

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC

SUPERIOR COURT

MICHAEL GRAYHURST

:

PM 2005–3148

:

vs.

:

:

STATE OF RHODE ISLAND

:

DECISION

RODGERS, P.J. Before this Court is the application of Michael Grayhurst (“Grayhurst” or “petitioner”) for post–conviction relief. Grayhurst was convicted and sentenced in three cases—P2–00–1114A, P2–00–1052A, and P2–97–3209A—which were consolidated into one trial.¹ Grayhurst now seeks post–conviction relief pursuant to G.L. 1956 § 10–9.1–1. The State of Rhode Island (“State”) moves to dismiss petitioner’s application.

I

Facts and Travel

On April 6, 2000, a Superior Court jury convicted Grayhurst of twenty five counts of threatening public officials, violating no contact orders, extortion and blackmail, stalking, assaulting a uniformed officer, and obstructing an officer. (Tr. 624–30). The trial justice sentenced Grayhurst to thirty five years of imprisonment. (Tr. 709–10). The defendant subsequently appealed, and his convictions were affirmed by the Rhode Island Supreme Court on June 23, 2004. State v. Grayhurst, 852 A.2d 491 (R.I. 2004). One year later, the petitioner filed an Application for Post–Conviction Relief. (Application for Post–Conviction Relief, June 20, 2005.)

¹ As the trial justice is no longer a member of the Rhode Island Superior Court, this Court considers the matter pursuant to Rhode Island Superior Court Rules of Practice 2.3(d)(4).

In his Application for Post–Conviction Relief, the petitioner alleges that he was denied his right to effective assistance of counsel; due process of law; free speech; and to be protected from double jeopardy. Grayhurst also alleges that “the convictions for violating the no contact orders . . . were for conduct that was not specifically prohibited by the terms of the no contact orders, to wit mailing of items to . . . [his ex–wife’s] attorney” (Application for Post–Conviction Relief ¶ 9.)

Grayhurst alleges that the convictions and sentences were imposed in violation of his right to effective assistance of counsel guaranteed by the Sixth Amendment of the United States Constitution and Article 1, section 10 of the Rhode Island Constitution. The petitioner presents five claims arising from counsel’s actions or omissions at trial and one claim from counsel’s actions or omissions during sentencing. With regard to the performance of Gerard Donley, petitioner’s trial counsel, petitioner argues that counsel (1) failed to ensure that the trial justice deliver a curative instruction that the justice agreed to issue; (2) failed to move for judgment of acquittal in P2–00–1114A; (3) failed to object to the jury instructions issued with respect to the charges of extortion and stalking; (4) failed to object to the testimony of James Greenless; (5) failed to move for a continuance or mistrial based on the testimony solicited from Greenless. (Mem. in Supp. of Def.’s Mot. to Reduce Sentence and Objection to State’s Mot. to Increase Sentence and Mem. of Law in Supp. of Application for Post Conviction Relief 23–29 [hereinafter Mem. of Law].) Grayhurst also argues that Donley was ineffective due to his (6) failure to present testimony from a mental health professional as mitigating evidence at his sentencing. (Mem. of Law 20–22.)

II
Claims of Ineffective Assistance of Counsel

A
The Strickland Standard

Claims of ineffective assistance of counsel are rooted in the Sixth Amendment of the United States Constitution and, in Rhode Island, by Article I, section 10 of our state constitution. As early as 1940, the U.S. Supreme Court described the right to counsel as a “sacred” component of the nation’s judicial procedures. Avery v. Alabama, 308 U.S. 444, 447 (1940). For almost forty years, the federal courts have “recognized that the right to counsel is the right to the effective assistance of counsel.” McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970). Similarly, the Rhode Island Supreme Court has long recognized that the federal and state constitutions guarantee effective assistance of counsel. State v. Desroches, 110 R.I. 497, 293 A.2d 913, 915 (1972). “‘Effective’ does not mean successful. It means conscientious, meaningful representation wherein the accused is advised of his rights and honest, learned and able counsel is given a reasonable opportunity to perform the task assigned to him.” State v. D’Alo, 477 A.2d 89, 91 (R.I. 1984) (quoting Desroches, 293 A.2d at 916).

Today, claims of ineffective assistance of counsel are governed by the United States Supreme Court’s opinion in Strickland v. Washington. 466 U.S. 668 (1984). According to the Supreme Court, the right to effective assistance of counsel recognizes that counsel is charged with “ensur[ing] a fair trial” by “advocat[ing] the defendant’s cause.” Id. at 686, 688. “[T]he defendant must show that counsel’s representation fell below an objective standard of reasonableness.” Id. at 688. The Strickland Court issued a two–pronged standard requiring the petitioner to show that trial counsel’s performance

was deficient and that the deficiency prejudiced the defendant. Id. at 687. As the Court explained,

“First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” Id.

Under the deficiency prong, the defendant “must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.” Id. at 690. Importantly, courts distinguish between unreasonable actions or omissions and tactical decisions made as part of counsel’s trial strategy. “[M]ere tactical decisions, though ill–advised, do not by themselves constitute ineffective assistance of counsel.” Toole v. State, 748 A.2d 806, 809 (R.I. 2000). “[A] court must distinguish between tactical errors made as a result of ignorance and neglect and those arising from careful and professional deliberation ‘Thus, a choice between trial tactics, which appears unwise only in hindsight, does not constitute constitutionally–deficient representation under the reasonably competent assistance standard.’” D’Alo, 477 A.2d at 92 (quoting United States v. Bosch, 584 F.2d 1113, 1121 (1st Cir. 1978)).

To satisfy the prejudice prong, “[t]he defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability

sufficient to undermine confidence in the outcome.” Brown v. Moran, 534 A.2d 180, 182 (R.I. 1987) (quoting Strickland, 466 U.S. at 694). In Rhode Island, “prejudice exists if there is a reasonable probability that, absent counsel’s deficient performance, the result of the proceeding would have been different.” Larngar v. Wall, 918 A.2d 850, 856 (R.I. 2007) (quoting State v. Figueroa, 639 A.2d 495, 500 (R.I. 1994)).

The Rhode Island Supreme Court has repeatedly endorsed and explained the Strickland standard. See e.g., Moniz v. State, No. 2006–211, at 7 (R.I. 2007); Heath v. Vose, 747 A.2d 475, 478 (R.I. 2000); Brown, 534 A.2d at 182. Recently, our Supreme Court stated that it “will reject an allegation of ineffective assistance of counsel ‘unless the attorney’s representation [was] so lacking that the trial has become a farce and a mockery of justice.’” Moniz, No. 2006–211, at 7 (quoting State v. Dunn, 726 A.2d 1142, 1146 n.4 (R.I. 1999)). Under this standard, the critical concern 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, 747 A.2d at 478 (quoting Strickland, 466 U.S. at 686). Moreover, the court must make this determination in consideration of all the trial circumstances. Heath, 747 A.2d at 478 (quoting Strickland, 466 U.S. at 688). A claim of ineffective assistance is shown only if counsel’s representation “amount[ed] to a complete absence of a defense.” Heath, 747 A.2d at 479. Each claim is analyzed separately. See Alessio v. State, 924 A.2d 751, 753–54 (R.I. 2007); Evans v. Wall, 910 A.2d 801, 804–06 (R.I. 2006); Bryant v. Wall, 896 A.2d 704, 707–08 (R.I. 2006).

The standard set forth in Strickland has rightly been characterized as “highly demanding.” Kimmelman v. Morrison, 477 U.S. 365, 382 (1986). In addition to the

two-pronged test, “counsel is strongly presumed to have rendered adequate assistance.” Strickland, 466 U.S. at 690. Nonetheless, the Strickland standard is “by no means insurmountable.” Kimmelman, 477 U.S. at 382.

B
Specific Claims
(1)
Curative Instruction

Grayhurst contends that Donley deprived him of his right to counsel by failing to ensure that the trial justice issue a curative instruction to the jury as the justice indicated he would do. (Mem. of Law 24–25). The following colloquy occurred between the trial justice and Donley:

“The Court: Good afternoon, ladies and gentlemen. The Court is in receipt of a communication from the foreperson. ‘Can a no contact order be violated by contacting a third party if the third party forwards the contact?’

The Court: That’s what this whole case is about. You have to decide this. The answer is if the person violating the no contact order reasonably expected that it would be forwarded by the person who sent it to another party, then yes.

....

The Court: Any objection?

Mr. Donley: I’d object for the record, your Honor.

The Court: And for the record I might add tomorrow morning I’ll tell them that the state has to prove that the defendant intended it to be forwarded to his wife.

Mr. Donley: I would invite the Court to do so and formally request it.” (Tr. at 621–22.)

The next morning neither the justice nor Donley addressed this instruction. Consequently, the justice did not issue the curative instruction to the jury.

Grayhurst previously raised this claim before our Supreme Court. However, the Supreme Court did not reach a determination on this issue. The Court noted that

“defense counsel’s failure here to remind the trial justice of the promised instruction means that defense counsel has failed to preserve this issue for consideration on appeal.”

State v. Grayhurst, 852 A.2d at 518. The court instructed Grayhurst that “he must pursue his claim through an application for post–conviction relief,” as Grayhurst has now done.

Id. at 518–19. Grayhurst now contends that he

“was entitled to an instruction that for a communication with his wife’s lawyer to constitute a violation of the no contact order with her, he had to intend the communication with the lawyer to be forwarded to the wife . . . [and that Donley’s] failure to remind the Court about this instruction, which the Court had agreed to give, prejudiced the defendant” (Mem. of Law 25.)

This Court must first determine whether Donley’s failure to remind the trial justice about the instruction constitutes deficient performance. Importantly, the United States Supreme Court, in United States v. Cronin, found that “specific errors and omissions” can be the basis of an ineffective assistance claim. 466 U.S. 648, 657 n.20 (1984). Thus, an attorney’s omission and an attorney’s erroneous action are to be analyzed identically under the Strickland standard.

According to the Rhode Island Supreme Court, a defendant is entitled to a jury instruction that fully and fairly explains the law on issues of fact favorable to the defendant. As the Court explained, “where there is evidence in the record ‘in support of any defense offered by an accused, which raises an issue of fact favorable’ to the accused, he or she is entitled to an affirmative instruction which fully and fairly states the law applicable thereto; that principle applies regardless of how ‘slight and tenuous the evidence may be’” Larnegar v. Wall, 918 A.2d 850, 857 (R.I. 2007) (quoting State v. DiChristofaro, 848 A.2d 1127, 1129–30 (R.I. 2004)). In contrast, the court has

repeatedly denied post-conviction relief based on jury instructions that were unfavorable to the defendant where the instruction properly reflected the law. See, e.g., Hughes v. State, 656 A.2d 971, 972 (R.I. 1995) (finding that a defense attorney was not deficient in failing to object to certain jury instructions given that the attorney reasonably believed that the instructions were supported by the evidence); DeCiantis v. State, 599 A.2d 734, 735 (R.I. 1991) (rejecting the petitioner's contention that the jury instructions "were erroneous and prejudicial in that they pertained to aiding and abetting" even though the petitioner was only charged with murder because there was evidence that the petitioner was present at the scene of the crime, thus satisfying the requirements of aiding and abetting; since the instruction was proper, defense counsel's failure to object was not a basis for ineffective assistance of counsel).

The instruction upon which Grayhurst bases his claim of ineffective assistance of counsel—that the no contact order violation contained an intent requirement that the State had the burden of proving—was clearly favorable to him. The State could not obtain a conviction for the no contact order violations charged in P2-00-1052A without proving that Grayhurst intended that communications sent to his ex-wife's attorney be forwarded to his ex-wife. This requirement is precisely the matter addressed by the instruction that Donley requested and the trial justice agreed to issue. Thus, Grayhurst was entitled to the instruction. Though Donley requested the instruction, his critical failure was in not ensuring that the trial justice actually delivered the instruction. An instruction that is not delivered to the jury is no instruction at all. However, Donley's failure to remind the judge to issue the instruction was neglectful and therefore his assistance was deficient. Second, this Court must determine whether Donley's deficient performance with regard

to the jury instruction prejudiced Grayhurst. In several cases, the Rhode Island Supreme Court has adopted the prejudice standard declared by the Strickland Court, that “prejudice exists if there is a reasonable probability that, absent counsel’s deficient performance, the result of the proceeding would have been different.” Larngar, 918 A.2d at 856 (quoting Figueroa, 639 A.2d at 500); Doctor v. State, 865 A.2d 1064, 1068 (R.I. 2005) (quoting Figueroa, 639 A.2d at 500); see Strickland, 466 U.S. at 694 (“The defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”).

A reasonable probability does not mean that the petitioner must show that “counsel’s deficient conduct more likely than not altered the outcome in the case.” 466 U. S. at 693. Rather, the reasonable probability standard is met if the deficient act or omission was material to the defense. As the Strickland Court stated, “the appropriate test for prejudice finds its roots in the test for materiality of exculpatory information not disclosed to the defense by the prosecution and in the test for materiality of testimony made unavailable to the defense by Government deportation of a witness.” 466 U. S. at 694 (citations omitted) (citing United States v. Valenzuela–Bernal, 458 U.S. 858, 872–74 (1982); United States v. Agurs, 427 U.S. 97, 104, 112–13 (1976)). In Agurs, the court explained that “implicit in the requirement of materiality is a concern that the suppressed evidence might have *affected* the outcome of the trial.” Agurs, 427 U.S. at 104 (emphasis added). Similarly, in Valenzuela–Bernal, the Supreme Court wrote: “As in other cases concerning the loss of material evidence, sanctions will be warranted for deportation of alien witnesses only if there is a reasonable likelihood that the testimony could have *affected* the judgment of the trier of fact.” 427 U.S. at 873–74 (emphasis added). The

Valenzuela-Bernal Court added: “Sanctions may be imposed on the Government for deporting witnesses only if the criminal defendant makes a plausible showing that the testimony of the deported witnesses would have been material and favorable to his defense, *in ways not merely cumulative to the testimony of available witnesses.*” Id. at 873 (emphasis added).

Our Supreme Court has followed this reasoning when determining whether counsel’s deficient performance prejudiced the petitioner. In Toole, the Court found that the petitioner—who contended that the victim’s doctor was available to testify regarding the lack of physical evidence of sexual abuse—had not been prejudiced by his trial counsel’s failure to call the victim’s doctor because there was other incriminating evidence, including the petitioner’s admissions, available to the prosecution. 748 A.2d at 809, 810. The Toole Court implicitly adopted the same reasoning as did the Strickland Court by determining that the exclusion of material evidence did not reach the level of prejudice because other evidence available to the decision-maker was such that the exculpatory evidence could not be said to have affected the outcome. In contrast, the Heath Court found that the defense attorney’s failure to investigate the defense of intoxication to show the defendant’s inability to form the specific intent required to sustain a charge of burglary was prejudicial. 747 A.2d at 478–79. The Court determined that trial counsel’s failure to discuss the intoxication defense with the defendant and subsequent “fail[ure] to move for a judgment of acquittal on the ground that [petitioner] Heath was so intoxicated that he was unable to form the specific intent necessary” contributed to prejudicing the defendant. Id. Without question, the inability of a defendant to achieve the required intent would affect the outcome of a trial. See, e.g.,

State v. Turley, 113 R.I. 104, 318 A.2d 455, 459 (1974) (noting that liability for crimes requiring specific intent may be negated by offering evidence of drunkenness).

Donley's failure to remind the trial justice to actually deliver the curative instruction that the justice agreed to issue does not preclude the "possibility that a jury could have received the instruction and still have decided that Grayhurst violated the no contact orders. See Rompilla v. Beard, 545 U.S. 374, 393 (2005). However, Grayhurst is not required to meet such an outcome-determinative standard. See Strickland, 466 U.S. at 693-94. Instead, under the materiality-based reasonable probability standard it is sufficient that the curative instruction "might well have influenced the jury's appraisal of . . . [the petitioner's] culpability" by clarifying for the jury that "the state has to prove that the defendant intended . . . [the correspondence sent by Grayhurst to his ex-wife's attorney] to be forwarded to his wife," as the trial justice agreed to inform the jury. Rompilla, 545 U.S. at 393 (quoting Wiggins v. Smith, 539 U.S. 510, 538 (2003)); Tr. at 621-22. "[T]he likelihood of a different result if the . . . [instruction] had gone in is 'sufficient to undermine the confidence in the outcome' actually reached" Rompilla, 545 U.S. at 393 (quoting Strickland, 466 U.S. at 694). Consequently, Donley's deficient performance was prejudicial to Grayhurst, leaving this Court with "no confidence in the outcome of this criminal proceeding" as it pertains to the no contact order violations charged in P2-00-1052A. Heath, 747 A.2d at 479.

(2)

Judgment of Acquittal

Grayhurst contends that Donley was ineffective in failing to move for judgment of acquittal in P2-00-1114A. (Mem. of Law 23-24). He argues that the four violations of no contact orders for which he was convicted, pursuant to G.L. 1956 § 12-29-4 and G.L. 1956 § 12-29-5, “were for conduct that was not specifically prohibited by the terms of the no contact orders, to wit mailing of items to either complainant and/or her attorney and the convictions should therefore be vacated.” (Application for Post-Conviction Relief ¶ 9.) Grayhurst was also convicted on seven counts of threats to a public official, G.L. 1956 § 11-42-4.

Under Rule 29(a)(1) of the Superior Court Rules of Criminal Procedure, “The court on motion of a defendant . . . shall order the entry of judgment of acquittal of one or more offenses charged . . . after the evidence on either side is closed, if the evidence is insufficient to sustain a conviction of such offense or offenses.” “If the totality of the evidence so viewed and the inferences so drawn would justify a reasonable juror in finding a defendant guilty beyond a reasonable doubt, the motion for a judgment of acquittal must be denied.” State v. Forbes, 779 A.2d 637, 641 (R.I. 2001).

The trial record is replete with evidence that a judgment of acquittal would have been properly denied with regard to the no contact order violations. Section 12-29-4 prohibits the person against whom a no contact order is issued from contacting the victim. Section 12-29-4(a)(1). As the Supreme Court noted in its review of Grayhurst’s direct appeal, Grayhurst repeatedly violated two separate no contact orders issued by the District Court by sending correspondence to his ex-wife. Grayhurst, 852 A.2d at 499. In

addition, the trial transcript reveals that both parties devoted significant time questioning two witnesses and introducing several exhibits into the record over multiple days to unraveling the many instances in which Grayhurst sent correspondence to his ex-wife and her attorney. (Tr. 153–54, 159–60, 214–17). The prolonged discussion evident from the trial record was sufficient to allow a reasonable juror to find Grayhurst guilty by a reasonable doubt of violating the no contact orders. Therefore, even if Donley had moved for judgment of acquittal, his motion would have been of no consequence. Consequently, Donley did not deny Grayhurst of his right to effective assistance of counsel.

The record also leaves no question that judgment of acquittal would have been properly denied regarding the convictions for threatening public officials. Section 11–42–4(a) prohibits:

“knowingly and willfully deliver[ing] or convey[ing], directly or indirectly, a verbal or written threat to take the life of, or to inflict bodily harm upon, a public official . . . because of the performance or nonperformance of some public duty, because of hostility of the person making the threat toward the status or position of the public official, or because of some other factor related to the official's public existence”

Again, a significant amount of time at trial was devoted to Grayhurst’s threats to public officials, including testimony by three justices or magistrates of the Family, District, and Superior Courts. (Tr. 398– 433, 451–462, 483–499). In addition, as our Supreme Court noted, several documents were introduced into evidence alleging that Grayhurst created a “hit list” that included the names of several public officials. Grayhurst, 852 A.2d at 502–03; Tr. 504–07. The Court determined that admission of the “hit list” did not constitute error. Grayhurst, 852 A.2d at 504. Consequently, a reasonable juror could have inferred from the evidence that Grayhurst was guilty by a reasonable doubt of threatening public

officials. As such, Donley was not ineffective in failing to move for judgment of acquittal.

(3)
Jury Instructions Regarding Extortion and Stalking

Grayhurst asks this Court to find Donley ineffective “based on the jury instructions with respect to the extortion and stalking counts.” (Mem. of Law 24). In issuing instructions to a jury, the trial justice “need only ‘adequately cover[] the law.’” State v. Marini, 638 A.2d 507, 517 (R.I. 1994) (quoting State v. Grundy, 582 A.2d 1166, 1170 (R.I. 1990)) (alteration in original). Furthermore, the instructions must be examined in the manner in which ordinary jurors would have understood them. Marini, 638 A.2d at 517. In determining the correctness of a jury charge, this Court must consider the entire charge. Infantolino v. State, 414 A.2d 793, 796–97 (R.I. 1980).

Section 11–42–2 defines extortion as the communication of a malicious threat of “injury to the person, reputation, property, or financial condition of another . . . with intent to extort money or any unlawful pecuniary advantage” The trial justice instructed the jury that “extortion has two basic elements, a threat to place the person in peril of bodily harm and an intent to compel the victim to do something against his or her will. In other words, if someone threatens someone with physical bodily harm if they [sic] don’t do something they don’t want to do, then that’s extortion.” (Tr. 611). Though the justice failed to reference the element of a monetary or pecuniary motive required by § 11–42–2, the justice did expressly refer the jury to the Interrogatories which he submitted to them. (Tr. 610). The three relevant extortion counts instruct the jury to determine whether Grayhurst “did extort money from” his ex–wife or “did maliciously threaten . . . [her] with the intent to extort money.” (Interrogatories 1, 2, 3). Taken as a

whole, the instructions provided by the trial justice speaking from the bench and in the Interrogatories would have been understood by an ordinary juror in a manner adequately reflective of the law's requirements. See Marini, 638 A.2d at 517. Consequently, this Court finds that there was no error with the instructions regarding extortion. Therefore, Donley's failure to object to the instructions did not deny Grayhurst of his right to effective assistance of counsel.

Stalking is defined as "(1) harass[ing] another person; or (2) willfully, maliciously, and repeatedly follow[ing] another person with the intent to place that person in reasonable fear of bodily injury" Section 11-59-2. Accordingly, the trial justice instructed the jury that stalking is defined as "any person harassing another person or willfully, maliciously and repeatedly[,] in this case[,] follows . . . with the intent to place that person in reasonable fear" (Tr. 610). Since the trial justice essentially read the statutory language to the jury, this Court finds that the instruction regarding the charge of stalking was appropriate. Therefore, Donley's failure to object to this instruction did not deny Grayhurst of his right to effective assistance of counsel.

(4) and (5)
Testimony of Greenless

Grayhurst argues that Donley's failure to object to the testimony of James Greenless, an officer at the Adult Correctional Institution, or, alternatively, "to move for a continuance or mistrial upon the receipt of discovery in the middle of the trial" denied him his right to effective assistance of counsel. (Mem. of Law 25-26.) Grayhurst contends that "there is no conceivable reason" to explain Donley's failure to object to Greenless' testimony. (Mem. of Law 30.) While Donley did not object to Greenless' entire testimony, he did object to the only prejudicial component of Greenless'

testimony—the introduction of a Grayhurst’s so-called hit list. (Tr. 471, 503–05.) In seven pages of testimony by Greenless, all but two pages concern the contents and admission of this list. (Tr. at 500–07.) After a lengthy discussion and objection by Donley, the trial justice admitted the list. (Tr. 465–82, 505–06). Our Supreme Court considered the admission of this list on direct appeal and concluded that admission of the list was neither erroneous nor prejudicial. Grayhurst, 852 A.2d at 503, 504. This Court, therefore, does not revisit this contention except to note that properly admitted evidence cannot form the basis for a claim of ineffective assistance of counsel.

(6)
Failure to Call Mental Health Professional at Sentencing

Lastly, Grayhurst claims that Donley failed to introduce adequate testimony of Grayhurst’s mental health condition as a mitigating factor at his sentencing. Grayhurst contends that the trial justice should have had the benefit of the insight of a mental health professional to understand the history of the mental illness with which he was afflicted. (Tr. 7.) A review of the sentencing transcript reveals the trial justice granted Donley’s request to hear from the State Mental Health Advocate, Mr. Reed Cospers, and Mr. Neal Haber, Grayhurst’s brother-in-law and a respected attorney licensed to practice law in Rhode Island. Indeed, the trial justice stated at p. 661, “While it’s highly unusual, I’ll let Mr. Cospers speak.” Both witnesses discussed Grayhurst’s history of mental illnesses and expressed their desire for Grayhurst to receive medical treatment. Cospers provided extensive details about Grayhurst’s mental health condition and recommended that the

court compel Grayhurst to receive treatment. (Tr. 674.) Cospers testified that, in his opinion, Grayhurst met the state's standards for involuntarily treating someone with mental illness. (Tr. 667.) After discussing Grayhurst's history of mental illness, Haber pleaded: "This man deserves, if for no other reason, society should try and help people that are mentally ill. He has a recognized mental illness. He needs help. We have already seen very, very, very clearly that extended incarceration is not the answer." (Tr. 681.)

In support of this claim, Grayhurst relies primarily on the United States Supreme Court's decision in Rompilla. That case concerned the level of investigation required by Strickland of a defendant's history of mental health illness for potential use as mitigating information at sentencing. Rompilla, 545 U.S. at 380–81. The Court noted that the defendant's attorneys spoke with the defendant and members of his family in building a mitigation case. Id. at 381–82. However, the Court explained that

"the [defendant's] lawyers were deficient in failing to examine the court file on Rompilla's prior convictions. . . . It flouts prudence to deny that a defense lawyer should try to look at a file he knows the prosecution will cull for aggravating evidence, let alone when the file is sitting in the trial courthouse, open for the asking." Id. at 383, 389.

In another case involving counsel's investigation of mitigating information for purposes of sentencing, the Court noted that "counsel introduced no evidence of . . . [the petitioner's] life history. . . . At no point did . . . [the defense attorney] proffer any evidence of petitioner's life history or family background." Wiggins, 539 U.S. at 515–16. The Court explained that "Strickland does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy. Rather, a reviewing court must consider the reasonableness of the investigation said to support that

strategy.” Wiggins, 539 U.S. at 527 (citing Strickland, 466 U.S. at 691). The Court found petitioner’s counsel ineffective because counsel failed to provide evidence with which the jury could “place petitioner’s excruciating life history on the mitigating side of the scale.” Wiggins, 539 U.S. at 537.

Donley’s preparation for and performance at the sentencing hearing is not comparable to the deficient assistance exhibited in Rompilla and Wiggins. Unlike counsel in those cases, Donley ensured that the trial justice received testimony from various witnesses familiar with Grayhurst’s mental illness. The record evidences that Cospers and Haber were as informative as they were passionate in their description of Grayhurst’s struggles with mental illness and his need for medical treatment. Though it is likely that “the presentation of . . . psychiatric evidence could only have helped the defendant,” as Grayhurst contends, an attorney’s failure to provide the court with all possible mitigating information is not the standard required by Strickland and its progeny, including Rompilla and Wiggins. “In this case, as in Strickland, petitioner’s claim stems from counsel’s decision to limit the scope of their investigation into potential mitigating evidence. . . . [C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” Wiggins, 539 U.S. at 521 (quoting Strickland, 466 U.S. at 691). This Court finds that Donley acted reasonably in electing to present evidence of Grayhurst’s mental illness through Cospers and Haber rather than a mental health professional. Donley’s request, although unusual according to the trial justice, is a compliment to his advocacy of Grayhurst at sentencing. Donley should be commended, not condemned, for his representation at sentencing.

Consequently, Grayhurst was not denied his right to effective assistance of counsel at sentencing.

III Other Claims for Post–Conviction Relief

In addition to a claim of ineffective assistance of counsel, Grayhurst contends that he was denied his right to due process of law; free speech; and to be protected from double jeopardy. The Supreme Court considered and denied Grayhurst’s free speech and double jeopardy claims. Grayhurst, 852 A.2d at 501, 515. Therefore, this Court does not disturb those findings. Furthermore, the petitioner did not address his due process claim in either his supporting memorandum or during oral arguments. “Simply stating an issue for appellate review, without a meaningful discussion thereof or legal briefing of the issues, does not assist the Court in focusing on the legal questions raised, and therefore constitutes a waiver of that issue.” Wilkinson v. State Crime Lab. Comm’n, 788 A.2d 1129, 1132 n.1 (R.I. 2002). Therefore, this Court gives no further consideration to petitioner’s bare assertion of a due process violation.

Conclusion

This Court finds that Grayhurst has established a claim of ineffective assistance of counsel with regard to Donley’s failure to ensure that the trial justice delivered the curative instruction he agreed to issue. Grayhurst’s other claims for post–conviction relief are denied. Therefore, Grayhurst’s application for post–conviction relief is granted with regard to the convictions for violations of no contact orders issued in P2–00–1052A. and P2-00-1114A.

Filed: February 12, 2008

This Court will assign the matter for hearing on Tuesday, February 26, 2008 at 9:30 a.m. to consider what convictions were obtained and what sentences were imposed as a result of counsel's failure to ensure the trial justice delivered the curative instruction as promised. In addition, the Court will hear counsel on the defendant's motion to reduce sentences and the State's motion to increase sentences.