STATE OF RHODE ISLAND

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: May 8, 2023)

PEDRO MURIEL REYES	**:**	
	:	
VS.	**:**	**PM-2016-5066**
	:	
STATE OF RHODE ISLAND	**:**	

DECISION

KRAUSE, J. In this postconviction relief (PCR) application, Pedro Muriel Reyes contends that his 2002 murder and other convictions should be vacated, along with his habitual offender sentence. In all, he was sentenced as follows: Count 1, life for the second degree murder of Angel Martinez; Count 2, carrying a pistol without a license, ten years to be served concurrently with Count 1; Count 3, a mandatory consecutive life term for discharging a firearm during the commission of a crime of violence resulting in Martinez's death; and ten nonparolable years as a habitual offender, to be served concurrently with the second life term. Reyes's conviction has been affirmed. *State v. Reyes*, 984 A.2d 606 (R.I. 2009).

Reyes's petition is separated into three parts: (1) ineffective assistance of trial counsel; (2) prosecutorial misconduct; and (3) due process. At the April 17, 2023 hearing on his PCR application, Joseph Voccola, one of Reyes's trial attorneys, testified. (His co-counsel, Thomas Connors, passed away in 2016.) Mr. Reyes opted not to testify.

I. Ineffectiveness of Counsel Claims

A. Identification

Although Reyes's application includes myriad claims, his principal challenge is that trial counsel was ineffective for failing to request the Court to provide the jury with an identification instruction, as well as faulting counsel for not engaging an eyewitness identification expert (ineffectiveness issues 3 and 4). [1]

The benchmark for a claim of ineffective assistance of counsel is *Strickland v. Washington*, 466 U.S. 668 (1984); *accord Brennan v. Vose*, 764 A.2d 168, 171 (R.I. 2001); *LaChappelle v. State*, 686 A.2d 924, 926 (R.I. 1996). Whether an attorney has failed to provide effective assistance is a factual question which a petitioner bears the "heavy burden" of proving. *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*,

[1] In his memorandum Reyes refers to his multiple claims as "issues," and the Court will address them in that fashion for ease of reference.

223 F.3d 976, 981 (9th Cir. 2000)), and "a defendant must overcome a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance and sound trial strategy." *Hughes v. State*, 656 A.2d 971, 972 (R.I. 1995); *Gonder v. State*, 935 A.2d 82, 86 (R.I. 2007).

Even if the petitioner can satisfy the first part of the test, he must also demonstrate that his attorney's deficient performance was prejudicial. Thus, 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).

The legal landscape at the time of Reyes's trial twenty-one years ago did not support his present PCR identification challenges. Under existing Rhode Island case law in 2002, no identification instruction was required. For decades the Rhode Island Supreme Court has accorded trial judges wide discretion in deciding whether to offer an identification instruction, and the Court did not mandate that one be given. *State v. Andrade*, 544 A.2d 1140, 1143 (R.I. 1988). As long as the jury was told, as it was in Reyes's case (Trial Tr. at 319), that the state was required to prove beyond a reasonable doubt that the defendant was, in fact, the person who committed the offense, "a trial justice is not required to give specific instructions [on identity."] *Andrade*, 544 A.2d at 1143; *State v. Desrosiers*, 559 A.2d 641, 645-46 (R.I. 1989); *State v. Maxie*, 554 A.2d 1028 (R.I. 1989); *State v. Gomes*, 604 A.2d 1249, 1256 (R.I. 1992); *State v. Payette*, 557 A.2d 72, 73-74 (R.I. 1989) ("Hence it is established Rhode Island law that a specific jury instruction on identification is not mandatory and failure to give such an instruction is not reversible error. . . [A] general instruction is preferable on the rationale that a specific instruction may be construed to be partisan comment by the trial justice."). The *Payette* sentiment has been recently renewed. *State v. Hampton-Boyd*, 253 A.3d 418, 424 (R.I. 2021).

This Court is mindful that in recent years the weight heretofore accorded to the accuracy of eyewitness identification, as well as a juror's assumed understanding of its potential shortcomings, have been more closely examined by professionals and other courts. Our Supreme Court noted the alteration in that terrain in *State v. Davis*, 131 A.3d 679, 697 (R.I. 2016) and in *State v. Fuentes*, 162 A.3d 638, 644-46 (R.I. 2017).

Although the *Davis* Court recognized the growing awareness of "the problematic nature of eyewitness identification and its potential for misidentification," the Supreme Court has nonetheless continued to hold that "a specific jury instruction on identification is not mandatory." *Davis*, 131 A.3d at 694, 696; *Hampton-Boyd*, 253 A.3d at 424. Although *Davis* observed that "the better practice would be for courts to provide the jury with more comprehensive instructions when eyewitness testimony is an issue," *Davis*, 131 A.3d at 697, the Court nevertheless later characterized that observation as "aspirational dictum," *Fuentes*, 162 A.3d at 645 n.12, and expressly reiterated that "*Davis* did not announce a new rule of law" mandating an identification instruction, but was, instead, alerting trial courts not to overlook "the growing concern in other jurisdictions" and in scientific studies regarding the "questionable accuracy" of eyewitness accounts. *Id*.

In the end, however, the yardstick by which to measure trial counsel's efficiency in Reyes's case is not in the context of recent developments or in today's more cautious approach to eyewitness identification; rather, it must be gauged by existing law at the time of trial. After all, providing "effective assistance of counsel does not involve the ability to accurately predict the future," *Bell v. State*, 71 A.3d 458, 462 (R.I. 2013). "The question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms[.]'" *Harrington v. Richter*, 562 U.S. 86, 105 (2011) (quoting *Strickland*, 466 U.S. at 690). As the Rhode Island

Supreme Court said in *Barros*, 180 A.3d at 833: "We would emphasize that, in evaluating an attorney's performance under *Strickland*, our approach is to look at the legal landscape and what was known to the attorney *at the time at issue*." (Emphasis in original text.)

Since an identification instruction was not even mandated at the time of Reyes's trial, it most certainly was not ineffective assistance if trial counsel neither requested an identification instruction nor contemplated engaging an eyewitness identification expert, whose testimony this Court would not have admitted anyway. *See Morris v. State*, 744 A.2d 850, 858 (R.I. 2000); *State v. Day*, 898 A.2d 698, 701 (R.I. 2006).[2]

B. Other Ineffectiveness Claims

Reyes's remaining ineffectiveness challenges are without basis. Among them is his allegation (issue 1) that trial counsel should have filed a pretrial identification suppression motion because Officer Scott McGregor, who witnessed the shooting, had insufficient ability to view the shooter -- i.e., that he was not a competent witness under Evidence Rule 602. That contention was addressed by the Supreme Court in Reyes's direct appeal and is barred by the *res judicata* doctrine. *See infra.*

As to Reyes's complaint that trial counsel should have nonetheless filed a pretrial suppression motion because McGregor was not 100 percent certain of his selection of Reyes's picture from a photo array, Mr. Voccola explained that he expected that such a motion was likely to be denied and would have only provided Officer McGregor with a preview of what to expect during cross-examination at trial. Counsel's reasoning was a sensible trial tactic, and *Strickland*

[2] Similarly, in *Barros v. State*, 180 A.3d 823, 833 (R.I. 2018), the Court affirmed the trial judge's refusal to advance funds so that the defendant could hire an expert witness on false confessions. There, the Supreme Court noted that "[s]uch an expert simply was not necessary to determine this claim of ineffective assistance of counsel," noting the importance of "conserving . . . meager state resources in a situation where the requested expenditure would have been unnecessary." *Id.*

and its progeny frown on the hindsight review of a trial attorney's tactical decisions. "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). *See State v. D'Alo*, 477 A.2d 89, 92 (R.I. 1984) ("Thus, a choice between trial tactics, which appears unwise only in hindsight, does not constitute constitutionally-deficient representation under the reasonably competent assistance standard."). Here, trial counsel's strategy was entirely reasonable.

Reyes mistakenly believes that counsel was remiss in not protesting the warrantless search of the red Navigator in which he fled after the shooting and a pouch found in the vehicle (issue 5). Rhode Island case law such as *State v. Werner*, 615 A.2d 1010, 1013-14 (R.I. 1992), follows the federal rule: "As long as the police have probable cause to believe that an automobile, or a container located therein, holds contraband or evidence of a crime, then police may conduct a warrantless search of the vehicle or container, even if the vehicle has lost its mobility and is in police custody"; *Pennsylvania v. Labron*, 518 U.S. 938 (1996) (holding that warrantless searches of vehicles, even after impoundment, are permissible). *Accord Maryland v. Dyson*, 527 U.S. 465 (1999) (holding that the automobile exception permits a warrantless search even when police have ample time to obtain warrant); *see United States v. Polanco*, 634 F.3d 39, 43 (1st Cir. 2011) (nothing that an "impressive convoy of auto-exception cases" holds that if the requisite probable cause exists, it matters not whether the vehicle was already parked, searched at another location, or even whether agents had time to obtain a warrant) (citations omitted).

Reyes further says that trial counsel failed to investigate and interview potential witnesses (ineffectiveness, issue 7). Counsel did present witnesses whom he believed could assist in Reyes's defense. He was unfamiliar with the individuals mentioned at the PCR hearing, but he testified that if Reyes had offered potential witnesses, he and co-counsel would have explored such

suggestions if they thought there was a basis for them. Reyes presented no evidence whatsoever at the hearing that the individuals listed in issue 7 were ever brought to trial counsel's attention and made no proffer as to how they might have been of assistance. This claim has no legs at all.

Reyes also faults his trial team for not having filed a motion under *Franks v. Delaware*, 438 U.S. 154 (1978) to challenge the arrest warrant (ineffectiveness issue 6). Reyes offers no grounds or basis to support a *Franks* hearing. This claim is rejected out of hand. *See State v. DeMagistris*, 714 A.2d 567 (R.I. 1998); *State v. Verrecchia*, 880 A.2d 89 (R.I. 2005).

Reyes additionally complains (ineffectiveness issue 9 and due process issue 6) that the admission of the testimony of Dr. Elizabeth Laposata, Chief Medical Examiner, contravened *Crawford v. Washington*, 541 U.S. 36 (2004), which restricted the use of testimonial hearsay at trial. *Crawford*, however, does not retroactively apply to cases on collateral review. *Whorton v. Bockting*, 549 U.S. 406, 409 (2007).

Reyes also says that counsel did not communicate with him regarding trial strategies, defenses, and mandatory sentencing. Like many of his claims, however, Reyes again presented no evidence at the PCR hearing to support those assertions, and Mr. Voccola testified that he and Mr. Connors did indeed confer with him as to those issues. This Court fully credits that unrebutted testimony.

Reyes further criticizes trial counsel for not challenging the constitutionality of G.L. 1956 § 11-47-3.2(b), which subjected him to the mandatory consecutive life term. Any such challenge would have been rejected then, just as it has been several times since its enactment in various constitutional challenges. *E.g. Sosa v. State*, 949 A.2d 1014, 1016-17 (R.I. 2008) (separation of powers); *State v. Monteiro*, 924 A.2d 784, 792-96 (R.I. 2007) (double jeopardy; separation of powers; Eighth Amendment); *State v. DeJesus*, 947 A.2d 873, 884-86 (R.I. 2008) (equal

protection); *State v. Feliciano*, 901 A.2d 631, 647-48 (R.I. 2006) (double jeopardy); *see additionally*, *State v. Rodriguez*, 822 A.2d 894, 904-05 (R.I. 2003); *State v. Marsich*, 10 A.3d 435 (R.I. 2010); *State v. Stone*, 924 A.2d 773, 779 (R.I. 2007); *State v. Linde*, 965 A.2d 415, 415 n.1 (R.I. 2009).

II. Prosecutorial Misconduct

Reyes's claims of prosecutorial misconduct (which are not otherwise barred by *res judicata*) are without merit. He claims (issue 2) that the prosecutor vouched for the credibility of Joseph Para, who was expected to have been a state's witness but recanted his incriminating testimony. His prior inculpatory statement was admitted at trial for the jury's consideration. *See State v. Offley*, 131 A.3d 663, 677 (R.I. 2016) (McKenna-Goldberg, J., separate opinion); *State v. McManus*, 990 A.2d 1229, 1236 (R.I. 2010). Impermissible vouching or bolstering occurs when one offers an opinion regarding the truthfulness or accuracy of a witness's testimony. *See State v. Martin*, 68 A.3d 467 (R.I. 2013). The prosecutor branded Para a liar, a disparaging sobriquet which scarcely amounts to vouching for a witness's credibility.

Reyes also complains (issue 4) that the prosecutor impermissibly vouched for the credibility of Officer McGregor, who had selected the defendant's picture from a photospread but with the caveat that he was not 100 percent certain of his identification. Petitioner's suggestion that the prosecutor's candid acknowledgement of McGregor's less-than-certain identification somehow constitutes vouching or bolstering is groundless.

Additionally, Reyes says the prosecutor commented on his failure to testify and that he also allowed false evidence to go uncorrected (issue 5). Reyes offers no support for those barren allegations, and this Court finds them baseless.

Reyes also attempts to find a *Batson* issue in the jury empanelment process (issue 3). The record admits of no such misstep. *See Batson v. Kentucky,* 476 U.S. 79 (1986).

III. Due Process

Reyes claims (issue 1) that the Court failed to include a manslaughter instruction. He offers no evidentiary support for that claim, and even if trial counsel had requested such a lesser charge, this Court would have declined to include it in the jury instructions. Intentionally firing a gun into a crowd of people hardly bespeaks a manslaughter offense. For that criminal conduct, Reyes was charged with murder, which (whether first or second degree) requires proof of malice. Manslaughter does not; it is the unlawful killing of a human being *without* malice. *State v. Fetzik*, 577 A.2d 990, 995 (R.I. 1990).

Reyes says the Court impermissibly injected itself in the trial proceedings and acted as an "advocate." (Issues 2 and 8.) The record supports no such imprecation. Reyes's reference to the Court's inquiries (Trial Tr. at 99-101) simply reflects the Court's effort to ensure that the witness heard, understood, and answered the prosecutor's questions. Such is not advocacy.

Reyes also alleges that the court reporter failed to read back relevant cross-examination of Officer McGregor (issue 4). Reyes, however, does not specify what he says was omitted. Whatever the reporter read to the jurors (Trial Tr. at 379-80, 382) completely responded to their request. No party complained that there was an absence of testimony or a lack of diligence in that respect. This claim is also rejected.

In issue 7, Reyes says that the Court "gave an insufficient instruction on malice and intent to kill." The Court's jury instructions fully complied with the requirements needed to advise the jury of the elements of the crime of murder in the first degree and second degree. The claim is without any basis.

Reyes also complains that he was unjustly subjected to a sentence under the Habitual Offender Statute (G.L. 1956 § 12-19-21). He contends that the state's initial notice, which was untimely filed in the first case (P1/01-2622AG), estopped the state from filing another notice when he was arraigned on a superseding indictment (P1/01-3193AG). The second indictment added an additional offense under the then-recent firearm statute (§ 11-47-3.2(b)), which mandated a consecutive life sentence if a defendant discharged a firearm during a violent crime resulting in the death of another person. Reyes cites no authority which would block the state from filing a habitual notice in the subsequent action. He apparently suggests that the second indictment was an excuse to cure the untimely filing of the notice in the first case. The Court disagrees.

The superseding indictment added a new and significant firearms offense. The second indictment was markedly different from the first one, and there was no compelling reason to have barred the state from including a Habitual Offender notice in a new, expanded action.

Even if the habitual notice were to be characterized as impermissible, Reyes has suffered no prejudice, because the much shorter ten-year habitual term was ordered to be served concurrently with and was subsumed by the life term. *See Kassir v. United States*, 3 F.4th 556 (2nd Cir. 2021) (holding that a concurrent sentence, even if impermissible, will not adversely affect a defendant if it has no effect upon the defendant's release on another (greater) sentence. The *Kassir* Court said:

> "The discretionary concurrent sentence doctrine remains viable in the context of a collateral proceeding. Courts may decline to consider collateral challenges to a conviction's validity if the petitioner is concurrently serving an equal or longer sentence on another valid count of conviction." *Id.* at 569.

IV. Claims Precluded by *Res Judicata*

At the PCR hearing, counsel referenced several additional claims which the petitioner insisted be raised (along with those in Part I(B), II, and III): ineffectiveness of counsel, issues 2, 8, 11; prosecutorial misconduct, issue 1; due process, issue 3. None of them invites consideration and all are barred by the doctrine of *res judicata*.

That doctrine of law precludes 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). *See Hall v. State*, 60 A.3d 928, 931-32 (R.I. 2013); *Barros*, 180 A.3d at 831-32, and that rule of law applies fully to PCR applications. *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'" (quoting *State v. DeCiantis*, 813 A.2d 986, 993 (R.I. 2003)).

Furthermore, "[u]nder § 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). That exemption is "a very limited and narrow exception to this otherwise absolute bar" to raising claims which were "finally adjudicated or not so raised." *Mattatall v. State*, 947 A.2d 896, 905 (R.I. 2008). None of the listed issues can in any way surmount that high bar, and since counsel at the PCR hearing has acknowledged their failure because of *res judicata*, it is unnecessary to expand the pages of this Decision with further comment.

V. Conclusion

A PCR applicant is required to demonstrate by a preponderance of the evidence that he is entitled to the relief sought. *Brown v. State*, 32 A.3d 901, 907 (R.I. 2011); *Barros v. State*, 180 A.3d 823, 828 (R.I. 2018). Reyes has taken no measurable steps to meet that obligation.

Further, the onus upon a petitioner who claims that his trial counsel rendered prejudicially deficient representation carries a "prodigious burden," *Evans v. Wall*, 910 A.2d 801, 804 (R.I. 2006), which is '"highly demanding and heavy."' *Whitaker v. State*, 199 A.3d 1021, 1027 (R.I. 2019) (citing *Page v. State*, 995 A.2d 934, 943 (R.I. 2010), and quoting *Knight v. Spencer*, 447 F.3d 6, 15 (1st Cir. 2006)). The only evidence Reyes offered was the testimony of his trial attorney, a veteran criminal defense practitioner. Both he and his co-counsel zealously and professionally defended Reyes at trial. The jury, as did this Court in denying the motion for new trial, simply disagreed with their exhortations. In such circumstances, postconviction relief is not warranted.

The unrestrained and wholly unsupported criticism which Reyes has leveled at trial counsel and the collection of his other illusory claims in his petition have not even a gloss of plausibility. He has failed entirely to shoulder any part of the burden he must carry in order to succeed in this postconviction endeavor.

Reyes's application for postconviction relief is denied. Judgment shall enter in favor of the State of Rhode Island.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

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DATE DECISION FILED:	**May 8, 2023**
JUSTICE/MAGISTRATE:	**Krause, J.**
ATTORNEYS:	
For Plaintiff:	**John E. Sullivan, III, Esq.**
For Defendant:	**Judy Davis, Esq.**