STATE OF RHODE ISLAND

NEWPORT, SC. **SUPERIOR COURT**

[Filed: September 13, 2021]

CHARLES S. SMITH	:	
	:	
v.	:	**C.A. No. NM-2018-0337**
	:	
STATE OF RHODE ISLAND	:	

DECISION

VAN COUYGHEN, J. This matter is before the Court on the petition of Charles S. Smith (Petitioner) seeking post-conviction relief. Petitioner claims that he was denied effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution, and article I, section 10 of the Rhode Island Constitution, which resulted in an improper sentence of life without the possibility of parole. For the reasons stated herein, Petitioner's claim for post-conviction relief is denied. Jurisdiction is pursuant to G.L. 1956 §§ 10-9.1-1 *et seq.*

I

Facts and Travel

After a jury trial commencing January 26, 1998, and ending February 13, 1998, Petitioner was found guilty of murder in the first degree committed by means of torture and aggravated battery. Petitioner was sentenced to life in prison without the possibility of parole on April 20, 1998. The underlying facts of Petitioner's criminal case are as follows[1]: Around the time of the incident, Petitioner had been living with his wife, Margaret Rose Benard (Benard); their three-

[1] The facts regarding Petitioner's underlying case are taken from the corresponding Supreme Court decision *State v. Smith,* 766 A.2d 913 (R.I. 2001).

year-old daughter Samantha Smith, and Benard's two daughters from her previous marriage—Kristen and Toni Jorge. On April 13, 1997, after an argument between Benard and Petitioner, Benard told the Petitioner to leave the apartment and not return.

The next day, Kristen skipped school and went to a friend's house in order to avoid being caught. She returned to the apartment at approximately 1:45 p.m. When Benard returned home from work, at approximately 2:20 p.m., she discovered Kristen's body wrapped in a comforter on her bedroom floor and called 911. When first responders arrived, they found Kristen's body under a bed and blankets soaked in blood. She had multiple lacerations to the neck, shoulder, back, and hand. Kristen was brought to Newport Hospital where she was later pronounced dead at 3:11 p.m.

Petitioner was arrested on April 15, 1997, as he left his sister's apartment. After being advised of his *Miranda* rights, Petitioner agreed to speak with detectives. Petitioner admitted to stabbing Kristen and having intercourse with her after she was dead. According to Petitioner's statement to the police, after drinking and smoking marijuana with a neighbor, Petitioner had entered the apartment he previously shared with Benard through a window and grabbed a kitchen knife. When Kristen first entered the apartment, Petitioner hid from her and attempted to escape while she was walking the dog. Kristen returned before Petitioner could escape and threatened to call the police. Petitioner then claims he "bugged out" and took Kristen to her bedroom and stabbed her with the kitchen knife.

On September 8, 1997, the State charged Petitioner, by indictment, with one count of murder in the first degree pursuant to G.L. 1956 § 11-23-1 and two counts of first-degree sexual assault pursuant to § 11-37-2. *See* Joint Ex. 1. The State then notified Petitioner of its intent to seek a sentence of life without parole should he be convicted of murder in the first degree pursuant to § 11-23-2 and G.L. 1956 § 12-19-2. *Id.* The State also filed notice that should Petitioner be

convicted, he was a habitual offender pursuant to G.L. 1956 § 9-19-21. *Id.* At the time of trial, the Petitioner was indigent and was represented by Christine O'Connell from the Office of the Public Defender. *Id.* As previously stated, at the conclusion of trial, a jury found Petitioner guilty of murder in the first degree committed by means of torture and aggravated battery. Petitioner was acquitted of the sexual assault charges based on technical reasons. *Id.*[2]

On April 20, 1998, at Petitioner's sentencing hearing, Attorney O'Connell attempted to mitigate Petitioner's sentence by highlighting his unfortunate upbringing, his mental health issues, and that he was not taking his prescribed medication at the time of the incident. *See* Pet'r's Ex. 4 at 1364-1370. The trial justice considered the mitigating factors presented by Attorney O'Connell and in the presentencing report but was not persuaded. The trial justice found that the mitigating factors relating to Petitioner did not overcome the aggravating circumstances of the murder and "[a]t no time did [Petitioner] demonstrate any mental impairment or deficiency . . ." Pet'r's Ex. 4 at 1378:6-8. As such, the trial justice sentenced Petitioner to life without the possibility of parole. Petitioner was also sentenced to an additional consecutive term of fifteen years under the habitual offender statute § 12-19-21.[3]

Petitioner claims that he received ineffective assistance of counsel. Petitioner argues that Attorney O'Connell's representation was ineffective because she failed to present enough mitigating factors at Petitioner's sentencing hearing. Specifically, Petitioner takes issue with the fact that Attorney O'Connell failed to call his doctor to testify at his sentencing hearing regarding his mental health and the fact that he was not taking his medication at the time of the incident.

[2] The trial justice granted defendant's motion for judgments of acquittal on the sexual assault charges based on the testimony of Dr. Sikirica that he was unable to determine whether Kristen was alive at the time of the apparent sexual assault. *See Smith*, 766 at 918 n.1.

[3] The habitual offender sentence was ultimately overturned on appeal.

On June 21, 2021, at his post-conviction relief hearing, Petitioner testified at length about his troubled childhood and his ongoing mental health issues. Much of the testimony is not relevant to the matter before the Court. To summarize, Petitioner was removed from an abusive home at age five and sent to various centers and group homes until around the age of thirteen. During that time, Petitioner began experimenting with drugs and alcohol. Eventually, Petitioner began getting into trouble with the law and became incarcerated at the training school from about thirteen to eighteen years old. Petitioner's troubles with the law continued when he left Rhode Island and found himself in Utah. Eventually, Petitioner was sent to a mental health facility for a diagnostic evaluation and was allegedly diagnosed as schizophrenic with emotional problems and personality conflicts. As a result, Petitioner was prescribed Haldol but he refused to take it. Petitioner was eventually paroled to Rhode Island where he began attending sessions at Newport County Mental Health after being arrested for domestic violence in 1994. Petitioner was attending sessions every week until he decided to cease attending and again failed to take the medication being prescribed to him.[4] Petitioner testified that the medication he was prescribed caused unwanted side effects. Specifically, Petitioner testified that he was having problems being intimate with his wife. After getting in a car accident, Petitioner testified that he was told by a doctor at Newport County Mental Health to either stop the medication or stop the alcohol. Petitioner again chose to stop taking his medication.[5]

In regard to Attorney O'Connell's representation, Petitioner testified that he regularly met with her to discuss his case. He testified that Attorney O'Connell showed him discovery documents

[4] Petitioner was again being prescribed Haldol–350 milligrams and a shot of Haldol once every other week.

[5] Petitioner testified that this was towards the end of 1996 or beginning of 1997, a few months before the murder.

and that she discussed those documents with Petitioner as well as other evidence the State was going to use at trial. Petitioner also testified that if Attorney O'Connell could not meet with him, she would send someone else from the Public Defender's Office. Attorney O'Connell was also aware of Petitioner's background and mental health history. Petitioner testified that he and Attorney O'Connell generally had a good relationship until it came to the sentencing phase of his case. The relationship appeared to have a breakdown when the two disagreed on whether to call Petitioner's doctor to testify during the sentencing phase.

Attorney O'Connell also testified at the June 21, 2021 hearing. Attorney O'Connell testified that she was an Assistant Public Defender for the State of Rhode Island for thirty-three years before retiring in 2018. In 1997, at the time of the murder, Attorney O'Connell was the Assistant Public Defender in charge of Newport County. She became the attorney of record for Petitioner at that time and testified that she first met with Petitioner at his arraignment in Second Division District Court located in Newport where she spoke with him in the cell block of the courthouse. After this initial meeting, Attorney O'Connell testified that she believed she met with Petitioner on numerous occasions while he was being held at the ACI. Attorney O'Connell stated that it was her practice to meet with clients that were held once a week. During those meetings, Attorney O'Connell discussed with Petitioner the State's discovery and evidence that the State was going to use against him. This included discussing the witnesses and what their testimony would be.

Attorney O'Connell testified that Petitioner was actively participating in his defense during that time. *See* Tr. 82:13-15, June 21, 2021. Attorney O'Connell further testified that she and Petitioner, at one point, had discussed an insanity defense. While investigating whether this would be a viable defense, Attorney O'Connell was able to obtain Petitioner's records from Newport

County Mental Health, the Utah State facility, as well as Elmcrest Hospital.[6] *Id.* at 83:6-20. Attorney O'Connell testified that ultimately, she did not believe that the facts of Petitioner's case supported an insanity defense. Attorney O'Connell testified that these records, as well as Petitioner's background, were offered to the State as mitigating evidence; however, the State never budged from their recommendation of life without parole. *Id*. at 87:3-7, 19-23. Similarly, this evidence was also presented to the trial justice as mitigating evidence. *Id.* at 87:25-88:21.

In regard to preparation for sentencing, Attorney O'Connell testified that she did not believe having Petitioner's doctor testify was a good idea. Attorney O'Connell testified that having a doctor testify was often a "double edged sword." Attorney O'Connell explained that what she meant by this was that having a doctor testify is strategically dangerous because it subjects the doctor to cross-examination which could result in negative testimony. *Id*. at 89:20-90:6. Attorney O'Connell similarly explained that the doctor's cross-examination concerning Mr. Smith not taking his medication, coupled with the fact he was drinking alcohol contrary to doctors' orders, could be dangerous and harmful to mitigating considerations. *Id.* at 90:7-91:8. Attorney O'Connell testified that the mitigating information was presented to the trial justice through medical reports. She further testified that she did not believe there was any further beneficial information that could have been conveyed to the trial justice through the doctor's testimony that had not already been conveyed. *Id.* at 91:9-15.

Other facts will be presented as needed throughout this Decision.

[6] Elmcrest was a psychiatric hospital located in Connecticut.

II

Standard of Review

Any person who has been convicted of, or sentenced for a crime, can seek post-conviction relief pursuant to § 10-9.1-1. "'[P]ost-conviction relief is available to a defendant convicted of a crime who contends that his original conviction or sentence violated rights that the state or federal constitutions secured to him.'" *Otero v. State*, 996 A.2d 667, 670 (R.I. 2010) (quoting *Ballard v. State*, 983 A.2d 264, 266 (R.I. 2009)). "'Accordingly, in all criminal prosecutions, one who alleges the infringement of his or her constitutional Sixth Amendment right to the assistance of counsel may avail his or herself of the postconviction-relief process.'" *Navarro v. State*, 187 A.3d 317, 325 (R.I. 2018) (quoting *Rice v. State*, 38 A.3d 9, 16 (R.I. 2012)). Post-conviction relief petitions are civil in nature and thus are governed by all the applicable rules and statutes governing civil cases. *Ferrell v. Wall*, 889 A.2d 177, 184 (R.I. 2005). Thus, "'the burden of proving, by a preponderance of the evidence, that such [postconviction] relief is warranted'" falls on the applicant. *Motyka v. State*, 172 A.3d 1203, 1205 (R.I. 2017) (quoting *Anderson v. State*, 45 A.3d 594, 601 (R.I. 2012)).

Pursuant to the Sixth Amendment of the United States Constitution, criminal defendants have the right to effective assistance of counsel. It is well settled in Rhode Island that ineffective assistance of counsel claims are evaluated under the requirements of *Strickland v. Washington*, 466 U.S. 688 (1984). *See Brennan v. Vose*, 764 A.2d 168, 171 (R.I. 2001). "[T]he benchmark issue is whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Barros v. State*, 180 A.3d 823, 828 (R.I. 2018) (citing *Young v. State*, 877 A.2d 625, 629 (R.I. 2005)). The *Strickland Test*, adopted in *Barboza v. State*, 484 A.2d 881, 883 (R.I. 1984), sets forth a two-prong test to determine whether

counsel's assistance is ineffective. *Strickland,* 466 U.S. at 687. The complaining petitioner must establish both prongs in order to show ineffective assistance of counsel. *Id.*

First, a petitioner must show that counsel's performance was deficient to the point that "counsel was not functioning as the 'counsel' guaranteed [to] the [petitioner] by the Sixth Amendment." *Strickland,* 466 U.S. at 687. "'[E]ffective representation is not the same as errorless representation.'" *State v. D'Alo*, 477 A.2d 89, 92 (R.I. 1984) (quoting *United States v. Bosch,* 584 F.2d 1113, 1121 (1st Cir. 1978)). '"Thus, a choice between trial tactics, which appears unwise only in hindsight, does not constitute constitutionally-deficient representation . . ."' and will not satisfy this first prong. *Id.* (quoting *Bosch,* 584 F.2d at 1121). *See Bosch*, 584 F.2d at 1121 ("Even the most skillful criminal attorneys make errors during a trial. The myriad of decisions which must be made by defense counsel quickly and in the pressure cooker of the courtroom makes errorless representation improbable, if not impossible.")

"Second, the [petitioner] must show that the deficient performance prejudiced the defense." *Strickland,* 466 U.S. at 687. Unless both are shown, it cannot be said that the conviction or sentence "resulted from a breakdown in the adversary process that renders the result unreliable." *Id.* Therefore, "[a] defendant's failure to satisfy one prong of the *Strickland* analysis obviates the need for a court to consider the remaining prong." *Knight v. Spencer,* 447 F.3d 6, 15 (1st Cir. 2006).

III

Analysis

A

Laches

The State has raised laches as an affirmative defense. "Laches is an equitable defense that precludes a lawsuit by a plaintiff who has negligently sat on his or her rights to the detriment of a

defendant." *O'Reilly v. Town of Glocester*, 621 A.2d 697, 702 (R.I. 1993). The defense of laches may be invoked by the state as an affirmative defense to an application for post-conviction relief. *Heon v. State*, 19 A.3d 1225, 1225 (Mem.) (R.I. 2010) (citing *Raso v. Wall*, 884 A.2d 391, 394 (R.I. 2005)). A hearing on the issue of laches must still be held in an application for post-conviction relief. *Id.* "In order to prove the defense of laches, 'the state has the burden of proving by a preponderance of the evidence that the applicant unreasonably delayed in seeking relief and that the state is prejudice by the delay."' *Id.* (quoting *Raso*, 884 A.2d at 395). "Whether or not there has been unreasonable delay and whether prejudice to the adverse party has been established are both questions of fact, and a determination must be made in light of the circumstances of the particular case." *Raso*, 884 A.2d at 396 (citing *Lombardi v. Lombardi*, 90 R.I. 205, 209, 156 A.2d 911, 913 (1959)).

"[T]ime lapse alone does not constitute laches." *Rodriques v. Santos*, 466 A.2d 306, 311 (R.I. 1983). "Rather, when unexplained and inexcusable delay causes prejudice to the other party, the defense of laches may be successfully invoked." *Id.* (citing *Hyszko v. Barbour*, 448 A.2d 723, 727 (R.I. 1982)). "Laches, in legal significance, is not mere delay, but delay that works a disadvantage to another." *Chase v. Chase*, 20 R.I. 202, 37 A. 804, 805 (1897). The burden is on the State to show that "the claim was 'first asserted after an unexplained delay of such great length as to render it difficult or impossible for the court to ascertain the truth of the matters in controversy and do justice between the parties, or as to create a presumption against the existence or validity of the claim, or a presumption that it has been abandoned or satisfied.'" *Fitzgerald v. O'Connell*, 120 R.I. 240, 246, 386 A.2d 1384, 1387 (1978) (quoting *Lombardi*, 90 R.I. at 209, 156 A.2d at 913). Actual prejudice has been shown where parties have died and witnesses have been lost. *See*

Hyszko, 448 A.2d at 726; *Manton Industries, Inc. v. Providence Washington Indemnity Co.*, 113 R.I. 198, 319 A.2d 355 (1974).

Petitioner argues that he delayed filing this Petition because he was under the impression, after a hearing with Justice Nugent, that the Court would be scheduling the matter. Petitioner was seeking an attorney be appointed to him to assist with filing his post-conviction relief petition. At a hearing before Justice Nugent, Petitioner was told that the matter needed to be sent back to the trial judge to hear his motion, and that the matter would be set down for a control date a month out so the matter would not be continued indefinitely. State's Ex. B. Petitioner testified that he was under the impression that he would be brought back into Court and an attorney would be appointed to represent him. While it is understandable why Petitioner would think this, the Court is not convinced that this alone justifies Petitioner waiting thirteen years to bring this Petition. Surely, Petitioner did not believe for thirteen years he was still waiting to be brought back before the Court for appointment of counsel. Further, the Court also does not believe the forgetfulness Petitioner's medication allegedly caused him justifies the thirteen-year gap between his hearing with Justice Nugent and filing this Petition.

While the Court recognizes that laches is a proper affirmative defense in post-conviction hearings, and although the Court does not believe that Petitioner's delay was justified by his alleged confusion, the Court finds that the State has failed to meet its burden in proving that it was prejudiced by Petitioner's delay in bringing this petition.

The State's witness, Officer John Sullivan of the Newport Police Department, was assigned to Petitioner's post-conviction relief case in the Summer of 2020. Officer Sullivan's specific assignment was to track down witnesses connected to Petitioner's 1997 case. Officer Sullivan testified that there were a number of parties involved in the underlying case that he was unable to

contact during the time he worked on this assignment.[7] These parties are indicated on State's Exhibit O. Under the column marked "Contact," there are several entries that are left blank. Officer Sullivan testified that this meant an attempt to contact that individual was done and either that individual did not respond or that he did not speak with them. *See* Tr. 13:4-12, July 8, 2021. However, there was no evidence presented that indicated that these individuals, besides the parties marked as deceased, could not be contacted or found in the event a retrial was ordered.

Officer Sullivan also testified that under the column marked "Testified at Trial" in State's Ex. O, if there was a yes written it indicated that the individual was available and willing to testify if a new trial was ordered. *See id.* at 19:1-21.[8] However, many of the entries left blank under this column also appear to be related to individuals that Officer Sullivan was unable to speak with, so it is again unclear whether they would indeed be unavailable to testify if a new trial was ordered. It is also unclear who in fact testified at the 1997 trial. In short, the State failed to establish that necessary witnesses would be unavailable if a retrial was ordered.

Further, the State failed to prove that it was unable to locate evidence as a result of the delay. Officer Sullivan testified that the items recorded as not found on the log, marked State's Ex. Q, were missing from the Newport Police Department evidence room. However, the State also indicated there were boxes of evidence from Petitioner's criminal case in the courthouse. Officer Sullivan testified that the murder weapon was confirmed to be in these boxes. *Id.* at 15:23-25; 17:2-4. The State, however, did not compare the log with the exhibits to confirm that all the items marked as unfound were in fact not located in these same boxes of exhibits. *Id.* at 16:8-17:1.

[7] Officer Sullivan testified that he estimated he worked on this for about two weeks while he was on desk duty due to an injury.

[8] The way the column is labeled is misleading in that one could interpret it to mean the party had testified at Petitioner's prior criminal trial, which is not necessarily the case according to Officer Sullivan's testimony.

Therefore, the State has not met its burden to establish that the delay caused the State to lose witnesses and/or evidence. Thus, the State failed to prove that it was prejudiced by the delay and the defense of laches does not apply.

B

Res Judicata

The State also argues that Petitioner's claim is barred under the doctrine of *res judicata*. "[T]he doctrine precludes the relitigation of all the issues that were tried or might have been tried . . . as long as there is (1) identity of parties, (2) identity of issues, and (3) finality of judgment in an earlier action." *Reynolds v. First NLC Financial Services, LLC*, 81 A.3d 1111, 1115 (R.I. 2014) (internal citations omitted). Further § 10-9.1-8 states:

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

Our Supreme Court has held that § 10-9.1-8 "codifies the doctrine of *res judicata* as applied to petitions for post-conviction relief." *State v. DeCiantis*, 813 A.2d 986, 993 (R.I. 2003). *See also Ramirez v. State*, 933 A.2d 1110, 1112 (R.I. 2007); *Figueroa v. State*, 897 A.2d 55, 56 (Mem.) (R.I. 2006). "*Res judicata* bars the relitigation of any issue that could have been litigated in a prior proceeding, including a direct appeal, that resulted in a final judgment between the same parties, or those in privity with them." *Taylor v. Wall*, 821 A.2d 685, 688 (R.I. 2003) (internal citations omitted). Thus, "[u]nder § 10-9.1-8, parties cannot bring forth new claims in subsequent applications that could have been, but were not, raised in the first postconviction-relief application

[or prior appeal] absent an 'interest of justice' showing." *Ramirez*, 933 A.2d at 1112 (citing *Miguel v. State*, 924 A.2d 3, 4 (Mem.) (R.I. 2007)); *DeCiantis*, 813 A.2d at 993).

The State argues that Petitioner has already raised the issues presented in his Petition during his appeal. During his appeal, Petitioner raised three issues: (1) the trial justice erred in admitting his custodial statements to police into evidence; (2) that due to mitigating factors, a sentence of life without parole was unwarranted; and (3) that the habitual offender sentence should not have been imposed. *See Smith*, 766 A.2d at 918. Petitioner did not raise the issue of ineffective assistance of counsel, nor would it have been proper to do so. Our Supreme Court has refused to consider claims of ineffective assistance of counsel on direct appeal. *See State v. Farlett*, 490 A.2d 52, 54 (R.I. 1985). This is based on the principle that "'only specific rulings of a trial justice are reviewable on direct appeal."' *Id.* (quoting *D'Alo*, 477 A.2d at 90) (internal quotations omitted). "'[T]he appropriate vehicle for review of claims of ineffective assistance of counsel is the request for post-conviction relief.'" *Id.* (quoting *State v. Rondeau*, 480 A.2d 398, 403 (R.I. 1984)).

The State attempts to argue that Petitioner is essentially arguing that he should not have been sentenced to life without the opportunity for parole in the same manner that was argued on appeal. However, on appeal, Petitioner's argument was that the trial justice erred in finding that none of the mitigating factors presented outweighed the aggravating circumstance established. In this petition, the argument is that his counsel was ineffective by failing to present his physician's testimony concerning his mental health issues during the sentencing hearing. Since this issue was not previously raised on appeal, nor could it have been raised, the doctrine of *res judicata* does not bar Petitioner from bringing this Petition.

C

Ineffective Assistance of Counsel

1

The Performance Inquiry

As stated previously, Petitioner argues that Attorney O'Connell's failure to present mitigating factors at his sentencing hearing constitutes ineffective assistance of counsel. A petitioner claiming ineffective assistance of counsel is saddled with a heavy burden, as there exists "'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)). A court's analysis of counsel's performance must be highly differential and "'every effort must be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.'" *Tassone v. State*, 42 A.3d 1277, 1285 (R.I. 2012) (quoting *Lynch v. State*, 13 A.3d 603, 606 (R.I. 2011)). When determining whether an attorney's conduct amounts to ineffective assistance of counsel, "a court must be careful not to narrow the wide range of conduct acceptable under the Sixth Amendment so restrictively as to constitutionalize particular standards of professional conduct . . ." *Nix v. Whiteside*, 475 U.S. 157, 165 (1986).

Under the first prong, "an applicant for postconviction relief . . . 'must establish that counsel's performance was constitutionally deficient; this requires a showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed . . . by the Sixth Amendment.'" *Reyes v. State*, 141 A.3d 644, 654 (R.I. 2016) (quoting *Bido v. State*, 56 A.3d 104, 110-11 (R.I. 2012)) (internal alterations omitted). A petitioner can satisfy this prong only by "'showing that counsel's representation fell below an objective standard of reasonableness.'"

Lipscomb v. State, 144 A.3d 299, 308 (R.I. 2016) (quoting *Bell v. State*, 71 A.3d 458, 460 (R.I. 2013)). "Only if it is determined that trial counsel's performance was constitutionally deficient does the Court proceed to the second prong of the *Strickland* test . . ." *Linde v. State*, 78 A.3d 738, 745 (R.I. 2013) (citing *Guerrero v. State*, 47 A.3d 289, 300-01 (R.I. 2012)). "[E]ffective representation is not the same as errorless representation." *Bosch*, 584 F.2d at 1121 (internal citation omitted). "'It is well established that tactical decisions by trial counsel, even if ill-advised, do not by themselves constitute ineffective assistance of counsel.'" *Rice*, 38 A.3d at 18 (quoting *Vorgvongsa v. State*, 785 A.2d 542, 549 (R.I. 2001)). "'Thus, a choice between trial tactics, which appears unwise only in hindsight, does not constitute constitutionally-deficient representation under [this] . . . standard."' *Id.* (quoting *D'Alo*, 477 A.2d at 92).

Petitioner testified that he and Attorney O'Connell discussed his mental health issues and his dysfunctional family/upbringing. At the sentencing hearing, Attorney O'Connell presented the issue of both Petitioner's troubled childhood and mental health issues to the Court. Attorney O'Connell presented this same evidence to the Court, as well as the State, during the pretrial stage. Petitioner testified that he also discussed with Attorney O'Connell calling his mental health doctor to testify at his sentencing hearing. Petitioner testified that Attorney O'Connell told him this was a "double-edged sword" and that she was not going to call the doctor to testify.

Attorney O'Connell explained her reasoning for not calling the doctor at the sentencing hearing during her testimony at the post-conviction hearing. Attorney O'Connell testified that she believed that the doctor's testimony was not going to help Petitioner and may in fact hurt Petitioner. Attorney O'Connell explained that having a doctor testify is often "a double-edged sword," in that the doctor could be questioned on many issues such as whether the defendant is nonviolent or if the defendant would commit another crime if released. Tr. 89-90:6, June 21, 2021.

Attorney O'Connell testified that strategically, this sometimes is "a very dangerous thing to do." *Id.* Attorney O'Connell also testified that strategically it is dangerous to subject the doctor to cross-examination regarding the fact that Petitioner was voluntarily not taking his medication as he was directed and drinking alcohol against doctor's orders. Specifically, she testified that it is "hard to get sympathy from a Judge or a jury if the person made a choice not to comply with their . . . medical orders." *Id.* at 90:18-20. Ultimately, she made the strategic decision that it was not in the Petitioner's best interest to call his doctor, especially considering that Petitioner's medical records were submitted in the presentencing report to the Court for review which outlined his condition. It is clear from Attorney O'Connell's testimony that the decision not to call Petitioner's mental health doctor was a well-founded strategic decision. Attorney O'Connell is an experienced attorney. She was a Public Defender for thirty-three years before retiring and had worked on at least ten murders prior to handling Petitioner's case. In her opinion, based on her experience, calling a doctor to testify in this scenario was a dangerous strategic move. This type of tactical decision made by an attorney cannot be said to rise to the level of defective performance. Petitioner has failed to present to the Court any evidence that Attorney O'Connell's performance fell below the objective standard of reasonableness. Accordingly, Petitioner has not satisfied the first prong of the ineffective assistance of counsel inquiry.

2

Prejudice

Even if, arguendo, there was deficient performance by Attorney O'Connell, the Court does not find that such performance was prejudicial. In order to prove the second prong, a petitioner must "demonstrate that the 'deficient performance was so prejudicial to the defense and the errors were so serious as to amount to a deprivation of the applicant's right to a fair trial.'" *Page v. State*,

995 A.2d 934, 943 (R.I. 2010) (quoting *Brennan*, 764 A.2d at 171). The second prong is not satisfied unless a petitioner "'demonstrates that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Chum v. State*, 160 A.3d 295, 299 (R.I. 2017) (quoting *Lipscomb*, 144 A.3d at 308). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. "[A] court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury." *Id.* at 695. "Under the prejudice prong, not all errors by counsel are sufficient to meet the standard of a reasonable probability that, but for the counsel's errors, the result of the proceeding would have been different." *Knight*, 447 F.3d at 15. Our Supreme Court has held that this is a "highly demanding and heavy burden." *Barros*, 180 A.3d at 829.

There has been no evidence presented by Petitioner that indicates that had Attorney O'Connell called Petitioner's doctor to testify that the trial justice would have rendered a sentence other than life without the possibility of parole. As stated previously, Petitioner's mental health history and background were presented to the trial justice prior to sentencing. The trial justice still found that the mitigating circumstances did not overcome the aggravating circumstances of the murder. There is nothing to indicate that had the trial justice heard testimony from Petitioner's doctor that he would have believed differently. There also has been nothing presented to indicate that anything the doctor could testify to would be different than what was already presented to the trial justice. Therefore, it cannot be said that Attorney O'Connell's failure to call Petitioner's doctor at his sentencing hearing prejudiced the defense and thus, Petitioner has not satisfied the second prong.

Accordingly, Petitioner has failed to meet his burden of satisfying both prongs of the *Strickland* test and, therefore, cannot prove he was denied effective assistance of counsel.

IV

Conclusion

For the foregoing reasons, Petitioner's petition for post-conviction relief is denied. Counsel shall confer and submit a form of judgment in favor of the State.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE: **Charles S. Smith v. State of Rhode Island**

CASE NO: **NM-2018-0337**

COURT: **Newport County Superior Court**

DATE DECISION FILED: **September 13, 2021**

JUSTICE/MAGISTRATE: **Van Couyghen, J.**

ATTORNEYS:

For Plaintiff: **Pamela E. Chin, Esq.**

For Defendant: **Judy Davis, Esq.**