

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

SUPERIOR COURT

(FILED: August 25, 2016)

JORGE DEPINA

:

v.

:

C.A. No. PM-2003-3727

:

STATE OF RHODE ISLAND

:

:

**DECISION**

**GALLO, J.** Before the Court is Petitioner Jorge Depina’s<sup>1</sup> (Petitioner or Depina) application for postconviction relief. Petitioner asserts several theories as to why he is entitled to postconviction relief: (1) that his trial counsel rendered constitutionally ineffective assistance of counsel; (2) that the State of Rhode Island (the State) committed Brady<sup>2</sup> violations in the course of its investigation and prosecution; (3) that the State failed to preserve exculpatory evidence; (4) that newly discovered evidence warrants postconviction relief; and (5) that several instances of conduct during the trial deprived Petitioner of his right to a fair trial.

**I**

**Facts and Travel**

The facts and travel of this case are presented in detail in State v. Depina, 810 A.2d 768 (R.I. 2002), Petitioner’s direct appeal from the judgment of conviction entered in this Court in 1999. The Court will review the facts briefly and supplement them as

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<sup>1</sup> As is noted throughout the published opinions relating to this case, the spelling of Petitioner’s name has been inconsistent. The Court adopts the spelling used in the Petitioner’s own memoranda.

<sup>2</sup> See generally Brady v. Maryland, 373 U.S. 83 (1963).

necessary in discussing individual issues presented in this petition for postconviction relief.

Petitioner was convicted of one count of first-degree murder and one count of conspiracy to commit first-degree murder. Id. at 772. These convictions stem from events that occurred in the early morning hours of December 28, 1997. Id. at 773. At that time, Petitioner was at the International Club, a Providence nightclub; he was there along with roughly 100 other patrons when the club closed at 2:00 a.m. Id. A series of fights broke out after the club closed, with the situation outside the establishment swiftly becoming a general melee. Postconviction Hr’g Tr. 14-15, 26-27, 31, Nov. 12, 2015 (First Hr’g Tr.). Sometime during these fights, Joao Resendes (Resendes) was stabbed, perishing shortly afterwards at a hospital. Depina, 810 A.2d at 773.

Petitioner, along with two codefendants, was indicted for murder and conspiracy to commit murder in April 1998. Id. He retained Attorney Robert Watson (Attorney Watson) to defend him from the charges.<sup>3</sup> At trial, the State presented three main witnesses: Elma Braz (Braz); Nilton Pires (Pires); and Gelci Reverdes (Reverdes). Id. Petitioner was identified as one of the assailants, and a jury found him guilty of both murder and the conspiracy charge. Id.

Petitioner then brought a direct appeal from the judgment of conviction, raising a number of issues with the trial. Id. at 772. He argued that the trial justice erred in barring certain statements during his counsel’s opening argument, id. at 773-74, and in limiting the scope of cross-examination, id. at 775. He further attacked the trial justice’s denial of his motion to sever his trial from that of his codefendants’ and his motion to pass the

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<sup>3</sup> The codefendants in the case were each represented by separate counsel.

case. Id. at 776-77. Finally, he objected to the trial justice's jury instructions and the denial of his motion for a new trial after the jury verdict. Id. at 778-79. The Rhode Island Supreme Court rejected each argument in turn and affirmed the judgment of conviction. Id. at 783.

The long travel of this case began in 2003, when Petitioner, acting pro se, filed the first in a series of applications for postconviction relief. See Compl., July 14, 2003. The application for postconviction relief included a motion for the appointment of counsel; although counsel was appointed, Petitioner eventually retained private counsel. Seven years of inactivity followed. In May 2010, Petitioner secured new counsel and filed an amended application for postconviction relief.<sup>4</sup> A period of discovery ensued and four days of hearings followed, the first two occurring on November 12 and 13, 2015 (the First and Second Hearings) and the final two on February 29 and March 1, 2016 (the Third Hearing).<sup>5</sup>

At the First and Second Hearings, the Court heard testimony from Nylton Andrade (Andrade), Elsie Gamboa (Gamboa), Stephanie Rosa (Rosa), Jose Canuto (Canuto), and Officers Manuel Soares (Soares) and Jose Deschamps (Deschamps) of the Providence Police Department. The Third Hearing featured the testimony of Elizabeth Wadja (Wadja), retired Det. John J. Corley (Corley), Reverdes, and Attorney Watson. Also submitted into evidence at the Second Hearing, as a joint exhibit, was the deposition

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<sup>4</sup> This pleading was itself amended later; the operative pleading in this case is currently Petitioner's Second Amended Application for Post Conviction Relief, June 6, 2014 (Second Am. Compl.). See Grieco v. Perry, 697 A.2d 1108, 1109 (R.I. 1997) (filing of amended pleading supersedes original for all purposes, rendering it a nullity).

<sup>5</sup> The long intervals between hearings resulted in nonconsecutively paginated transcripts. While the first and second days of testimony each have their own transcript, the final two days (Feb. 29 and March 1, 2016) are consolidated in one transcript. For clarity, the Court cites to these hearings independently, based on the transcript documents.

testimony of Reverdes. The evidence from these hearings will be discussed with the other relevant evidence as necessary. Following the hearings, the parties submitted briefs and oral argument, and the matter is now ripe for decision.

## II

### Standard of Review

In creating the postconviction relief process, the General Assembly provided that a person “who has been convicted of a crime may seek collateral review of that conviction based on alleged violations of his or her constitutional rights.” Lynch v. State, 13 A.3d 603, 605 (R.I. 2011); see also G.L. 1956 § 10–9.1–1. The action is civil in nature, with all rules and statutes applicable in civil proceedings governing. Sec. 10-9.1-7; see also Ouimette v. Moran, 541 A.2d 855, 856 (R.I. 1988). An applicant for postconviction relief “bears the burden of proving, by a preponderance of the evidence, that such relief is warranted.” Rice v. State, 38 A.3d 9, 16 (R.I. 2012) (quoting Mattatall v. State, 947 A.2d 896, 901 n.7 (R.I. 2008)).

## III

### Analysis

As noted above, Petitioner’s claims can be grouped into five categories: (1) ineffective assistance of counsel; (2) Brady violations; (3) the failure to preserve exculpatory evidence; (4) new evidence claims; and (5) claims relating to the conduct of his trial. The Court will address each issue in succession. The State, in turn, argues that the doctrine of laches provides a complete defense to all of Petitioner’s claims, in addition to arguing against each claim on the merits. The Court need not reach the laches

argument presented in this case. For the following reasons, all of Petitioner’s claims fail and his application for postconviction relief is denied and dismissed.

## A

### **Ineffective Assistance of Counsel**

Petitioner claims that his defense counsel at trial, Attorney Watson, rendered constitutionally ineffective assistance in violation of his Sixth Amendment rights. Specifically, Petitioner takes issue with two of Attorney Watson’s decisions during the murder trial. He argues that Attorney Watson failed to call a series of witnesses known to the defense at the time, and asserts that the failure to do so was objectively unreasonable. According to Petitioner, there is a reasonable probability that the outcome of the trial would have been different had Attorney Watson called those witnesses. Petitioner also argues that defense counsel failed to adequately address an instance of jury intimidation during the trial by failing to request a mistrial or individually poll the jurors. The State argues in response that Attorney Watson’s decisions regarding witnesses and a request for a mistrial are matters of trial strategy committed to the discretion of counsel and cannot be the basis for a claim of ineffective assistance of counsel.

## 1

“This Court reviews an allegation of ineffective assistance of counsel under the criteria set forth by the United States Supreme Court in its opinion in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).” Perry v. State, 132 A.3d 661, 668 (R.I. 2016) (citing Merida v. State, 93 A.3d 545, 549 (R.I. 2014)). An applicant “must establish that counsel’s performance was constitutionally deficient; [t]his requires [a] showing that counsel made errors so serious that counsel was not

functioning as the counsel guaranteed \* \* \* by the Sixth Amendment.” Id. (quoting Linde v. State, 78 A.3d 738, 745 (R.I. 2013)). This criterion can only be satisfied by showing that the quality of defense trial counsel’s representation “fell below an objective standard of reasonableness.”<sup>6</sup> Strickland, 466 U.S. at 688. The Court must conduct a “highly deferential” review and extend a defendant’s trial counsel a “strong presumption that [his or her] conduct falls within the permissible range of assistance.” Perry, 132 A.3d at 668 (quoting Merida, 93 A.3d at 549 (internal quotation marks omitted)).

It is only where assistance of counsel is constitutionally deficient that the Court proceeds to the second prong of the analysis. Id. (citing Hazard v. State, 968 A.2d 886, 892 (R.I. 2009)). The second prong of the analysis is where an applicant “must show 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.’” Id. (quoting Linde, 78 A.3d at 745-46). Under this prejudice prong, an applicant must show that the objectively unreasonable performance created “a reasonable probability that . . . the result of the proceeding would have been different.” Washington v. State, 989 A.2d 94, 99 (R.I. 2010) (quoting Strickland, 466 U.S. at 694).

## 2

Petitioner takes issue with Attorney Watson’s failure to call four specific witnesses: Andrade, Gamboa, Rosa, and Canuto. At the Second Hearing, Attorney Watson was unable to offer any firm justification for his decision not to call any of these

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<sup>6</sup> Although Rhode Island’s application of this standard previously included some distinction between privately-retained and publicly-appointed counsel, our Supreme Court has eliminated any ambiguity: Rhode Island now definitively treats all claims of ineffective assistance of counsel under the same rubric. Reyes v. State, \_\_\_ A.3d \_\_\_, 2016 WL 3668037, at \*7 (R.I. 2016); see also Evitts v. Lucey, 469 U.S. 387, 395 (1985).

witnesses; indeed, Attorney Watson had not consulted his file nor did he have any specific recollection as to nearly any significant aspect of the case. See Third Hr’g Tr. at 119.

Andrade, who has known Petitioner since childhood, testified at the First Hearing that he was present at the International Club on the night of Resendes’ murder and saw a fight upon exiting the club. First Hr’g Tr. at 8, 13-14. He stated that he could see the participants in the fight and asserted that Petitioner was not among them, instead being some distance away observing the events. Id. at 15-17. Andrade went on to say that at some point he heard screaming and saw a man on the ground with stab wounds. Id. at 18-20.

Gamboa also testified that she was at the International Club on the night of Resendes’ murder; while she knew Resendes, she stated that she did not know Petitioner at the time. Id. at 63-64. Gamboa saw the same melee that the other witnesses described and stated that she witnessed the stabbing of Resendes:

“we were all walking towards the car, and then one of his friends, the second person got stabbed, and then [Resendes] turned around to go help his friend, and that’s when they grabbed [Resendes] and pulled him, four other guys grabbed him and pulled him on the trunk of the car. That’s when they start stabbing him.” Id. at 68.

She described the individual she saw stabbing Resendes as light-skinned and roughly six feet tall; this description is inconsistent with Petitioner’s appearance. Id. at 71. Gamboa stated that she had previously seen the individual that stabbed Resendes in the club. Id. at 72.

The State extensively cross-examined Gamboa at the hearing. When asked whether she had ever spoken with Petitioner in the last fifteen years, she denied doing so. Id. at 91. The State, however, played a recorded telephone call in which Gamboa spoke to Petitioner on

her birthday; she admitted contact after this. Id. at 95-98. The State further questioned whether Petitioner’s brother was present when she signed an affidavit on behalf of Petitioner. Id. at 98-99. She denied this, but admitted her lie following another recording proving the contrary. Id. at 116. It was revealed that her contact with Petitioner arose through her niece, who is an acquaintance of his brother. Id. at 117. She had no recollection as to whether she was asked—or actually could provide—a physical description of the individual that she believes to have killed Resendes at the time of the trial. Second Hr’g Tr. at 29-30.

Rosa, like the other witnesses, was also in the area of the International Club brawl. Id. at 33. She witnessed one of the stabbings that occurred that evening; with a man she could not identify, but described as being roughly six feet tall and wearing a hoodie, stabbing an individual against a car. Id. at 35. Rosa did not identify the victim of the stabbing she witnessed. See id. at 42-43.

Canuto is a longtime friend of Petitioner, who traveled to the International Club on the night of the murder with two other friends. Id. at 54-55. He observed Petitioner standing apart from the fighting in the street for roughly forty-five minutes. Id. at 58-59. Sometime after, he witnessed a stabbing, with the victim being pushed up against a car, but could not identify the victim. Id. at 60-61. Canuto asserted that he was sure Petitioner was not involved in the stabbing he witnessed. Id. at 64. He additionally testified that another individual approached him and declared that, “I stabbed him like I stabbed your friend Chris.” Id. at 62-63.

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The Court does not agree with Petitioner’s argument that the failure to call these witnesses at trial was an objectively unreasonable decision. It is well settled that strategic or 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)). Indeed, “effective representation is not the same as errorless representation” under the Strickland standard. Id. (quoting State v. D’Alo, 477 A.2d 89, 92 (R.I. 1984)). “[A] choice between trial tactics, which appears unwise only in hindsight, does not constitute constitutionally deficient representation under [the Strickland] . . . standard.” Id. (quoting D’Alo, 477 A.2d at 92). Many of an attorney’s tasks fall under the rubric of “an art, not a science[,]” and the Court will not “meticulously scrutinize an attorney’s reasoned judgment or strategic maneuver in the context of a claim of ineffective assistance of counsel.” Brennan v. Vose, 764 A.2d 168, 173 (R.I. 2001).

Choices as to what witnesses to present on behalf of a defendant are frequently, if not almost always, tactical, especially when they involve witnesses who did not themselves see the actual incident for which a defendant is charged. See, e.g., Larngar v. Wall, 918 A.2d 850, 861 (R.I. 2007). It is only when a choice is “so patently unreasonable that no competent attorney would have made it” that the first prong of ineffective assistance is satisfied. Tevlin v. Spencer, 621 F.3d 59, 66 (1<sup>st</sup> Cir. 2010) (quoting Knight v. Spencer, 447 F.3d 6, 15 (1<sup>st</sup> Cir. 2006)). The choices that Attorney Watson made in this case do not rise to that level of unreasonableness.

Entirely valid concerns exist to justify Attorney Watson’s decisions to not call each witness. Neither Andrade nor Rosa identify the victim of the stabbings they observed. While this might not present an issue in many other cases, it presents clear issues in this one: there were at least six separate stabbings that occurred on that night in 1997. See Third Hr’g Tr. at 51; see also State’s Trial Ex. A, Goncalves Statement. There

is no way to know exactly which stabbing they witnessed, and it is entirely reasonable for Attorney Watson to have concluded that his client was best served by leaving the State to its burden of proof under these circumstances. See Larngar, 918 A.2d at 861. When a witness is not present to observe events and identify the parties involved, they can hardly be said to be a firm alibi witness. Crombe v. State, 607 A.2d 877, 879 (R.I. 1992).

Canuto's proposed testimony is similarly infirm. He is unable to say that he saw Resendes being stabbed, and his testimony regarding the admission of the Brockton individual is clearly hearsay. Second Hr'g Tr. at 60-63; see R.I. R. Evid. 801(c). Canuto can certainly be said to have witnessed a stabbing, but it is not clear that he witnessed the stabbing Petitioner stood accused of. Testimony of limited relevance and utility is testimony that counsel can make a reasoned, strategic determination about whether or not to present. Larngar, 918 A.2d at 861.

Gamboa's testimony would present a far more difficult issue. She stated that she knew Resendes by sight and testified that she clearly saw the individuals stabbing him and asserted that it was not Petitioner. First Hr'g Tr. at 70-74. However, she is simply not a credible witness. Gamboa repeatedly prevaricated on the witness stand when asked about elementary details of her relationship and contact with Petitioner. First Hr'g Tr. at 91, 96, 98, 99, 116. And though these details, if admitted to, would not be damning, "[t]hese lies are . . . gross as a mountain, open, palpable." William Shakespeare, Henry IV, Part I, act 2, sc. 4. Even assuming for the sake of argument that Attorney Watson totally failed to interview or present Gamboa as a witness, her lack of credibility means that no prejudice inured to Petitioner. Rodrigues v. State, 985 A.2d 311, 317 (R.I. 2009).

The Court is not persuaded that Gamboa had any exculpatory testimony to provide in 1998, nor is it persuaded that she has any credibility on the witness stand.

Based on the evidence and testimony presented, Attorney Watson made reasonable tactical decisions in not calling these witnesses at Petitioner's trial. Even if he failed to make such a decision with Gamboa, the issues with her testimony preclude a reasonable probability of changing the outcome at trial. His conduct cannot even be held to be "ill-advised," and falls well below the level of incompetence necessary to create a constitutional issue. See Rice, 38 A.3d at 18. Petitioner has therefore not established that it is more likely than not that Attorney Watson provided ineffective assistance of counsel by failing to call these four witnesses.

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Petitioner also briefly argues that Attorney Watson rendered constitutionally ineffective assistance of counsel by failing to poll the jury or request a mistrial following an incident involving an outside party and the jury. This argument fails for much the same reason Petitioner's arguments regarding Attorney Watson's witness decisions fail. The Court will not "meticulously scrutinize an attorney's reasoned judgment or strategic maneuver in the context of a claim of ineffective assistance of counsel." Brennan, 764 A.2d at 173. The decision to poll the jury or request a mistrial in the middle of deliberations is clearly a strategic choice, one that is made when weighing the possibility of acquittal against conviction or the burden of retrial. The Court does not find that Attorney Watson's judgment in this scenario was "not within the range of competence demanded of attorneys in criminal cases . . . ." Washington, 989 A.2d at 100 (quoting

Rodrigues, 985 A.2d at 315. Because this is the case, Petitioner’s claim of ineffective assistance of counsel as to those decisions fails.

## **B**

### **Brady Claims**

Petitioner’s next argument is that the State withheld several pieces of exculpatory evidence. He argues that the State withheld exculpatory statements made to the police by Gamboa and Andrade, and further argues that the State failed to disclose a report made by Reverdes on the night of the murder. The State responds with two arguments: first, it argues that Gamboa and Andrade’s supposed exculpatory statements to the police did not actually occur; and second, it argues that Reverdes’ deposition testimony does not establish that she spoke to the police on the night of the murder—thereby generating the material subject to Brady—and that even if she did, the material would be cumulative impeachment evidence not necessitating a new trial.

## **1**

The due process clause of the Fourteenth Amendment to the United States Constitution requires that the State’s prosecution team disclose material evidence to a criminal defendant. State v. Chalk, 816 A.2d 413, 418 (R.I. 2002) (citing Brady v. Maryland, 373 U.S. 83 (1963)). The State’s obligation encompasses evidence that is “material either to guilt or punishment,’ even in the absence of a request by the accused.” Id. (quoting Cronan ex rel. State v. Cronan, 774 A.2d 866, 880 (R.I. 2001)). This standard also includes evidence that may be used for impeachment purposes. Id. (citing United States v. Bagley, 473 U.S. 667, 676 (1985)). “[I]f a prosecutor has suppressed evidence that would be favorable to the accused and the evidence is material to guilt or

punishment, the defendant's due-process rights have been violated and a new trial must be granted.” Tempest v. State, \_\_\_ A.3d \_\_\_, 2016 WL 3755461, at \*4 (R.I. 2016) (quoting DeCiantis v. State, 24 A.3d 557, 570 (R.I. 2011)). Evidence is material if “there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” Id., at \*7 (quoting Lerner v. Moran, 542 A.2d 1089, 1091 (R.I. 1988)).

An applicant claiming a Brady violation “need not show that he ‘more likely than not’ would have been acquitted had the new evidence been admitted.” Id. (quoting Wearry v. Cain, 136 S. Ct. 1002, 1006 (2016)). It is enough to show a “reasonable probability” that the outcome would have been undermined. Id. (quoting Lerner, 542 A.2d at 1091). If the State has failed to disclose Brady material, and “the failure to disclose is deliberate, [the] [C]ourt will not concern itself with the degree of harm caused to the defendant by the prosecution’s misconduct; [it must] simply grant the defendant a new trial.” Id., at \*4 (quoting State v. Wyche, 518 A.2d 907, 910 (R.I. 1986)). The prosecution acts deliberately when “it makes ‘a considered decision to suppress . . . for the purpose of obstructing’ or where it fails ‘to disclose evidence whose high value to the defense could not have escaped . . . [its] attention.’” Id. (quoting Wyche, 518 A.2d at 910). In cases where there is a failure to disclose evidence that is not deliberate, the Court must balance the culpability of the prosecution with the materiality of the evidence in determining whether a new trial is appropriate. In re Ouimette, 115 R.I. 169, 177-79, 342 A.2d 250, 254-55 (1975).

Applying this rubric to the instant case, the Court is not convinced that any Brady violations have occurred. The factual predicates for Petitioner's claims are shaky at best and do not carry the evidentiary burden necessary to persuade the Court that it is more likely than not that Petitioner is entitled to postconviction relief.

The argument in respect to Gamboa is predicated upon her version of a statement given to Corley at the bail hearing in this case. See First Hr'g Tr. at 74-80. The parties agree that Gamboa appeared at the bail hearing, spoke to Corley, and was shown a photo array. According to Petitioner's version of events, she informed Corley that not only did she not see Resendes' killer in the photo array, but also stated that Petitioner was not the killer, recognizing him in the array. Id. at 79-80. Corley recalls the events differently; he has no memory of Gamboa directly exculpating Petitioner and asserted his certainty that, if she had, he would have made a report. Third Hr'g Tr. at 32-36. But as the Court has already discussed, Gamboa was not a credible witness in this proceeding. On the other hand, the Court finds Corley's testimony to be credible and his recollection substantially correct: Gamboa simply failed to identify anyone in the photo array and the police treated this information as having no value, either exculpatory or inculpatory. The information would not, then, be "evidence whose high value to the defense could not have escaped . . . [the State's] attention." State v. McManus, 941 A.2d 222, 230 (R.I. 2008) (quoting Wyche, 518 A.2d at 910). Gamboa failed to identify anyone, which was unsurprising given the late hour of the stabbing, the confusing melee outside the International Club, and the multiple stabbings that occurred. There is no Brady violation with respect to Gamboa.

The same is true of the evidence offered in respect to Andrade, though in no respect due to any lack of credibility. Andrade testified forthrightly and offered his sincere belief that he thought he recalled speaking to a police officer over the phone regarding the incident. First Hr'g Tr. at 22-23. But this is contradicted by Corley's testimony that phone interviews were not the practice of the Providence Police Department at that time, which is corroborated by the fact that the old police headquarters used at this time did not possess telephonic recording equipment. Third Hr'g Tr. at 45-46, 63, 66-67; see also Walden v. City of Providence, 596 F.3d 38, 44-48 (1st Cir. 2010). Andrade's testimony alone does not establish that he spoke with the police; he could not identify the individual with whom he spoke nor provide any other corroborating details. The Court must be convinced that there was actually some information within the scope of Brady communicated to the State or its prosecution team, and here, with respect to Andrade, it is not.

Finally, turning to the alleged Reverdes report, the same issues are present. Petitioner argues forcefully that Reverdes's 2011 deposition establishes that she spoke with the police on the night of the murder. But her testimony at the deposition is far from clear. She testified at her deposition that she had no memory of going to the police station on the night of the murder. See generally Joint Ex. 1, Dep. of Gelci Reverdes. She appears to recall only that she went to court to testify. In fact, at her deposition in 2011 and at her appearance at the hearings in this case, her memory appears to have completely failed her. Third Hr'g Tr. at 82, 83-84, 88, 89. The Court cannot conclude, based on the record presented, that she spoke with the police on the night of the murder,

let alone provided some exculpatory information; it is more likely than not that she simply had no reliable recollection of events either in 2011 or today.

In each instance alleged by Petitioner, the requisite factual basis for the Brady claim has not been established by a preponderance of the evidence. As a factual matter, it is more likely than not that none of the allegedly exculpatory material ever existed, let alone made its way into the hands of the police or the State. Petitioner must show, at a minimum, that the State actually possessed exculpatory material to sustain a Brady claim in an application for postconviction relief; he has failed to do so here.

## C

### **Failure to Preserve Evidence**

Closely related to Petitioner's Brady claims are his assertions that the Providence Police Department failed to preserve evidence material to his defense. The Supreme Court of the United States has developed ““what might loosely be called the area of constitutionally guaranteed access to evidence.”” California v. Trombetta, 467 U.S. 479, 485 (1984) (quoting United States v. Valenzuela-Bernal, 458 U.S. 858 (1982)); see also Arizona v. Youngblood, 488 U.S. 51, 55 (1988). These cases extend the logic of Brady and United States v. Agurs<sup>7</sup> to impose a constitutional duty on the government to preserve some types of evidence. State v. Garcia, 643 A.2d 180, 184-85 (R.I. 1994) (citing United States v. Femia, 9 F.3d 990, 993 (1st Cir. 1993)).

Together, Trombetta and Youngblood create a three-part test to determine whether the failure to preserve evidence violates a defendant's due process rights: first, the evidence must possess apparent exculpatory value; second, the defendant must be unable

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<sup>7</sup> 427 U.S. 97, 112-13 (1976) (imposing an affirmative duty upon the state to disclose exculpatory evidence).

to obtain comparable evidence by other reasonable means; and third, the defendant must show that the failure to preserve the evidence was the result of bad faith on the part of the state. Id. at 185 (citing Youngblood, 488 U.S. at 58; Trombetta, 467 U.S. at 488, 89). “Exculpatory evidence includes evidence that is favorable to an accused and is material to guilt or punishment.” State v. Werner, 851 A.2d 1093, 1105 (R.I. 2004) (quoting State v. Roberts, 841 A.2d 175, 178 (R.I. 2003)). A mere possibility that evidence could exculpate a defendant if preserved, though, “is not enough to satisfy the standard of constitutional materiality in Trombetta.” Id. (quoting Youngblood, 488 U.S. at 56-57 n.\*).

Petitioner argues that the State, through the police, were in possession of the car upon which the fatal stabbing purportedly occurred, and that five women inside the car at the time of the stabbing were escorted to the police station. He avers that the failure to retain and preserve the car, as well as the failure to take down the names of its occupants, amounted to a denial of Petitioner’s right to due process. The State responds that the evidence lacks any apparent exculpatory value and also argues that there is no evidence of bad faith on the part of the police.<sup>8</sup>

There is no indication in the record that either the car or its occupants held apparent exculpatory value. It is far from clear that the car was, in fact, the scene of the murder or that the female occupants observed anything relevant to the investigation.<sup>9</sup> It is not enough for an applicant for postconviction relief to point to evidence that has not

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<sup>8</sup> Counsel for Petitioner and his codefendants knew of the red car and five women at the time of trial. Trial Tr. Vol. V at 1052-53, 1056-67 (Petitioner’s closing argument); see also Trial Tr. Vol. V at 1045-47 (Codefendant’s closing argument).

<sup>9</sup> Petitioner’s witness, Gamboa, testified that there was no one in the car on which Resendes was stabbed, so even if we credit her dubious testimony, it would cut against the thrust of Petitioner’s argument on this point. First Hr’g Tr. at 70.

been preserved and request an inference that, because it was not preserved, it must have been exculpatory; it is Petitioner's burden to come forward with evidence that shows that the lost evidence was exculpatory, that the police knew it was exculpatory, and destroyed it because it was exculpatory. Youngblood, 488 U.S. at 56-57 & n.\*. The Court is without any evidence from which it could determine whether the car or its occupants could have exculpated Petitioner, and the mere "possibility that [the evidence] could have exculpated [defendant] if preserved or tested is not enough to satisfy the standard of constitutional materiality in Trombetta." Werner, 851 A.2d at 1105 (quoting Youngblood, 488 U.S. at 56-57 n.\*). Nor is there any evidence that the Providence police acted in bad faith. There is only Petitioner's speculation that they must have; it is his burden to come forward with evidence of this bad faith. Although Youngblood has been criticized for this requirement, see generally Norman C. Bay, Old Blood, Bad Blood, and Youngblood: Due Process, Lost Evidence, and the Limits of Bad Faith, 86 Wash. U. L. Rev. 241 (2008), it remains the law, and the burden remains Petitioner's. He has not carried it.

## **D**

### **New Evidence**

Petitioner also advances the theory that new evidence concerning Reverdes's mental health and memory justify a new trial. "In applications for postconviction relief based on newly discovered evidence, [the Court uses] the same standard of review as in a motion for [a] new trial based on newly discovered evidence." Dominick v. State, 139 A.3d 426, 431 (R.I. 2016) (quoting D'Alessio v. State, 101 A.3d 1270, 1275 (R.I. 2014)). The standard is split into two parts, and the first applies a four-part threshold test: the new

evidence must “be (1) newly discovered and not available at the time of trial; (2) it must not have been discoverable by due diligence; (3) it must be material, not simply cumulative or impeaching; and (4) it must be of the type that would likely change the verdict at trial.” Id. (quoting D’Alessio, 101 A.3d at 1275). “For a defendant to satisfy his burden of showing that information could not have previously been discovered through a diligent search, we have ordinarily required the defendant to show that he made a reasonable investigation of evidence which was available to him prior to trial.” Id. (quoting State v. Quaweay, 89 A.3d 823, 828 (R.I. 2014)). If the threshold prong is satisfied, the evidence “must meet the second prong, which is an assessment of whether it is ‘credible enough to warrant relief.’” Id. (quoting D’Alessio, 101 A.3d at 1275); see also Ferrell v. Wall, 889 A.2d 177, 184 (R.I. 2005).

A review of Reverdes’s deposition transcript, though, makes it clear that this is not newly discovered evidence within the reach of postconviction relief. To the extent that Reverdes’s mental health and memory are relevant to her testimony at the trial, Petitioner was entitled to explore those issues at trial. To whatever extent he did not, that is the choice of his counsel; he has not chosen to take issue with that decision by raising a claim of ineffective assistance of counsel on that point. Furthermore, there is no new evidence that indicates Reverdes had any memory issues that would affect her testimony at trial. To the contrary, all indications point towards her developing issues in the years following the trial in 1998, not before or during it. Even if it was, it appears that the proffered evidence would be cumulative or impeaching, rather than material, and so would not entitle Petitioner to a new trial. See id. For these reasons, Petitioner is not entitled to postconviction relief on the basis of newly discovered evidence.

## E

### **Trial-Related Claims**

The last series of arguments Petitioner advances relate to the conduct of the trial. Specifically, he takes issue with the trial justice's response to juror harassment and the denial of Petitioner's motion for judgment of acquittal. The State argues that these claims are clearly barred by res judicata. The Court agrees.

Section 10-9.1-8 codifies the doctrine of res judicata in the postconviction context. Ramirez v. State, 933 A.2d 1110, 1112 (R.I. 2007). Section 10-9.1-8 does not bar only issues that were raised in prior proceedings, but also covers “the relitigation of any issue that could have been litigated in a prior proceeding, even if the particular issue was not raised.” Ferrell v. Wall, 971 A.2d 615, 620 (R.I. 2009) (quoting Ouimette v. State, 785 A.2d 1132, 1138 (R.I. 2001)). The preclusive dictates of § 10-9.1-8 apply not only to prior applications for postconviction relief—but also to any issues that could have been raised in a direct appeal from the judgment of conviction. Campbell v. State, 56 A.3d 448, 457 (R.I. 2012) (quoting Taylor v. Wall, 821 A.2d 685, 688 (R.I. 2003)). The res judicata bar may be avoided if the interests of justice require it, but this exception is a limited and narrow one. Brown v. State, 32 A.3d 901, 910 (R.I. 2011).

Petitioner appears to concede that his claims are barred by res judicata; he acknowledges that the bar exists and argues that the interests of justice require consideration of his claims. This is the case, he says, because he is asserting his actual innocence. A mere recitation of a petitioner's claim of actual innocence cannot suffice to avoid the res judicata bar. If that were the case, the exception would swallow the rule inasmuch as very few petitioners do not protest their innocence. More to the point, the

claims he advances relative to the conduct of the trial were issues that he clearly could have taken issue with at the trial and then advanced in a direct appeal.

The claims are, in fact, exactly the type of claims res judicata bars in the postconviction relief context: issues “that could have been [raised] in a . . . direct appeal,” see Campbell, 56 A.3d at 457, the entertainment of which will amount simply to relitigation of issues that could have been addressed in the first instance. Although Petitioner correctly notes that an issue not raised in the first instance may in some circumstances escape the res judicata bar if coupled with a claim of ineffective assistance of counsel, this argument is of no avail here. See Carillo v. Moran, 463 A.2d 178, 183 (R.I. 1983). The Court has already concluded that Attorney Watson’s representation was not constitutionally deficient in respect to the jury harassment issue, and Petitioner makes no claim of ineffective assistance of counsel as to the motion for judgment of acquittal. There is, then, no exception through which Petitioner’s claims may pass. Section 10-9.1-8 bars consideration of these claims. The interests of justice do not compel the Court to pass upon their merits, and it will not.

#### **IV**

#### **Conclusion**

For the foregoing reasons, Petitioner’s application for postconviction relief is denied and dismissed.



**RHODE ISLAND SUPERIOR COURT**  
*Decision Addendum Sheet*

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**TITLE OF CASE:** Depina v. State of Rhode Island

**CASE NO:** PM-2003-3727

**COURT:** Providence County Superior Court

**DATE DECISION FILED:** August 25, 2016

**JUSTICE/MAGISTRATE:** Gallo, J.

**ATTORNEYS:**

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