STATE OF RHODE ISLAND

PROVIDENCE, SC. SUPERIOR COURT

(FILED: March 26, 2021)

TRACEY BARROS	:	
	:	
v.	:	PM/18-3085
	:	(P1/06-2058AG)
STATE OF RHODE ISLAND	:	

DECISION

KRAUSE, J. Tracey Barros, who is serving consecutive life terms for an execution-style murder with a firearm in 2005, has filed another postconviction relief (PCR) application, again accusing his trial and appellate attorneys with providing him with substandard assistance. Barros was tried twice. The first trial resulted in a hung jury in June of 2007, and a mistrial was declared. He was convicted at a January 2008 retrial. That conviction has been affirmed. *State v. Barros*, 24 A.3d 1158, 1161 (R.I. 2011) (*Barros I*).

Barros continues to denigrate every attorney who has represented him, beginning in a series of PCR pleadings ten years ago in PM/11-5771.[1] In that offensive, Barros filed the following amendments to his initial 2011 request seeking postconviction relief:

First Amended PCR application (filed January 3, 2013) – Included criticism of trial counsel for failing to engage and present an expert witness in the field of false confessions.

[1] Barros has been represented by as many as eight experienced criminal defense attorneys: four from the Public Defender's office at both of his trials and on direct appeal, including lead trial counsel, John Lovoy, whom the Supreme Court has twice commended, along with other attorneys in that office. *Barros v. State*, 180 A.3d 823, 835 (R.I. 2018) (*Barros II*), *State v. Sampson*, 884 A.2d 399, 404-05 (R.I. 2005). Barros' entourage has also included his veteran court-appointed PCR attorneys, Andrew Berg, George West, and (presently) Richard E. Corley.

Second Amended petition (filed April 2, 2014) - Added his appellate attorney and two additional rebukes: trial counsel's failure to request the Court's recusal, and appellate counsel's failure to argue trial counsel's voir dire shortcomings.

Third Amended application (filed June 11, 2014) - An additional complaint, expanding upon his claim that trial counsel failed to carry out effective voir dire relating "to issues surrounding his alleged confession."

This Court was unimpressed by any of those entreaties and denied all of them in a written decision on May 18, 2015. On April 4, 2018, the Supreme Court agreed and affirmed that denial. *Barros v. State*, 180 A.3d 823 (R.I. 2018) (*Barros II*).

Undeterred, Barros returned within two weeks, and on April 25, 2018, he filed, *pro se*, another PCR application (PM/18-3085), again targeting lead counsel, Mr. Lovoy, other Assistant Public Defenders, and, for good measure, he also included Messrs. Berg and West, his PCR attorneys, claiming that all of them had deficiently represented him.

Shortly thereafter, on May 21, 2018, the State moved to dismiss Barros' renewed efforts to reassert ineffectiveness claims, citing the PCR statute, G.L. 1956 § 10-9.1-8, as well as the doctrine of *res judicata,* both of which the Supreme Court had employed when it refused to address some of Barros' claims in his 2011 PCR petition. *Barros II*, 180 A.3d at 831-32. This Court concurred with the state's assessment, and by Order dated May 24, 2018, it dismissed Barros' restocked PCR ineffective-counsel petition.

Two weeks later, on June 6, 2018, Barros actually acknowledged that his new PCR petition was a "premature second filing" and asked that it be dismissed without prejudice, a request this Court denied in view of its May 24, 2018 dismissal Order. Thereafter, the matter was presented to the Supreme Court, and on November 2, 2018, it directed that Barros at least be afforded an

opportunity to reply to that May 24, 2018 dismissal Order. The Court appointed attorney Richard E. Corley to assist Barros in that endeavor.

Both parties have filed memoranda, and in a February 22, 2021 Order, this Court alerted counsel that it would review their written submissions, along with the relevant record of the litigation, and determine whether any further proceedings were necessary to decide the petition. To date, no request for a hearing has been made by either party.

Having considered all of those materials, the Court is satisfied that the facts and legal contentions are adequately presented in the materials before the Court and that any further hearing or oral argument will not aid the decisional process. *See Ryan v. Roman Catholic Bishop of Providence*, 941 A.2d 174, 187–88 (R.I. 2008), *United States v. DeCologero,* 821 F.2d 39, 44 (1st Cir. 1987) (Selya, J.).

Adequacy of Counsel's Assistance - *Strickland*

PCR petitions which criticize counsel's representation invite application of the test delivered by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984) and its prolific progeny, which measure the adequacy of a lawyer's performance. The Court need not expand the pages of this decision unnecessarily with an extensive recitation of what has essentially become hornbook law. An abridged explication will suffice here; further expansion is set forth in this Court's May 18, 2015 *Barros II* decision at page 14 *et seq*. and by the Supreme Court in its affirmance at 180 A.3d commencing at page 828.

In short, when evaluating allegations of ineffective assistance of counsel, the standard employed by Rhode Island courts is identical to that set forth in *Strickland.* A petitioner has the burden of demonstrating that his lawyer's performance was "deficient," falling below an objective standard of reasonableness, and, secondly, that such impaired performance was "prejudicial" such

that the attorney's errors essentially deprived the defendant of a fair trial. *Jaiman v. State,* 55 A.3d 224, 231 (R.I. 2012), *Tassone v. State,* 42 A.3d 1277, 1284–85 (R.I. 2012).

Put differently, even if counsel's performance was deficient, the petitioner must also establish that his attorney's shortcomings prejudiced his defense to the point 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 687, 694; *Crombe v. State*, 607 A.2d 877, 878 (R.I. 1992). Both of *Strickland*'s requirements must be satisfied to mount a successful ineffectiveness claim, *Hazard v. State,* 968 A.2d 886, 892 (R.I. 2009), and a strong presumption exists that counsel fulfilled his or her responsibilities efficiently. *Gonder v. State,* 935 A.2d 82, 86 (R.I. 2007).

* * *

It would be charitable to designate Barros' current PCR application as his "second" one, inasmuch as he filed three amended petitions in his 2011 excursion, padding each republication with another layer of disenchantment and meritless disparagement of his attorneys. When coupled with those earlier postconviction entreaties, Barros' current missive is at least his fourth or fifth at-bat. And, the state is not wrong to urge the Court not to consider them, again citing § 10-9.1-8, the *res judicata* doctrine, *Barros II,* and other applicable case law, all of which aim at finalizing litigation, not rejuvenating PCR petitions containing remodeled allegations which were or should have been raised in a previous proceeding, either by direct appeal or via a prior PCR application.

In *Hall v. State*, 60 A.3d 928, 931–32 (R.I. 2013), as in *Barros II*, 180 A.3d at 831-32, the Court described the high bar a convicted felon must surmount in order, if at all, to have a proverbial second bite at the PCR apple:

> Section 10–9.1–8 '"codifies the doctrine of *res judicata* as applied to petitions for post-conviction relief."' *Taylor v. Wall,* 821 A.2d 685, 688 (R.I. 2003) (quoting *State v. DeCiantis,* 813 A.2d 986, 993

(R.I. 2003)); *see also Price v. Wall,* 31 A.3d 995, 999 n.10 (R.I. 2011). Section 10–9.1–8 provides in pertinent part:

> "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."

"*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,* 821 A.2d at 688; *see also Price,* 31 A.3d at 999–1000. "Under § 10–9.1–8, an applicant is permitted to assert an otherwise estopped ground for relief only if it is in the 'interest of justice.'" *Ferrell v. Wall,* 971 A.2d 615, 621 (R.I. 2009).[2]

The Claims

At the outset, Barros' pending petition faults prior counsel for not ordering a transcript of the voir dire proceedings. This is an odd criticism, as Barros devoted a significant part of his 2011 PCR petition to criticizing, with record citation, trial counsel's voir dire, as well as upbraiding appellate counsel for not raising on appeal Mr. Lovoy's purportedly ineffective voir dire. *See Barros II*, 180 A.3d at 836 *et seq*. In any event, Barros has meandered through the voir dire record

[2] *Accord*, *Jaiman v. State*, 55 A.3d 224, 232 (R.I. 2012) ("This 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). *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."). "Our jurisprudence on this issue is quite firm." *Martinez v. State*, 128 A.3d 395, 396 (R.I. 2015) (having raised issues of ineffective assistance of counsel in an earlier postconviction relief action, petitioner was foreclosed from litigating such issues, regardless of whether they were earlier pressed or appealed, in a second application, which was properly denied).

and the rest of the transcripts, apparently hoping to unearth prejudicial missteps by prior counsel which might pass the tests outlined in *Hall*.

After reviewing the record and the pleadings, this Court has found nothing in Barros' latest solicitations which deserves consideration. None of them satisfies the tight margins limned in *Hall*, and, most assuredly, there is nothing which satisfies the seldom applied "interest-of-justice" exception prescribed by *Ferrell*. However, lest there remain any question as to this Court's views as to the merits of Barros' second (or, perhaps more accurately denominated as his fifth) round of attorney disparagement, the Court will address them, at least in core fashion.

Barros first complains that Mr. Lovoy mishandled disclosures by two trial jurors of information which Barros says should have prompted counsel to demand their disqualification. During voir dire, juror John Smith,[3] in response to general inquiry of the prospective panel as to whether any jurors knew law enforcement personnel, lawyers, or anyone associated with the criminal justice system, had said at a sidebar conference that his niece had been a Superior Court law clerk and was now an Assistant Public Defender. He also acknowledged a distant DUI infraction which had occurred in 1984, *i.e.*, about a quarter-century prior to the trial. Mr. Smith assured the Court and counsel that he would not converse with his niece during the trial, whom he rarely saw other than at family functions, anyway. Understandably, Mr. Lovoy asked him no follow-up questions; neither did the prosecutor. (Tr. at 119-120.)

During the next evening, after a half-day of testimony, juror Smith belatedly recalled that he knew two law enforcement officers: a state trooper who lived in his immediate neighborhood, and a Providence policeman (unrelated to the Barros case) who was a member of his health club

[3] Other than identifying counsel, pseudonyms will be employed for other individuals throughout to preserve their privacy.

and who happened to know someone who was a friend of Smith's brother-in-law's brother. Any conversation between the juror and that officer (whom Smith never really thought of "as an officer") typically related to sports. ("The only thing I've ever talked to him about is hoops.") Lastly, the juror related that he had some familiarity with firearms because he had engaged in some hunting twenty years previously. (Trial Tr. at 227-29.)

It appears that Smith was worried about not having recounted that information during the voir dire and that he had shared his concern over that omission with some other juror(s), who apparently told him that inquiry had been made about firearm familiarity. He thereafter recounted the above information to the Court and counsel that morning, before proceedings resumed. He made clear to everyone, however, and particularly to Mr. Lovoy, that none of it was of any import to him and that it did not affect his impartiality in any way. (Trial Tr. at 229.) With that reassurance, no attorney expressed any concern.

Barros also complains that trial counsel failed to object to a second juror, Mary Johnson, remaining on the jury after she said, on the third trial day, that she had recognized her uncle's nephew, Henry Ashe, briefly enter the courtroom and appear to make eye contact with Melissa Larsen, one of the prosecutors. Ms. Johnson recalled that long ago her mother had told her that Henry had married someone in the Attorney General's office. After being advised that Henry was married to Ms. Larsen, who had retained her maiden name, she was asked whether that information had any impact on her judgment of the case, and she replied, "Not at all."

In response to Mr. Lovoy's follow-up questions, the juror assured him that she was not at all uncomfortable with the information, that she had last seen Henry "years ago" and couldn't even remember that encounter, and she doubted that he would even recognize her. She simply felt that

she was obliged to disclose her courtroom observation, but that it had no bearing whatsoever on her impartiality as a juror. (Trial Tr. at 487-88.)

Mr. Lovoy's comfortable assessment of both jurors was a practical decision which *Strickland* generously allows counsel to make without fear of Monday morning quarterbacking. "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) (quoting *Strickland,* 466 U.S. at 689). Tactical decisions by trial attorneys generally do not, even if hindsight proves the strategy unwise, amount to constitutionally-deficient representation under the "reasonably competent assistance standard." *Rice v. State*, 38 A.3d 9, 18 (R.I. 2012) (quoting *State v. D'Alo*, 477 A.2d 89, 92 (R.I. 1984)); *see United States v. Bosch*, 584 F.2d 1113, 1121 (1st Cir. 1978).

Barros criticizes trial counsel for not conferring with him about the jurors' disclosures and for failing to demand their excusal for cause. Those are commonplace determinations by trial counsel; and, while some attorneys might discuss such decisions with a client before expressing satisfaction with such innocuous mid-trial impartations, omitting to do so - in the calculus of a seasoned counsel's practiced experience - is hardly substandard advocacy.

That is especially true here, as it is this Court's unalterable opinion that the comments and responses of the two jurors were entirely acceptable and that each of them clearly reflected what is expected of a sworn factfinder: an impeccable sense of responsibility and unwavering impartiality. The record admits of absolutely no rational ground whatsoever to have separated either of these jurors from the panel for cause, and this Court would have refused to dismiss them "for cause" even if trial counsel had made such a demand. All of Barros' objurgations relating to these two jurors are meritless.

Barros next complains that trial counsel failed to request the Court to instruct the jury not to discuss the case while it was ongoing. He didn't need to; and, in any case, Barros misreads the record. The Court admonished the jurors in myriad ways regarding their responsibilities, instructing them not to engage in any internet research, not to take independent views of or visit the scene, or to reach premature conclusions, as well as to avoid media accounts of the case and not to discuss it until it was time to deliberate. *E.g.,* Tr. at 54-55, (475), 490, 817, 873-74, 885.

Barros also says that he was disadvantaged because trial counsel did not alert him to his options and risks before testifying at the retrial. This contention does not inch anywhere near deficient representation. While Barros was in custody, the police had obtained audio-recorded inculpatory statements from him, as well as several incriminatory statements when he was interviewed by federal and state detectives before making the recording. That recording was played at the first trial and also at the retrial, and detectives also recounted the unrecorded statements at both trials in the context of *Miranda v. Arizona,* 384 U.S. 436 (1966).[4] In response, Barros had testified at great length at his first trial and also for more than an entire day at his second trial, in an effort in each instance to explain away his statements as coerced, false confessions.

Barros knew that, realistically, he would be unable to counter that evidence and proffer his defense unless he testified. He knew full well that his testimony and credibility were just as important to the jury at the second trial as it had been at the first trial, and he openly said so. A review of his January 14-15, 2008 retrial testimony, which spanned 200 pages, clearly demonstrated that he very much wanted to annotate his professed circumstances and attempt to explain to the jury why he had made the incriminating statements**.** Nothing more need be added

[4] The recorded and unrecorded statements were the subject of an extensive pretrial suppression motion hearing. The Court denied the motion, and issues surrounding that ruling consumed a large part of Barros' unsuccessful direct appeal in *Barros I,* 24 A.3d at 1161.

to this make-weight argument, which, if it were to be raised at all, plainly should have been included in Barros' direct appeal or in his initial 2011 PCR application, and not as an afterthought in a subsequent one.[5]

Finally, Barros complains that trial counsel mistakenly allowed some testimony relating to Barros' connection with unrelated events seep into the trial. While such evidence may have been admitted during the initial mistrial, there was little of it at the retrial. And, to the extent that it was allowed, it was principally as a result of an evidentiary ruling the Court made, not because of counsel's alleged misstep. *See* Trial Tr. at 144, 581-84. In any event, this type of evidentiary complaint is clearly grist for the direct appeal mill, and not earmarked for a PCR petition, much less a subsequent one.

---

[5] Barros' testimony at the January 2008 trial is replete with his protestations and explanations, such as: "Yes. I want to explain to you." Trial Tr. at 96; "This is why we're here in court. This is why I'm testifying on the stand now, to try to prove to the Court that all this came about because I didn't want to go through with that." (116-17); and, to the prosecutor, during cross-examination: "You've been an AG for a while, we know that stuff like that does go on, Maybe other guys won't come to court and admit it, but I will;" (171); "You never been in my predicament. It does happen. That's why I'm here today explaining it." (599).

Conclusion

Withal, Barros has completely failed to demonstrate that any of his prior attorneys, be they trial or appellate counsel, or his previous PCR counsel, ill-served him in any way with deficient assistance. They did not.

As our Supreme Court said in *Anderson v. State*, 878 A.2d 1049, 1050 (R.I. 2005), "The conviction in this case was not a result of petitioner's attorney but, rather, the weight of the credible evidence against [him]." That same conclusion applies here, also.

Barros' renewed application for postconviction relief is denied, and judgment shall again be entered in favor of the state.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**Tracey Barros v. State of Rhode Island**
CASE NO:	**PM/18-3085 (P1/06-2058AG)**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**March 26, 2021**
JUSTICE/MAGISTRATE:	**Krause, J.**
ATTORNEYS:	
For Plaintiff:	**Richard K. Corley, Esq.**
For Defendant:	**Judy Davis, Esq.**