

"A. I guess that's what it meant.

"Q. And that was at midnight?

"A. Yes.

"Q. And you heard, did you not, both Detective Bilodeau and Burney testify that the shovel was not even seized until the afternoon of July 2nd of 1994?

"A. That's what I heard them say.

"Q. I'm going to ask you to take a look at what's been marked State's Number 10 full. Could you please take a look at the fifth paragraph, the first sentence and read that sentence for me?

"A. I swung the shovel at the sound, but it hit Kendra in the face. She fell to the ground and was bleeding. I was scared I killed her. I used the shovel to cover up with sand so nobody would know.

"Q. How did it feel the first time you hit her in the head?

"A. I didn't hit her in the head.

"Q. How did it feel the second time you hit her in the head?

"A. I didn't hit her in the head.

"Q. What about the third, fourth, fifth, six and seventh time you hit her in the head? Did it feel any better?

"A. I didn't hit her in the head.

"Q. What did she say while you were hitting her?

"A. I wasn't there. I didn't hit her in the head." *Id*. at 1051:1-1053:3.

Cross-examination concluded in a dramatic and escalating fashion with a series of questions to which Petitioner testified he was not at the murder scene and professed an inability to answer the State's question on ten occasions. Defense counsel made four objections during this final stretch of questioning, all of which were overruled. *Id*. at 1053:4-1055:10.

D

Trial Justice's Instructions to the Jury

The trial justice gave a comprehensive set of jury instructions at the end of the case. *Id*. at 1115-1142. In relevant part, the trial justice instructed the jury:

> "I'm going to direct your attention at the outset, as long as we are under the general heading of evidence, to the statements, the so-called admissions made by the defendant to the police. It is a rule of law that a jury cannot consider a so-called confession or admission, whether it's verbal or in writing, unless the jury is satisfied as to three preliminary matters. The first is that the defendant's constitutional rights were explained to him; that is to say that he was advised of all the rights he had. Second, that the defendant voluntarily gave up those rights, and, third, that the confession or admission was voluntarily made.
>
> "Now, throughout the balance of my instructions, you will hear me refer to proof beyond a reasonable doubt. But, with respect to the issue of confessions or admissions, that is not the standard of proof. The standard of proof is you must be convinced by what is called clear and convincing evidence; evidence that the defendant was advised of his rights, that he voluntarily gave up those rights, and that he voluntarily made those statements." *Id*. at 1119:7-1120:2.

The trial justice, in her complete instruction, went on to comprehensively explain the precise rights that a defendant must be advised of, the meaning of the words "voluntarily," "knowingly," and "intelligently," and the need for the State to prove any waiver by clear and convincing evidence. The trial justice also instructed the jury as to what police tactics were and were not permissible, and what the jury must have been satisfied with prior to considering any statement of the Petitioner. *Id*. at 1120:3-1123:4. The trial justice, in her comprehensive instruction, also advised the jury, "I tell you as a matter of law that it is not until a person is in custody that the police have to inform him of his rights, and I charge you as a matter of law that the mere fact that a person is in a police station, for example, doesn't mean that he is in custody."

Id. at 1121:9–13. The trial justice goes on to instruct that, "[a] person is in custody when he is not free to leave; the equivalent of being arrested, or if he is informed that he is in custody or under arrest." *Id*. at 1121:13-16. The trial justice describes the point of custody as the point that triggers the requirement to advise a defendant of his rights and obtain a knowing, voluntary, and intelligent waiver thereof before police questioning may proceed. *Id*. at 1121:16-22.

In addition to the comprehensive instruction relative to the jury's use of the Petitioner's statements during their deliberations, the trial justice gave a limiting instruction to the jury during the trial just prior to their hearing the contents of Petitioner's statements. This limiting instruction parroted the comprehensive final instruction on this issue. *Id*. at 392:20-395:3.

E

Deliberation and Verdict

After being sent to deliberate, the jury returned a guilty verdict on the charge of first-degree murder, answered the special interrogatory in the affirmative on phase two of the deliberations, and thereafter, a sentence of life without parole was imposed on Petitioner.

F

The Appeal and the Instant Proceeding

The Rhode Island Supreme Court affirmed the conviction on appeal. *Tassone*, 749 A.2d 1112. Petitioner now brings a number of claims requesting postconviction relief.

II

Standard of Review - Postconviction Relief

"[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) (citing *Page v. State*, 995 A.2d 934, 942 (R.I. 2010)) (further citation omitted); *see also* § 10-9.1-1. "An 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) (quoting *State v. Laurence*, 18 A.3d 512, 521 (R.I. 2011)). Postconviction relief motions are civil in nature and thus governed by all the applicable rules and statutes governing civil cases. *Ferrell v. Wall*, 889 A.2d 177, 184 (R.I. 2005).

III

Petitioner's Claims

A

Overview of Petitioner's Claims

After the evidentiary hearing on May 16 and 17, 2018, Petitioner filed a memorandum outlining how his trial counsel was deficient in a number of respects. While those contentions will be addressed, *infra*, in the Analysis section, such contentions generally include that Petitioner's trial counsel failed to investigate and pursue lines of inquiry at or before trial; failed to present certain evidence; failed to move to suppress certain evidence; failed to present exculpatory evidence; and failed to make certain arguments or object to specific evidence or argument at certain times during the trial.

The State filed its memorandum opposing Petitioner's Application, generally arguing that either Petitioner's counsel was not ineffective, but even if counsel was ineffective, that Petitioner was not prejudiced by his counsel's performance.

The Petitioner next filed a Supplemental Post Conviction Memorandum raising further points, and the State, in response, filed a Supplemental Memorandum Opposing Petitioner's Application for Post-Conviction Relief.

B

Standard of Review – Ineffective Assistance of Counsel

Any analysis of a claim of ineffective assistance of counsel begins with the case of *Strickland v. Washington*, 466 U.S. 668 (1984), which has been adopted by the Rhode Island Supreme Court. *See LaChappelle v. State*, 686 A.2d 924, 926 (R.I. 1996) and *Brown v. Moran*, 534 A.2d 180, 182 (R.I. 1987). Whether an attorney has failed to provide effective assistance is a factual question which a petitioner bears the "heavy burden" of proving. *Rice v. State*, 38 A.3d 9, 17 (R.I. 2012); *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010) (noting 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).

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 "the court should recognize that counsel is strongly

presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland,* 466 U.S. at 690. *Hughes v. State*, 656 A.2d 971, 972 (R.I. 1995) ("[A] defendant must overcome a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance and sound trial strategy."); *Bell v. State*, 71 A.3d 458, 461 (R.I. 2013) ("[A]pplicants seeking postconviction relief due to ineffective assistance of counsel are saddled with a heavy burden, in that there exists a strong presumption [recognized by this Court] that an attorney's performance falls within the range of reasonable professional assistance and sound strategy . . . ." *Rice,* 38 A.3d at 17 (quoting *Ouimette v. State,* 785 A.2d 1132, 1138-39 (R.I. 2001)) (internal quotation marks omitted).

Even if the Petitioner can satisfy the first part of the *Strickland* test, he must still overcome a second hurdle by demonstrating that his attorney's deficient performance was prejudicial. By that measure, 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; *Hazard v. State*, 968 A.2d 886, 892 (R.I. 2009).

Ordinarily, tactical decisions by trial attorneys do not, even if hindsight proves the strategy unwise, amount to defective representation. *Linde v. State*, 78 A.3d 738, 747 (R.I. 2013). "As the *Strickland* Court cautioned, a reviewing court should strive '*to eliminate the distorting effects of hindsight*.'" *Clark v. Ellerthorpe,* 552 A.2d 1186, 1189 (R.I. 1989) (emphasis added) (quoting *Strickland*, 466 U.S. at 689). "Thus, a choice between trial tactics, which appears unwise only in hindsight, does not constitute constitutionally-deficient representation under the reasonably competent assistance standard." *United States v. Bosch,* 584 F.2d 1113, 1121 (1st Cir. 1978).

i

A Word on Trial Strategy and Trial Counsel's Availability

During the evidentiary hearing on May 16 and 17, 2018, Petitioner admitted that prior to his trial he had discussions with trial counsel about certain ways the case would be handled, "what type of evidence would be produced, what type of questions." Evid. Hr'g Tr. 7:17-21. Petitioner further admitted that these conversations continued during his trial. *Id*. at 7:22-23. During his evidentiary hearing, Petitioner admitted that he had "five or so" "detailed conversations" with his trial counsel about "strategy" once Petitioner familiarized himself with the contents of discovery. *Id*. at 77:3-24. Petitioner further testified that during his trial he sat next to trial counsel and had "multiple conversations with him as the days went on." *Id*. at 78:10-24.

The Court is aware that both the state and Petitioner had made unsuccessful efforts to locate trial counsel. *Id*. at 112-113. After Petitioner had rested at the evidentiary hearing, counsel for the State indicated they had discovered a possible address for Petitioner's trial counsel in the state of Florida, and the State intended to send a certified letter to trial counsel to "see whether he responds." *Id*. at 118:20-119:3. At that time Petitioner's counsel indicated he had "no desire to call [trial counsel] as a witness." *Id*. at 119:12-15. The matter was taken under advisement for a written decision.

IV

Analysis

Any analysis of the effectiveness of defense counsel must include a consideration of the context of the proceedings before the trial justice. The instant case involved a suppression hearing where Clark and Bilodeau testified as described above. Petitioner also testified at the suppression hearing as described above. Trial Tr. 171–225. The timelines for the Petitioner's various

statements to the police, both before and after he arrived at the East Providence police station, were fairly linear and non-complex. Petitioner's statements, especially his written statements described above, must be contrasted with his testimony at the suppression hearing, and later at his trial. Defense counsel is not free to suborn perjury or invent facts. In the context set forth above, any veteran defense attorney would be sure to proceed with caution given the wide disparity between what the police testified to at the suppression hearing and what Petitioner testified to at the same suppression hearing, and later testified to at trial after the State had rested. In this context, defense counsel is forced to deal with the proverbial elephant in the room,[5] namely that Petitioner had confessed to the crime in a series of written statements made to the East Providence police on July 1 and 2, 1994.

A

Petitioner's Trial Counsel Failed to Hire an Expert to Examine a Rights Form

Petitioner's first[6] contention is that his trial attorney failed to hire an expert to examine a particular Rights Form containing a time of 2050 (military time). At the evidentiary hearing, the Court received a report from Hartford Kittel (Ex. 2) in which the expert averred that the "2050" typed in as the time on the 2050 Rights Form was typed on a different typewriter than the instrument that typed the remainder of said form. *See* Pet'r's Mem. at 2–4. Petitioner maintains

[5] The expression "elephant in the room" is a metaphorical idiom in English for an important or enormous topic, question, or controversial issue that is obvious, or that everyone knows about but no one mentions or wants to discuss because it makes at least some of them uncomfortable, or is personally, socially, or politically embarrassing, controversial, inflammatory, or dangerous. *See* "Elephant in the room" at Wikipedia.org last visited October 30, 2020.

[6] For the most part, the Court will address Petitioner's contentions in support of his Application in the order they appear in Petitioner's Memorandum and Supplemental Memorandum. Some contentions may be combined for a more efficient discussion and analysis. The State has addressed Petitioner's contentions in the State's Memorandum in Objection in a different order than Petitioner has presented in Petitioner's Memorandum.

that the "2050"[7] form was actually typed by the police at the original time of 0850, which was before the police went to Petitioner's house on July 1, 1994. *Id*. at 3. Petitioner further maintains this fact would be significant because it would establish that Petitioner was a suspect before the police went to his house on July 1, 1994, thus contradicting Clark's trial testimony that Petitioner was not a suspect. *Id*. at 4. The expert report indicates that the original time of "0850" had been whited out and the "2050" had been typed in on a different typewriter, thus detracting from the credibility of an important State witness. *Id*. Trial counsel also submitted to the jury in final argument that the police submitted a blank Rights Form to the Petitioner before Petitioner's 7:55 p.m. statement on July 1, 1994. (Trial Tr. 1069-1072.)

In its objection, the State refers to the time on the Rights Form as "8:50" and reminds the Court that Petitioner acknowledged that he signed the Rights Form at 8:50 p.m. (State's Mem. at 9 and Evid. Hr'g Tr. at 81.) The State argues that the "fact that Detective Clark may have used one typewriter to type 8:50 and a different typewriter in the squad room to later amend the form to 20:50 [*sic*] in no way would have undermined Detective Clark's testimony that the form was typed after [Petitioner] gave his 7:55 pm statement." (State's Mem. at 9.) The State argues that prior to that moment, the police had no reason to suspect that Petitioner was involved in the murder as they had not spoken to him and had no information tying Petitioner to the victim other than the card with the name Gary and the phone number turned over to police by Christopher Hutter (described, *supra*). The State goes on to contend, "To credit this preposterous claim, the jury would have had to believe that the police typed a rights form ten hours before their first

[7] It appears in Petitioner's Memorandum at 3 that he has referred to the 2050 form as the "1050" form. The Court infers a typographical error. Petitioner has acknowledged this in his Supplemental Memorandum at 2.

conversation with [Petitioner] and then staged the evening to have him sign it twelve hours later at exactly 8:50 pm." (State's Mem. at 9–10.)

The State also urges the Court to reject the conclusion that police had Petitioner sign a blank Rights Form when Petitioner arrived at the police station suggesting that the issue was fully vetted at both the suppression hearing and trial and was rejected by both the trial justice and the jury. *Id*. at 10.

The Court's analysis begins with a recognition of the difference between recording a particular time increment in either twelve-hour time or, in the alternative, in military time. Using the 8:50 p.m. as an example, it is necessary to record either "a.m." or "p.m." after the digits if one is referencing twelve-hour time. However, using military time, which utilizes a twenty-four-hour clock, one records 8:50 p.m. as 2050 hours. Therefore 8:50 p.m. is exactly the same as 2050 hours.

The expert's report (Kittel) produced at the evidentiary hearing contains the forms and statements signed by the Petitioner. One Rights Form contains only the time increment "2050" in addition to the other information on the form while another Rights Form in the expert's report, and contained in the submission to this Court, depicts both 0850 and 2050 at the top of the form. During a pretrial suppression before the trial justice back in 1997, Clark testified with regard to the "2050" time, "I [put it there]." (Trial Tr. 41:22-25.). He was later cross-examined as to this time notation. *Id*. at 117. At trial, before the jury, Clark is again queried about the time notation 0850 versus 2050. *Id*. at 413-416. At Petitioner's evidentiary hearing, Petitioner testified that he remembers Clark testifying *at trial* that there was a "typing error" and Clark testified that "he used Wite-Out to cover the 0850." (Evid Hr'g Tr. at 18:12-16.) At trial, Clark also testified about other typographical errors on Petitioner's statement with regard to the date of 7/29/1994, (Trial Tr. at 426-427) and explains why no rights were read to Petitioner the first time he gave a statement. *Id*.

at 478. Bilodeau also testified at the suppression hearing and testified about the typographical error involving the 7/29/1994 date, *id*. at 119, and also that certain statements were typed by two different officers not using the same typewriters. *Id*. at 159. Bilodeau also testified about the correction to the date of 7/29/1994 during his trial testimony. *Id*. at 548.

With regard to Petitioner's theory that the hiring of an expert to demonstrate the 2050 time increment was later inserted after the time 0850 was placed on the Rights form, given the "very forgiving" standard to be accorded to trial counsel, *Theodore*, 468 F.3d at 57, and the strong presumption that has rendered "adequate assistance and made all significant decisions in the exercise of reasonable professional judgment," *Strickland*, 466 U.S. at 690, and also that a reviewing Court strive "to eliminate the distorting effects of hindsight," *id*. at 689 and *Clark*, 552 A.2d at 1189, this Court, in the entire context described herein, finds that trial counsel rendered adequate assistance. Moreover, given that Petitioner has clearly acknowledged under oath that he signed the form and that Clark testified that he "put [the 2050 time] there," the Court is not persuaded by Petitioner's suggestion that a Rights Form was prepared at 8:50 a.m. (0850 hours) on the day police first went to Petitioner's house to initiate a conversation relative to the case. Trial counsel actually argues to the jury during closing, "So, at 8:50, they gave [Petitioner] a rights form, which is State's Number 8 full, which will be in the jury room, which I ask you to look at. And, on this rights form, they asked him to read it and to read what his rights were and to sign it and to also initial it that he understood what his rights were." (Trial Tr. 1070:19-24.) Trial counsel goes on to recite during his argument the entire dynamics with detailed specificity of Petitioner's four statements to the police. *Id*. at 1070-1074. In light of what, if anything, was to be gained, this Court does not fault trial counsel's efforts on this issue and finds that trial counsel did not render ineffective assistance.

B

Trial Counsel Failed to Hire an Investigator to Ascertain the Visibility of a Certain Willow Tree from the Route 195 Roadway

Petitioner suggests that his trial counsel should have hired an investigator to determine whether a certain willow tree would have been visible from the roadway. The evidence at trial reveals that Petitioner told police he had disposed of a blanket and a shovel near "a large willow tree on Route 195" on the night of the murder. (Pet'r's Mem. at 4.) Petitioner denies disposing of the blanket and shovel and suggests the inference be drawn that the police planted said items and falsely testified that Petitioner told them where he had disposed of these items. *Id*. Petitioner continues that the issue of lighting came up at trial when Bilodeau, on cross-examination, testified there were no street lights in the area of the willow tree, (Trial Tr. 606:1-3), but there was no follow-up as to whether the police viewed the tree at night to determine if it could be seen in the dark. (Pet'r's Mem. at 5.) In stressing the importance of this component, Petitioner suggests that the statement testified to by police regarding the willow tree could only be true if the Petitioner had the ability to view the willow tree area in the dark. *Id*.

The State responds that Petitioner's trial counsel "was well aware that Detective Bilodeau testified that the willow tree's enormous size overshadowed the scene where the shovel and blanket were located (citing Trial Tr. at 568, 581) [and that] [p]ictures of the area were admitted as full exhibits providing the jury with an opportunity to view the magnitude of the tree themselves. (citing to Trial Tr. 567, 579)" (State's Mem. at 13.) The State further argues the difficulty in replicating the conditions described that particular evening, especially with regard to any illumination by passing vehicles, and suggested that any such investigator's testimony would offer little in the way of suggesting that the police both lied and conspired to lie and frame Petitioner. *Id*.

Considering the testimony at trial, the arguments and segments referenced above, and the entire context of the trial and this proceeding, the Court finds that Petitioner has failed to overcome the strong presumption that trial counsel's performance falls within the range of reasonable professional assistance and sound strategy. *Rice*, 38 A.3d at 17. Trial counsel did explore this on cross-examination during trial, but trial counsel was still left with the evidence of Petitioner's confessions. Given the testimony and the photographic evidence, as well as the inability to duplicate the exact conditions as existed that night, trial counsel may have considered the ability of the jury to focus on this issue in light of the evidence before the court, and may well have felt it was better to focus the jury on other aspects of the evidence and the State's theory. Given the deference to trial counsel that this Court must apply on any review, the Court does not fault trial counsel on this issue and finds that trial counsel did not render ineffective assistance.

C

Trial Counsel Failed to Introduce Petitioner's School Records

Petitioner argues that his trial counsel should have presented his psychological and school records, pursuant to his request, during the suppression hearing to demonstrate that Petitioner did not fully understand "everything" when he was at the police department concerning the statements and rights forms he signed. *See* Pet'r's Mem. at 6 (citations to transcript omitted). The State responds that there is nothing in the record suggesting that Petitioner's reading comprehension issue undercut his ability to understand the *Miranda* warnings provided by police or rendered him incapable of giving a voluntary confession. *See* State's Mem. at 15. The State points out that during suppression hearing and trial testimony, Petitioner never claimed that he was unable to understand the *Miranda* warnings provided by the police. *Id*. The State specifically directs the Court's attention to Petitioner's testimony during the suppression hearing where Petitioner testified

that he read and signed the statements even though he knew much of the contents [in said statements] was false. *Id*., referring to Trial Tr. at 1010, 1022, and 1051. The State argues that Petitioner's ability to read the statements thoroughly enough to distinguish what he claimed were true facts from false facts completely undermines Petitioner's argument that his reading comprehension issue deprived him of his free will during interrogation. *Id*., referring to Trial Tr. at 1023, 1032, and 1033.

An examination of the State's argument in detail is appropriate here. The State posits that Petitioner signed statement one because, after reading the document, he had no dispute over its contents. *Id*. at 16. The State continues, noting that Petitioner ultimately claimed that when he signed statements two through four, he believed he killed Kendra, but Petitioner never once asserted that he gave this explanation due to his inability to comprehend. Petitioner testified that he was able to read the statements and understood what he was signing but was convinced that he might have committed the crime because he was tired. *See* Trial Tr. at 1021, 1044-47, 1051. The State argues that "[it was] not until the very end of his trial testimony that [Petitioner] gratuitously threw in that he has a problem with reading comprehension." State's Mem. at 16 (citing Trial Tr. at 1025-26). The State notes that Petitioner never tied the alleged issue into his claim that his statements were not voluntary. *Id*.

The State further suggests that from the trial justice's suppression ruling, the trial justice would not have been swayed by evidence of low grades and an alleged compromised ability to comprehend. The State directs this Court's attention to the transcript where the trial justice described Petitioner as "articulate, calm, cool and collected." *Id*. (citing Trial Tr. at 254). The trial justice also found that, throughout the hearing, Petitioner appeared to be educated, articulate,

and knowledgeable, and that Petitioner, based on his testimony, understood English and could read. *Id*.

The State next suggests that Petitioner did not present any testimony from an expert regarding the effect, if any, that his alleged comprehension impairment would have had on Petitioner's ability to render a voluntary statement to police. *Id*.

Given the deference to trial counsel that this Court must apply on any review, the Court does not fault trial counsel on this issue and finds that trial counsel did not render ineffective assistance.

D

Trial Counsel Failed to Move to Suppress Evidence from Search Warrants

Petitioner faults trial counsel for not moving to suppress items police obtained through two search warrants. Pet'r's Mem. at 7. He argues that the first warrant was for seizure of blood evidence from Petitioner for use in DNA comparison while the second warrant was for carpet fibers from a white Dodge owned by Petitioner's brother.

1. Blood Sample Evidence

Petitioner argues that the blood sample seized pursuant to a warrant issued on July 2, 1994 from Petitioner should have been suppressed because "blood does not constitute property as used in [G.L. 1956] § 12-5-2." *Id*. Petitioner relies on the case of *State v. Dearmas*, 841 A.2d 659 (R.I. 2004). Petitioner directs this Court's attention to a passage from the *Dearmas* case.

> "Considering the plain and ordinary meaning of the word "property," it is difficult for us to construe it in such a way as to include the involuntary seizure of a blood sample extracted from within a living person's body, especially when the person in question has not consented to such an extraction." *Id*. at 662.

Petitioner, while acknowledging that *Dearmas* "came down [ten] years after" Petitioner's blood was taken, suggests that his trial counsel "should have taken note that taking a blood sample from a person does not fit the "plain and ordinary meaning of the word 'property.'" Pet'r's Mem. at 7. Petitioner argues that the blood evidence was prejudicial to him because the blood sample allowed the State to ascertain Petitioner's DNA which was used to connect him to a blanket containing semen found by police near the shovel. *Id*. at 7-8.

2. The Carpet Fibers Evidence

Petitioner next argues that the State linked the blanket to Petitioner by carpet fibers on the blanket "which were consistent with carpet fibers" obtained from Petitioner's brother's white Dodge. *Id*. at 8. Petitioner submits that the warrant was obtained "on the basis of false information contained in the search warrant affidavit." *Id*. Petitioner explained that the warrant affidavit prepared by police averred that Petitioner had indicated in his statements to police "that he used his brother's vehicle on a regular basis." *Id*. Petitioner asserts that a review of Petitioner's typewritten statements to the police "indicate that [Petitioner] never made such a statement to [the] police." *Id*. Petitioner urges this Court to conclude that under the case of *Franks v. Deleware*, 438 U.S. 154 (1978), suppression of the results of the search of Petitioner's brother's car – where fibers were seized and found to be consistent with the fibers on the blanket – would be justified as the "warrant application relied upon materially false information." *Id*. Petitioner testified that he discussed this matter with trial counsel who took no action to try to suppress the evidence. *Id*. (citing Evid. Hr'g Tr. at 73-74). Against this backdrop, Petitioner argues that the case is analogous

to *State v Gomes*, 881 A.2d 97 (R.I. 2005) where the R.I. Supreme Court held that admission of blood evidence taken pursuant to a search warrant was error.[8] *Id*.

3. State's Position Relative to Blood Sample and Fibers Evidence

The State's objection suggests that the motions to suppress the blood and DNA evidence and the carpet fibers seized from Petitioner's brother's vehicle are meritless. (State's Mem. at 4.) The State notes that the *Dearmas* case was not decided until five years after Petitioner's trial. *Id*. The State goes on to argue in the alternative that, even if this Court were to find that defense counsel should have challenged the evidence, then given the lack of judicial guidance at that time regarding § 12-5-2, the admission of the DNA evidence would have been "harmless error" similar to what occurred in the Gomes case where there was independent, overwhelming evidence of the defendant's guilt. *Id*. The State suggests there was a "plethora" of evidence introduced at Petitioner's trial that "provided substantial evidence of [Petitioner]'s guilt" including Petitioner's four statements wherein he admitted to killing Ms. Hutter, corroboration of Ms. Hutter's red dress, location of her body, and the fact that Ms. Hutter's hands were sticking out of the sand as described by Petitioner. The State continues that the telephone call the morning after the murder that Petitioner described with the victim's husband was corroborated by Christopher Hutter and, finally, the State notes that Petitioner took police to the location where he dumped the murder weapon and the blanket described in his statements. *Id*. at 4-5. The State argues that there is considerable additional evidence in the record, including a card given to police by Christopher Hutter which contained Petitioner's name and phone number. The card was supposedly given to Christopher Hutter by Kendra, who told him that she was going out with the person whose

[8] Petitioner acknowledges in his Memorandum that the error described in Gomes was held to be a harmless error. *Id*. at 9.

information was on the card. Christopher Hutter used the card to locate Petitioner the next morning. The card also led police to Petitioner. Further, police found a "Misty" brand of cigarette in Kendra's grave and a "Misty" brand cigarette box in the car driven by Petitioner. The State adds that FBI agent Bruce Hall testified at trial that the sand found in Ms. Hutter's grave was likely the source of the sand found in the car that Petitioner told police he was driving that night. The State also adds that Professor Hermes testified that the sand on the white blanket identified by Petitioner was similar to the sand found at the grave site. The State concludes by adding that FBI agent Fram testified that the fibers on Petitioner's clothes matched fibers on the white blanket as well as residue from the 1977 Chrysler Petitioner was driving. *Id*. at 5.

The State also argues that the *Franks* issue presented by Petitioner, alleging that police improperly obtained a warrant to search a 1988 white Dodge with R.I. registration plate VK-253 owned by Michael Tassone, is without merit. Petitioner claims that police obtained this warrant based on the false information that Petitioner "often used Michael's car." *Id*. The State notes that during trial, agent Fram acknowledged that "he received carpet samples from the 1977 Chrysler and the white Dodge." *Id*. at 6 (citing Trial Tr. at 841). The State goes on to further note that agent Fram only testified to findings regarding fibers seized from the 1977 Chrysler. This car was Theresa Tassone's car and the car which Petitioner admitted he was driving on the night of the murder. *Id*. (citing Trial Tr. at 844-849). The State submits therefore that there was no evidence to suppress that was introduced at trial from the white Dodge. *Id*.

4. Court's Analysis Regarding Blood Sample, Fibers Evidence, and *Franks* Issue

The Court notes that *Dearmas* was decided by the Rhode Island Supreme Court on February 13, 2004. Petitioner testified in his own defense at trial on January 27, 1997. *See supra. Also see* Trial Tr. at 1002-1057. This is a little over seven years before the Rhode Island Supreme

Court spoke in *Dearmas*. Prior to that time, the case of *State v. DiStefano*, 764 A.2d 1156 (R.I. 2020), decided by the Rhode Island Supreme Court on December 20, 2000, almost four years after Petitioner's trial, dealt with certain certified questions addressing whether police could obtain a defendant's blood with a search warrant.

This Court is aware that the *DiStefano* case involved the specific question of:

Certified Question 2

> "Does the statutory language of RIGL 31–27–2.1, the Breathalyzer Refusal Statute, preclude members of law enforcement from obtaining a judicially authorized search warrant to seize a defendant's blood for alcohol or drug testing?" *Id*. at 1181.

Justice Bourcier, in a dissent joined by Justice Lederberg, specifically says:

> "I would respond to that question in the negative. My reason for so doing, I believe, is dictated by our long-standing rule of statutory interpretation that posits when the language of a statute is clear and unambiguous this Court should not search beyond the statute for a different meaning because "[i]n such a case the statute declares itself." *Bouchard v. Price*, 694 A.2d 670, 680 (R.I. 1997) (Flanders, J., concurring). "[A] 'court is not at liberty to indulge in a presumption that the Legislature intended something more than what it actually wrote in the law.'" *Id*. at 1181 (internal quotation omitted).

Given that *DiStefano* related to the Breathalyzer Refusal Statute, and given that the *DiStefano* plurality opinion postdated Petitioner's trial by almost four years, this Court finds that there was a reasonable argument to be made that in a murder case, the *DiStefano* limitations on what constituted "property" for search warrant purposes did not apply. Therefore, given the deference to trial counsel that this Court must apply on any review, the Court does not fault trial counsel on this issue and finds that trial counsel did not render ineffective assistance in failing to move to suppress the DNA evidence derived from the blood sample.

Even if the Court felt that defense counsel's performance in this area was deficient, the Court would hold that counsel's error was harmless beyond a reasonable doubt based upon the

State's marshalling of overwhelming evidence of Petitioner's guilt as set forth in their Memorandum and cited above.

With regard to the *Franks* issue, the Court finds, after a review of the record and reference to specific pages cited by the State, that no evidence from the white Dodge was presented to the jury at Petitioner's trial, and therefore, there was no evidence to suppress. The Court finds that Petitioner has not sustained his burden on the issues presented in this section.

E

Trial Counsel Failed to Present Exculpatory Evidence from Linda Hazard

Petitioner claims that defense counsel was ineffective in that he failed to present exculpatory evidence at trial. Specifically, Petitioner notes that Clark had previously interviewed an individual named Linda Hazard. Pet'r's Mem. at 9. Petitioner notes that at page 23 of Clark's police report, the following notation was made:

> "On 7/2/94 I interviewed Linda Hazard d.o.b. 7/4/82 of 14 Lloyd St., Pawtucket, Rhode Island. She said she was with Keesha Hazard on 6/29/94 when she saw a white male with long blonde hair, driving a white car pick up Kendra Hutter, sometime around 9:00 p.m. She was shown a photo array containing the photo of Gary Tassone, but was unable to make an identification of the person she saw driving the car." *See* Pet'r's Mem. at 9 (citing Ex. 13, Evid. Hr'g Tr. at 71).

Petitioner testified at the evidentiary hearing that he had discussed with defense counsel his desire to call Linda Hazard as a witness and defense counsel agreed she would cme in as a witness but Linda Hazard was never called. *See* Pet'r's Mem. at 9 and Evid. Hr'g Tr. at 72.

Petitioner argues that the testimony would have been helpful to the defense because it would have placed Kendra with a male other than Petitioner at 9:00 p.m. on the night she was killed and shown that she was getting into a white car and not the maroon car Petitioner was driving that night. Pet'r's Mem. at p 10. Furthermore, Ms. Hazard did not pick out Petitioner from a photo

array she was shown that contained Petitioner's photo. *Id*. Petitioner suggests that there was no valid reason not to call her at trial because even if her recollection were different at trial, the statement to Clark would have been admissible as a prior inconsistent statement. *Id*.

The State notes that Linda Hazard was eleven years old at the time of the interview and a neighbor of Kendra. State's Mem. at 14. The State further notes that Petitioner testified that he had multiple conversations with defense counsel regarding Ms. Hazard (referring to Evid. Hr'g Tr. at 94). The State argues that Petitioner had indicated at the evidentiary hearing that Petitioner learned that defense counsel had sent an investigator to speak with Ms. Hazard before trial and had subpoenaed her to testify. *Id*. (citing Evid. Hr'g Tr. at 94). The State argues that Petitioner's subsequent testimony that defense counsel stopped communicating with him is self-serving. *Id*.

Defense counsel did not testify at the evidentiary hearing although Petitioner had an opportunity to attempt to obtain that testimony. The Court can only speculate as to why Ms. Hazard was not called at trial, but it appears clear from Petitioner's own testimony that defense counsel did not overlook this option.

Ordinarily, tactical decisions by trial attorneys do not, even if hindsight proves the strategy unwise, amount to defective representation. *Linde*, 78 A.3d at 747. "As the *Strickland* Court cautioned, a reviewing court should strive '*to eliminate the distorting effects of hindsight*.'" *Clark*, 552 A.2d at 1189 (*emphasis added*) (quoting *Strickland*, 466 U.S. at 689). "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.

"An 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 at 907 (quoting

Laurence, 18 A.3d at 521). Postconviction relief motions are civil in nature and thus governed by all the applicable rules and statutes governing civil cases. *Ferrell*, 889 A.2d at 184.

Given that Petitioner had an opportunity to at least attempt to obtain testimony from defense counsel, and the fact that the Court can only speculate as to why Ms. Hazard was not called, the Court finds that Petitioner has not sustained his burden on this issue.

Petitioner further argues that Linda Hazard's testimony, or at least her prior statement, would have corroborated the testimony of Petitioner's mother at trial wherein she testified she received a message on Petitioner's answering machine in a girl's voice identifying herself as Kendra, and addressing Petitioner and saying she had to cancel her date that evening. *See* Pet'r's Mem. at (referring to Trial Tr. at 977). Given the extent of the record on this issue, the Court feels that defense counsel did not simply overlook Linda Hazard. Rather, for reasons unknown, the record indicates information that an investigator was possibly sent to Ms. Hazard and then she was not called for the defense at trial. When viewed in this hindsight, the Court still finds that Petitioner has not sustained his burden on this issue. It is equally plausible that *after* defense counsel considered what Ms. Hazard had to offer, and in light of the other evidence in the case, most notably Petitioner's four statements wherein he admitted killing Ms. Hutter, that defense counsel had reason to question the truth of his client's account and thereafter made a strategic decision to avoid calling Ms. Hazard. *Cf. Harrington v. Richter*, 562 U.S. 85, 108 (2011) ("Here Richter's attorney had reason to question the truth of his client's account, given, for instance, Richter's initial denial of involvement and the subsequent production of Johnson's missing pistol.").

F

Defense Counsel Failed to Present Third-Party Perpetrator Defense

Petitioner next suggests that defense counsel was ineffective for failing to present a third-party perpetrator defense that pointed to Kendra's husband, Christopher Hutter, as the murderer. *See* Pet'r's Mem. at 10-11 (referring to Evid. Hr'g Tr. at 54-55). Petitioner argues that the evidence pointing to Mr. Hutter consisted of his own statement, Officer Demoranville's statement, and the search warrant affidavit for the search of the Hutter property (Exhibit 9) plus the dog bowl found on the chest of Kendra when her body was excavated. *Id*. at 10-11. Petitioner argues that at his trial, defense counsel asked a number of questions about the Hutter residence and sought to introduce photos of the Hutter residence which led to objections by the State. The record indicates a sidebar occurred at trial wherein the trial justice inquired of defense counsel his purpose in introducing any photos. The record indicates defense counsel indicated that he was seeking to demonstrate that the apartment appeared that it was kept in a sloppy way. The trial justice thereafter sustained the objection but indicated that it might be revisited if the state of the apartment became more probative. *Id*. at 11-12 (with citations to trial transcript).

Petitioner argues that the verbal and written statements given by Christopher Hutter to the East Providence police establish a motive for him to want to harm or kill his wife. *Id*. at 12. The evidence demonstrates that Kendra installed a phone in her apartment and took out an ad in local newspapers to meet men, who would come at all hours. The evidence demonstrates that Ms. Hutter would meet these men in front of her home and leave alone with them returning home the next morning. *Id*. (referring to Exhibit 9). Petitioner further argues that on the morning of July 1, 1994, Christopher Hutter made a statement to Clark saying that "humans who have sex are nothing but dogs." *Id*. Petitioner further argues that during excavation of Ms. Hutter's body, an object

resembling a stoneware dog bowl was recovered. *Id*. Petitioner notes that the bowl was tagged and viewed during the postconviction evidentiary hearing. *Id*.

Petitioner continues that Bilodeau noted in one of his reports that Mr. Hutter was in a "disturbed mental state" and his behavior was "highly abnormal." *Id*. Petitioner recounts that Mr. Hutter requested a mental health evaluation and refused to allow police to search his apartment. *Id*. The police thereafter obtained a search warrant for Christopher Hutter's apartment leading Petitioner to suggest that the mere fact that a judge signed the search warrant should be "enough by itself to constitute a sufficient offer of proof . . . so as to permit a jury to decide whether this evidence raises a reasonable doubt to [Petitioner's] guilt." *Id*. at 12-13.

Petitioner further describes that "[a]fter the warrant was signed, Mr. Hutter was released by a mental health authorities [*sic*] and signed a consent to search [his home]." *Id*. at 13. Petitioner describes in detail certain evidence of Mr. Hutter's mental state and concern over his wife's activity. Petitioner argues that taken together, the totality of the evidence is enough to supply any husband with a motive to harm or kill his wife, especially one with mental health issues. *Id*.

The State, in its objection, notes that the law on the third-party perpetrator defense requires more than simply motive. State's Mem. at 6. The State cites *Gomes*, 881 A.2d at 111 and other cases providing that, in addition to motive, a defendant must make a "reasonably specific" offer of proof. The State argues that Petitioner "predicates" his claim on Christopher Hutter's statement that "people who have sex are nothing but dogs" and the fact that the "old, worn, dilapidated pottery found at the scene" is enough to support a third-party perpetrator defense. *Id*. at7. The State counters that even after Petitioner has marshalled all of his evidence on this issue, he has failed to provide the "reasonably specific offer of proof that our case law requires." *Id*.

This Court's analysis of the third-party perpetrator defense and counsel's failure to present this defense at Petitioner's trial begins with a statement of the law.

The Rhode Island Supreme Court has stated,

> "It is a self-evident proposition that 'an appropriate defense to a charge of criminal misconduct is that another person was the true perpetrator of the crime.' *State v. Wright*, 817 A.2d 600, 609 (R.I. 2003); *see also Gomes*, 881 A.2d at 111 ("There is no question that a defendant is entitled to present a defense that implicates another person."). At the same time, however, this Court has repeatedly indicated that when a criminal defendant wishes to mount such a third-party-perpetrator defense, the defendant must make an offer of proof that is *reasonably specific*. *Gomes*, 881 A.2d at 111; *see also State v. Scanlon*, 982 A.2d 1268, 1275 (R.I. 2009); *State v. Gazerro*, 420 A.2d 816, 824–25 (R.I. 1980)." *State v. Barros*, 24 A.3d 1158, 1184 (R.I. 2011).

The Supreme Court goes on to further indicate:

> "Such a 'reasonably specific' offer of proof to the effect that another person had a motive to commit the crime with which a defendant is charged must not only allude to the motive but must also point to '*evidence tending to show the third person's opportunity to commit the crime and a proximate connection between that person and the actual commission of the crime*.' *Gazerro*, 420 A.2d at 825; *see also Gomes*, 881 A.2d at 111; *Wright* 817 A.2d at 610; *State v. Brennan*, 526 A.2d 483, 488 (R.I. 1987)." *Barros*, 24 A.3d at 1184 (emphasis added).

The record reflects that Kendra's body was excavated, and, at that time, Clark described an item with the body. Clark described a rusted bowl encrusted with sand. Petitioner describes this as a "dog bowl" and links this to a statement made by Christopher Hutter where he stated to police, "people who have sex are nothing but dogs." Petitioner adds that Christopher Hutter exhibited strange behavior, especially considering that Mr. Hutter made a statement that he did not trust police. Petitioner further adds the evidence of multiple padlocks on the doors in Mr. Hutter's apartment, along with his initial refusal to consent to a search by police, as well as the deplorable state of the apartment and its contents, taken all together demonstrate that defense counsel was

inefficient in failing to make an offer of proof.

The State argues that a complete reading of the police report demonstrates that a few hours later, Mr. Hutter fully cooperated and allowed police to search both his apartment and van.[9] Mr. Hutter also later stated that his initial reluctance to allow a police search stemmed from his fear that police would discover marijuana roaches and an illegal telephone line. *See* State's Mem. at 8 (citing Bilodeau's affidavit dated July 1, 1994). Lastly, the State points out that police learned from statements taken from Joseph Beaucage and Armand Larose that Kendra's two-year relationship with another Beaucage was common knowledge and not an issue with Christopher Hunter. *Id*. (referring to Bilodeau's statement at 5 and John Burney's statement at 5).

The Court notes that notwithstanding any evidence of a motive on behalf of Petitioner, a point not conceded by the State, there is still a complete absence of "*evidence tending to show the third person's opportunity to commit the crime and a proximate connection between that person and the actual commission of the crime." See Barros*, 24 A.3d at 1184 (emphasis added) (internal quotation omitted). This Court is not persuaded that the stone pottery item located at the crime scene, referred to as a "dog bowl" by Petitioner, along with Christopher Hutter's statement to police that "people who have sex are nothing but dogs," taken together satisfy both the opportunity and proximate connection prongs the law requires before the Petitioner could have proceeded with the third-party perpetrator defense. The Court finds that such evidence is far too tenuous and, just as in the case of *Barros*, 24 A.3d at 1184, this Court, as well as the original trial justice, would have cut off any further inquiry as "an impermissible invitation to the jury to speculate on a

[9] The record indicates a complete timeline for Christopher Hutter's interactions with police and mental health providers at the time. *See* Clark's statement dated June 30, 1994 at 10 and Bilodeau's statement at 5. It is possible there may be typographical errors relative to certain dates set forth in footnote 1 of the State's Mem. at 8.

collateral matter." *See Barros*, 24 A.3d at 1184.

Additionally, the Court itself is left to speculate on Petitioner's failure to call defense counsel to explain any rationale for this decision. In light of the evidence of Petitioner's four statements where he confesses to killing Ms. Hutter, it is entirely plausible that defense counsel felt this defense was just too tenuous to present to the jury in this case. The third-party perpetrator defense does nothing to explain away Petitioner's four statements.

In the case of *Rivera v State*, 58 A.3d 171 (R.I. 2013), the Rhode Island Supreme Court noted:

> "As we have previously recognized, the United States Supreme Court has 'cautioned that the *Strickland* standard should not be applied overbroadly * * *.'" *Larngar v. Wall*, 918 A.2d 850, 864 (R.I. 2007) (citing *Nix v. Whiteside*, 475 U.S. 157, 165, 106 S.Ct. 988, 89 L.Ed.2d 123 (1986)). "[W]hen determining whether an attorney's conduct amount[s] to ineffective assistance of counsel, 'a court must be careful not to narrow the wide range of conduct acceptable * * * so restrictively as to constitutionalize particular standards of professional conduct * * * .'" *Id.* (quoting *Nix*, 475 U.S. at 165, 106 S.Ct. 988). There is "a strong presumption * * * that an attorney's performance falls within the range of reasonable professional assistance and sound strategy * * *." *Rice*, 38 A.3d at 17 (quoting *Ouimette v. State*, 785 A.2d 1132, 1138–39 (R.I. 2001))." *Rivera*, 58 A.3d at 179-180.

This Court finds that Petitioner has not sustained his burden of demonstrating his entitlement to postconviction relief on this issue. Applying the standard the law requires, this Court finds that defense counsel did not provide ineffective assistance relative to this issue.

G

Defense Counsel Failed to Object, or Move to Strike, or Move for a Mistrial Based on Certain Arguments Made by the State During Closing Argument

Petitioner provides an extensive[10] provenance regarding the sand evidence and related testimony at trial. It is clear that Trial Exhibit 58 consisted of certain sand "taken from the grave area of the beach, underneath the surface." Pet'r's Mem. at 14. Trial Exhibit 59 consisted of "sand taken from the surface of the beach area outside of the grave area." *Id*. The State called FBI Agent Bruce Hall and Professor Don Hermes, a geology professor at University of Rhode Island, to testify as to any linkage to sand recovered from Petitioner's car or the blanket in evidence.

Petitioner asserts that defense counsel did not object, move to strike, or move for a mistrial when the prosecutor repeatedly used the word "match" to describe any linkage between the sand and Petitioner's car or blanket. *Id*. at 15-17. Petitioner expressly acknowledges that neither Agent Hall nor Professor Hermes expressed an opinion that the samples were a "match" but couched their relative testimonies in terms of representing that said evidence was "a likely source," or "consistent with both samples of having come from a common source." *Id*. at 15–16 (citing Trial Tr. at 817 and 952-53.

Petitioner actually quotes a portion of the prosecutor's final argument wherein the prosecutor states:

> "Agent Hall told us what he didn't find, and what he didn't find is an exact match between the sand on the blanket and the sand from within the grave." *Id*. at 16 (citing Trial Tr. 1085:15-18).

However, Petitioner argues that "[a]lthough the prosecutor appeared to be making a concession, he was dangerously misstating the witnesses' testimony in a way that suggested a

[10] Petitioner's discussion consists of some six pages of his memo. *See* Pet'r's Mem. at 14-20.

match is possible in the science of sand comparison." *Id*. Petitioner continues that "[t]here was no objection by defense counsel to any of the numerous references to a 'match' with respect to the aforementioned said evidence, nor was there a motion to strike or motion for a mistrial." *Id*. at 17. Petitioner suggests that "[w]ithout a doubt any such objection or motion would have resulted in the word 'match' being stricken in reference to expert testimony that merely described a degree of connection between sands as 'consistent' or 'likely', rather than the state of equivalence required for a 'match.'" *Id*. at 17-18.

Petitioner also argues that the prosecutor likewise misstated the testimony of the State's hair and fiber expert, FBI Agent Robert Fram, "who repeatedly expressed the opinion that certain fibers were 'consistent with' other fibers, and never referred to this as a 'match.'" *Id*. at 18 (citing Trial Tr. 829-855 (witness testimony) compared to the prosecutor's use of the word "match" in closing argument, *id*. (citing Trial Tr. 1088:11-18 (prosecutor's words)).

Petitioner further argues that defense counsel did not diligently pursue the above-described issues relative to sand evidence when cross-examining the State's experts claiming this was "especially prejudicial to [Petitioner] because of the emphasis placed by the prosecutor on the sand evidence." *Id*. at 19.

Petitioner finally suggests that police took a photo of his car with what appeared to be a smudge of sand on the sidewall of one of the tires. *Id*. and *see* Exhibits 10 and 11. Petitioner stated that tire tracks from his car were not found at the beach and that "if there was sand on his tire it was planted there by police." *Id*. and Evid. Hr'g Tr. at 63. Petitioner claims he brought this to defense counsel's attention "who took no action." *Id*.

The Petitioner, in his Supplemental Post Conviction Memorandum, argues that "[t]rial counsel never hired a sand expert to prove that if a person with grave sand on his feet then walked

over about [one hundred] feet of top sand, then top sand, rather than grave sand, would have been found in the floor of [Petitioner]'s car. Pet'r's Suppl. Mem. at 3. He appears to advance this idea in support of a theory that the East Providence police planted sand in the 1977 Chrysler as well as on one of its tires. State's Mem. at 10.

The State, in responding to Petitioner's argument on this issue, points out that with regard to the claim that police planted evidence on his tire, the Petitioner conceded that there was no police report indicating that any substance was retrieved from the Chrysler's tires and as such there was no physical evidence for an expert to examine. *Id*. (referring to Evid. Hr'g Tr. at 102-03). As such, the State notes that there was no physical evidence for an expert to examine, and any sand expert for the Petitioner would not have been able to testify to the identification of the white substance without an analysis of the material itself. *Id*. The State also points out that Petitioner, during his Evidentiary Hearing, did not produce any expert testimony to support his claim of police tampering or planting of evidence. *Id*. Petitioner has failed to meet his burden of proof on this issue.

In its further analysis of Petitioner's arguments, the Court itself is left to speculate on Petitioner's failure to call defense counsel to explain any rationale for his decision to fail to object or move to strike to prosecutor's multiple references to the use of the word "match." In light of the nuances[11] associated with the meaning of the word "match," it is doubtful that a mistrial would have been granted. An objection or motion to strike would likely only have highlighted and reiterated the experts' relative testimonies. Given what the experts actually testified to, as set forth in Petitioner's Memorandum, any cross-exam about the lack of an exact "match" could be hurtful

[11] One definition of the word "match" states "*noun*. . . .a person or thing that *equals or resembles another in some respect*." See dictionary.com last visited October 13, 2021 (emphasis added).

to Petitioner if the experts were able to expound on their respective testimony during redirect examination. Furthermore, in light of the evidence of Petitioner's four statements where he confesses to killing Ms. Hutter, it is entirely plausible that defense counsel felt this was a point not worth pursuing. If that were the case, that would be a strategic decision. There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." *See Harrington*, 562 U.S. at 109 (citing *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003)) *(per curiam)*. Applying the standards set forth herein, this Court finds that defense counsel was not ineffective and that Petitioner has not carried his burden of proof with regard to these issues.

H

Relief Should be Granted due to Discovery Violation by State

Petitioner asserts that the State has committed a discovery violation for failing to disclose a certain photograph depicting what appears to be light colored sand on Petitioner's car. Pet'r's Suppl. Mem. at 2. Petitioner argues that the State never had that sand tested for comparison to the grave sand or beach sand, "and by failing to disclose it this deprived [Petitioner] of the right to have this sand examined." *Id*. The State responds by pointing out that Petitioner testified at the Evidentiary Hearing that defense counsel received the photograph from the State in discovery and that defense counsel "showed [Petitioner] the photograph." State's Suppl. Mem. at 1 (citing Evid. Hr'g Tr. at 100).

This Court concludes that Petitioner's claim of a discovery violation is undermined by his own testimony at the Evidentiary Hearing. Petitioner has not carried his burden of proof on this issue. This Court declines to order a new trial as suggested by Petitioner.

I

Issue Related to Position of Kendra Hutter's Body

Petitioner, in his Supplemental Memorandum, immediately begins with a section entitled, "The Position of Kendra Hutter's Body." Pet'r's Suppl. Mem. at 1. Petitioner points out that the testimony of the medical examiner, Dr. Elizabeth Laposata, was at odds with Petitioner's written statements to the police dated July 1, 1994 at 2400 hours and July 2, 1994. Specifically, Petitioner points to certain parts of Dr. Laposata's testimony wherein she testifies that Ms. Hutter's body was in rigor mortis which caused her hands to "stay in the position which they were placed." *Id*. (referencing Trial Tr. at 518). Dr. Laposata went on to testify that her opinion was that, "[Ms. Hutter] was placed in the ground with both her arms up and then buried with her arms sticking up." *Id*. (referencing Trial Tr. at 701).

Petitioner argues that the witness's testimony is "significant because it contradicts the words" attributed to Petitioner in the statement of Petitioner typed by Bilodeau. *Id*. Specifically, those words of Petitioner were, "I guess she was still alive, because her hands came up and out of the sand." *Id*. (referencing Trial Tr. at 1051).

Petitioner thus argues that "because the facts allegedly admitted by [Petitioner] . . . could not have been true, Dr. Laposata's testimony corroborated [P]etitioner's assertion that the words attributed by Detective Bilodeau to [Petitioner] were not true." *Id*. Beyond these lines and quotes, Petitioner does not fully develop the argument, further leaving this Court to speculate.

The State, in its initial Memorandum Opposing Petitioner's Application for Post-Conviction Relief, seems to anticipate the argument that is not expressly articulated. State's Mem. at 11. The State argues that Petitioner's "claim that [defense counsel] was ineffective for not referencing Dr. Laposata's testimony in his closing . . . is without merit." *Id*. The State indicates

that Dr. Laposata's testimony was that there was no medical reason for the victim's hands to be out of the ground and thus the perpetrator likely positioned them this way. *Id*. (referencing Trial Tr. at 701). The State goes on to reference two of Petitioner's statements to police[12] wherein Petitioner told police that Kendra must have been alive when she was buried because her hands came up out of the sand. *Id*. The State seems to infer that "[Petitioner] claims that this difference in explanation shows that the police suggested this information to [Petitioner]." *Id*. The State goes on to argue that the "inconsistent explanations, however, do not support the giant, improbable leap that [Petitioner] wanted the jury to take in finding that the police suggested this fact." *Id*. at 12. The State goes on to suggest that "[i]t is much more plausible that [Petitioner] provided the police with the arm positioning information contained in his signed and witnessed third and fourth statements and that Dr. Laposata, unaware of the contents of [Petitioner]'s statements, simply provided the most logical non-medical explanation for the arms' positions." *Id*.

The State goes on to remind this Court that issue of the voluntariness *vel non* of Petitioner's statements was fully vetted during both the suppression hearing and the jury trial. *Id*. The State adds that defense counsel argued strenuously during his closing that the police "misled, deceived and coerced [Petitioner] into giving statements." *Id*. (referencing Trial Tr. at 1067-1074). The State also reminds the Court that defense counsel contended that Petitioner was tired, disoriented, and forced to speak with the police even after Petitioner had requested an attorney and asked that questioning cease. *Id*. The State argues "[c]learly neither the trial justice nor the jury believed that [Petitioner]'s statements were the product of improper police tactics. Including an argument about the discrepancy between [Petitioner's] and Dr. Laposata's explanations for Kendra Hutter's arm positions would not have changed the jury's ultimate determination that [Petitioner]'s

[12] These are the statements of Petitioner dated July 1, 1994 at 2400 hours and July 2, 1994.

statements were freely and voluntarily given." *Id*.

It appears that the State is inferring that Petitioner argues that defense counsel was ineffective for failing to raise this discrepancy in defense counsel's final argument to the jury.

This Court will construe Petitioner's arguments and representations in the same vein as the State. After consideration of the respective arguments and reviews of the relevant parts of the record, and applying the standard as set forth herein, this Court notes that *Strickland* advises: "Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Strickland*, 466 U.S. at 689. Referring to the entire record, and especially defense counsel's efforts during the suppression hearing, trial, and final argument, it is clear to this Court that defense counsel had a narrative that was laid out for both the trial justice and the jury. *Strickland* notes that "[e]ven the best criminal defense attorneys would not defend a particular client in the same way." *Id.* at 689. Given that defense counsel has not testified, and given the deference due to defense counsel, this Court finds that defense counsel's performance was not ineffective, and Petitioner fails to satisfy the first prong of *Strickland*. Even if this Court held that defense counsel's performance on this issue was objectively unreasonable in context of the full record, this Court would still find that Petitioner cannot satisfy the prejudice prong of *Strickland*. It is not enough "to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693. Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687. Considering the entire record and counsel's record efforts, this Court is unable to say that the resulting verdict in Petitioner's case is unreliable. This Court declines to grant postconviction

relief on this issue.

V

Conclusion

After consideration of the arguments and the lengthy record of the case, as well as the complete context of said record, this Court denies postconviction relief for the reasons stated herein. Counsel shall submit an appropriate order and also a judgment.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**Tassone v. State of Rhode Island**
CASE NO:	**PM-2000-4624 (Associated with P1-1994-3384A)**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**October 22, 2021**
JUSTICE/MAGISTRATE:	**Carnes, J.**
ATTORNEYS:	
For Plaintiff:	**James T. McCormick, Esq.**
For Defendant:	**Jeanine P. McConaghy, Esq.**