STATE OF RHODE ISLAND

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: December 12, 2022)

THOMAS JOHNSON	:	
	:	
v.	:	**C.A. No. PM-2008-3183**
	:	
	:	
STATE OF RHODE ISLAND	:	

DECISION

MCGUIRL, J. (Ret.) Before this Court is Petitioner Thomas Johnson's (Petitioner) Application for Postconviction Relief challenging numerous aspects of his 1994 first-degree murder trial and the preceding investigation into the 1992 death of his common-law wife, Margaret Bazinet. Jurisdiction is pursuant to G.L. 1956 § 10-9.1-1.

I

Facts and Travel

A

Investigation and Trial

The facts underlying this case are set out in *State v. Johnson*, 667 A.2d 523 (R.I. 1995). In the late evening of July 31, 1992 and early morning hours of August 1, 1992, a person—later identified as Petitioner—called the Pawtucket police department and said, "I got a— a— a body on my living room floor at 433 West Avenue, second floor." *Johnson*, 667 A.2d at 525. Four minutes later, a rescue team arrived at Petitioner's home to find Petitioner standing outside. *Id.* Inside, Margaret Bazinet (Ms. Bazinet) lay in a pool of blood in the living room with multiple stab wounds. *Id.* Six minutes after Petitioner's call to the police department, Officer Michael Dolan (Officer Dolan) arrived at the scene, where rescue personnel informed him that Ms. Bazinet was

dead and that Petitioner was the only other adult in the home. *Id.* Officer Dolan testified at Petitioner's trial that there were no signs of forced entry and that, when questioned at the scene, Petitioner stated: "Yes, I'm the only one here." *Id.* After escorting Petitioner into the kitchen and observing eating utensils in the vicinity, including knives, Officer Dolan placed Petitioner under arrest. *Id.* He then inspected the apartment and found Petitioner's two young sons asleep in a bedroom. *Id.*

Police detectives commenced their investigation immediately, visiting the home of Audrey and Bobby Coogan, where Petitioner and Ms. Bazinet had visited and socialized earlier that night. *Id.* Detective Linda Stafford testified at trial that she asked Audrey Coogan to play back any messages on the couple's answering machine. *Id.* at 525-26. Three messages were recorded on the machine, all from Petitioner: (1) "This is Thomas. It's an emergency. Please. Hello. This is an emergency. All right, I'll call the police then. Thank you," *id.* at 526; (2) "Bobby Bobby. Did I take Maggie home with me? If so, I killed her. Please pick up," *id.*; and (3) "Yeah, Bobby! Tommy Johnson. I think I'm gonna need drastic help. Really. Get a hold of me as soon as you can. Please. Thank you." *Id.* In addition, detectives learned that Petitioner had slapped Ms. Bazinet in the face while at the Coogans' home and then had left without her. *Id.* at 525. Petitioner's brother, Gerald Johnson, who was also visiting the Coogans, drove Ms. Bazinet and the children home later that night and testified that, as he dropped off Ms. Bazinet, he saw Petitioner's car parked in front of the home and saw Petitioner in the kitchen window. *Id.*

Approximately three hours after Petitioner's initial call to the police, he was read his rights and gave a videotaped statement. *Id.* at 526. He claimed that he had no memory from the time he left the Coogans to when he found Ms. Bazinet on the floor of their home. *Id.* He stated that Ms. Bazinet was laughing and asked to make love and that he only noticed the blood when he tried to

help her up. *Id.* Asked whether he had killed his wife, Petitioner answered that he did not know but hoped he had not. *Id.*

Petitioner was indicted for his wife's murder on December 17, 1992 and proceeded to trial in 1994. *Id.* At trial, Petitioner's eight-year-old son, Shawn Bazinet (Shawn), testified that after going to bed on the night his mother died, he heard his parents arguing, saw his father hit his mother in the kitchen, and then watched as his father later walked out of the living room with "red paint 'all over him.'" *Id.* Shawn testified that he saw his father wash the paint off and then remove a green garbage bag from the home. *Id.* Audrey Coogan testified that the shirt Petitioner was wearing when he was arrested was not the shirt he was wearing earlier in the evening. (Sept. 9, 2021 Hr'g Ex. 5A, Tab 6 (Trial Tr.) 172:14-174:14.)

Petitioner's defense theory was that the police had immediately and erroneously settled on Petitioner as their prime suspect and had otherwise failed to properly investigate Ms. Bazinet's murder. *Id.* at Ex. 5B, Tab 9 (Trial Tr.) 642:6-13, 654:8-15, 655:2-9. Defense counsel argued that "[t]he investigation by the police in this case was shoddy at best, incompetent[,] and probably did not rise to any level that would be accepted by any professional police officer." *Id.* at 671:7-11.

On September 27, 1994, Petitioner was found guilty of murder in the first degree and received a mandatory life sentence. *Johnson*, 667 A.2d at 526. Additional facts will be supplied as necessary in the Analysis section, *infra*, to provide appropriate context.

B

Appeal to the Rhode Island Supreme Court

Petitioner timely appealed his conviction, raising five issues on appeal that challenged:

> "(1) the probable cause for his arrest, (2) the trial justice's comments during the defense's cross-examination of the defendant's son, (3) the failure to instruct the jury on voluntary manslaughter and diminished capacity due to intoxication, (4) the preclusion of the

> defendant's testimony in regard to other possible suspects, and (5) the introduction of a videotaped statement that allegedly included hearsay statements of the interrogating police officer." *Id.* at 524-25.

The Supreme Court denied and dismissed Petitioner's appeal and affirmed his conviction. *Id.* at 530.

C

Petitioner's Applications for Postconviction Relief

The travel of this matter following denial of Petitioner's appeal is detailed in *Johnson v. Wall*, No. CA 09-611 S, 2010 WL 5101390, at *3-6 (D.R.I. Aug. 12, 2010). In sum, Petitioner prepared his First Application for Postconviction Relief (First PCRA) *pro se*, which was received by this Court on October 5, 2000 and docketed on October 19, 2000. *Johnson*, 2010 WL 5101390, at *3. After Petitioner failed to comply with a Superior Court justice's order to condense and clarify the First PCRA, it was dismissed. *Id.* at *5.

Petitioner mailed another *pro se* Application for Postconviction Relief (Second PCRA) on April 16, 2008, which was docketed on April 29, 2008. *Id.* Petitioner's Second PCRA was assigned for decision on November 10, 2008. (Nov. 10, 2008 Order.) The Court appointed an attorney for Petitioner on June 14, 2010 and again on July 12, 2010. (June 24, 2010 Letter to Att'y Quirk; July 27, 2010 Letter to Att'y McCormick.)

On October 9, 2012, the Court docketed a no-merit memorandum prepared by Petitioner's then-attorney pursuant to *Shatney v. State*, 755 A.2d 130, 136 (R.I. 2000). (Pet'r's Postconviction Mem.) The October 9, 2012 memorandum indicated that Petitioner's only viable claim was his allegation that the State had substituted evidence of the bathroom sink trap and cannister, i.e. State's Trial Exhibits 27A and B. *Id.* at 6-10, 33. The Court ordered the clerk's office to retrieve and "produce the sink drain and videotape of the seizure of the drain." (Nov. 4, 2013 Order.)

The Court held evidentiary hearings related to the sink trap on March 7 and March 21 of 2014.[1] General Chief Clerk Steven Burke (Mr. Burke), Retired Bureau of Criminal Investigations Detective Joseph Vincent Harrold (Det. Harrold), Petitioner's trial and appellate counsel Richard Corley (Mr. Corley), and Petitioner all offered testimony. Petitioner also submitted an affidavit from Dale Anderson, Petitioner's original trial attorney; a Pawtucket police statement regarding actions by one of its detectives relating to the sink trap; and the warrant return.

Mr. Burke testified that he has worked in the court system for thirteen years, and it was his responsibility to locate the evidence introduced during Petitioner's 1994 trial. He stated that he had only recently found the sink trap in a Superior Court secured evidence area after an extensive search. Although it was not found for a long period of time, the sink trap was ultimately discovered with its original identification tags from the trial, which identified the corresponding case number and matched the trial's exhibit list.

Petitioner testified that the sink trap that was originally under his bathroom sink was made of polyvinyl chloride (PVC), but he did not install it. He maintained that the sink trap presented by the State at the evidence viewing was not the same as the sink trap in his apartment, and that he had informed his trial attorneys, Dale Anderson and then Mr. Corley, that the sink trap had been switched. Furthermore, Petitioner contended that the sink trap presented at trial was yet another sink trap, different than the one presented at the evidence viewing. Thus, he alleged that, including the original sink trap from his apartment, there had been at least three, and possibly four, different sink traps presented throughout these proceedings.

[1] The Court was not able to obtain transcripts of those hearings, but relies upon facts as recorded in a previously drafted but unpublished decision. *See Imbert v. Kenneway*, No. 19-10050-NMG, 2022 WL 1591538, at *2 (D. Mass. May 19, 2022) ("[T]rial judge's reconstructed record was sufficient to serve as an adequate substitute for the transcript.").

Det. Harrold testified that he worked as a Pawtucket Police officer for more than twenty years and had retired as patrol captain seven years earlier. He was assigned to investigate Petitioner's case and entered Petitioner's apartment on August 3, 1992 to execute a search warrant. The warrant permitted Det. Harrold to seize the bathroom sink trap due to Shawn Bazinet's testimony that Petitioner had washed "red paint" off his hands. Det. Harrold recalled using a wrench to remove the trap, but he could not recall any specific details. He did acknowledge that the Pawtucket Police statement indicated that a Detective Malo had cut the sink trap and that the warrant return described the item as being fifteen inches long. In reviewing the evidence, Det. Harrold indicated that he was not responsible for filling out the warrant return, nor did he review or prepare the Pawtucket Police statement.

Mr. Corley testified at the hearing regarding his trial tactics, including why he chose not to press Petitioner's claims regarding the existence of multiple sink traps. In Mr. Corley's opinion, presenting that theory to the jury likely would have backfired, given the absurdity of so many sink traps being fabricated, and could well have strengthened the State's case.

Although the Court was prepared to rule on the sink trap issue shortly after those hearings, Petitioner maintained that all of his claims had merit, notwithstanding his attorney's no-merit memorandum, and desired a full hearing on *all* of his claims. *See* Oct. 11, 2012 Letter to Att'y McCormick. As an incarcerated and indigent defendant convicted of murder and sentenced to a lengthy prison term, the Court permitted appointment of a new attorney to advise Petitioner and to assist him in proceeding with all claims. *See* Dec. 5, 2018 Letter to Att'y Hoopis Manosh; *see also Campbell v. State*, 56 A.3d 448, 459 (R.I. 2012) ("[I]n order to have a meaningful opportunity

to reply prior to summary dismissal under § 10-9.1-6(b), an indigent, first-time applicant for postconviction relief must be afforded counsel upon request.”)[2]

On July 15, 2019, Petitioner—now represented by counsel—submitted a memorandum to the Court that itemized and categorized the various grounds alleged in the Second PCRA. *See generally* Mem. in Supp. of Question Presented by the Ct. (Pet’r’s Summ. Mem.). For ease of reference and with the agreement of counsel, this Decision adopts the numbering format and order of references used in that July 15, 2019 memorandum. Petitioner puts forward five areas of complaint: (I) ineffective assistance of counsel, including nine itemized violations; (II) due process violations by the Court, including three itemized violations; (III) due process violations by the Prosecutor, including ten itemized violations; (IV) due process violations by the police, including one violation involving eleven pieces of evidence; and (V) one claim of newly discovered evidence. *Id.* at 2-4. In total, Petitioner alleged thirty-four violations for review by this Court. *See generally id.*

On December 1, 2020, the State filed a motion to dismiss various grounds of Petitioner’s Second PCRA. *See generally* State’s Mot. to Dismiss Pet’r’s Appl. for Postconviction Relief. The Court conducted a hearing on May 11, 2021 and subsequently granted in part and denied in part the State’s motion on July 28, 2021. (July 28, 2021 Order.) The Court dismissed seven of Petitioner’s thirty-four alleged violations[3] and scheduled the remaining claims for hearings. *See id.*; Hr’g Tr. 15:1-21, 18:19-24, June 16, 2021.

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[2] Further delays resulted from the parties deferring hearings due to unavailability of the parties and continuing hearings due to COVID-19 and other medical reasons.

[3] The July 28, 2021 Order dismissed five grounds based on *res judicata*, itemized in Petitioner’s July 15, 2019 memorandum as:

- Items I(1)-(3): Three of Petitioner’s ineffective assistance of counsel claims, including the alleged failure to challenge whether there was probable cause to arrest Petitioner, failure

The Court held a hearing on September 9, 2021 at which Petitioner testified at length about his remaining allegations and his theory of the proof supporting those allegations. *See generally* Sept. 9, 2021 Hr'g Tr. On October 7, 2021, the Court again heard testimony from Mr. Corley, after which the State submitted a motion to dismiss the remaining grounds contained in Petitioner's Second PCRA. *See generally* State's Post Hr'g Mot. to Dismiss Pet'r's Appl. for Postconviction Relief.

Having heard Petitioner's testimony and offer of proof as well as testimony from Mr. Corley, Mr. Burke, and Det. Harrold, the Court is prepared to rule on Petitioner's remaining claims.

II

Standard of Review

Postconviction relief is a statutory remedy available to "[a]ny person who has been convicted of, or sentenced for, a crime . . . who claims . . . [t]hat the conviction or the sentence was in violation of the constitution of the United States or the constitution or laws of this state" or who claims "[t]hat there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice[.]" Sections 10-9.1-1(a)(1), (4). "The applicant for postconviction relief 'bears the burden of proving, by a preponderance of the evidence, that such relief is warranted in his or her case.'" *Barros v. State*, 180 A.3d 823, 828 (R.I. 2018) (quoting *DeCiantis v. State*, 24 A.3d 557, 569 (R.I. 2011)). Further, "[a]ny ground

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to contest the voluntariness of Petitioner's statement to police, and failure to litigate the legality of the search of Petitioner's home (July 28, 2021 Order ¶¶ 1-3); and

- Items II(1)-(2): Two of Petitioner's claims of due process violations by the Court, including that he was denied the right to a speedy trial and that it was an abuse of discretion to admit certain evidence. *Id.* ¶¶ 5-6.

This Court also dismissed Items III(5)-(6), two of Petitioner's claims of due process violations by the prosecution, including allegations that the Court allowed a police officer to sit by defendant at trial and permitted a friend of the victim to serve as deputy sheriff in the courtroom. *Id.* ¶ 8.

finally adjudicated or not so raised . . . may not be the basis for a subsequent application, unless the court finds that in the interest of justice the applicant should be permitted to assert such a ground for relief." Section 10-9.1-8.

III

Analysis

Petitioner's Issue I: Ineffective Assistance of Counsel

The Court first addresses items I(4)-(9) from Petitioner's July 15, 2019 memorandum, relating to his claims of ineffective assistance of counsel. (Pet'r's Summ. Mem. 2.) "The law in Rhode Island is well settled that this Court will pattern its evaluations of the ineffective assistance of counsel claims under the requirements of *Strickland v. Washington*, 466 U.S. 668 . . . (1984)." *Brennan v. Vose*, 764 A.2d 168, 171 (R.I. 2001). The *Strickland* standard consists of two prongs:

> "First, an applicant must demonstrate that counsel's performance was deficient, to the point that the errors were so serious that trial counsel did not function at the level guaranteed by the Sixth Amendment. In order to be considered ineffective under the first prong of *Strickland*, trial counsel's performance must have fallen below an objective standard of reasonableness considering all the circumstances . . . a strong (albeit rebuttable) presumption exists that counsel's performance was competent, and that counsel's strategy and tactics fall within the range of reasonable professional assistance.
>
> "The second prong of *Strickland* requires the applicant to demonstrate that the deficient performance was so prejudicial to the defense and the errors were so serious as to amount to a deprivation of the applicant's right to a fair trial. Satisfying this second prong of *Strickland* requires a showing that there is a reasonable probability that, *but for* counsel's unprofessional errors, the result of the proceeding would have been different. That is a highly demanding and heavy burden." *Barros*, 180 A.3d at 829 (internal citations and quotations omitted).

(I)(4): Failure to Litigate the State's Prosecutorial Misconduct, Specifically the Influencing of Shawn Bazinet to Provide Incriminating Testimony

Petitioner alleges that his trial counsel, Mr. Corley, failed to litigate whether Shawn had been improperly influenced to provide incriminating testimony. (Hr'g Tr. 10:4-13:19, Sept. 9, 2021).) This claim is plainly contradicted by the trial transcript. During defense counsel's cross-examination of Shawn, Mr. Corley elicited testimony as to whether Shawn truly witnessed or remembered his mother's death and whether adults—including Shawn's uncle, the prosecutor, police officers, and Shawn's counselor—had told Shawn what to say at trial. (Sept. 9, 2021 Hr'g Ex. 5A, Tab 7 (Trial Tr.) 238:16-243:17, 245:23-248:11, 253:16-255:1, 260:18-264:21.) Mr. Corley also pressed this theory in his closing argument to the jury, asking:

> "[W]as Shawn telling you that he actually saw his father fighting with his mother that night, or is he telling you, I remember something like that happening before. And these people, that are assuming that Thomas Johnson killed his mother, suggested and filled in the gap, so that [Shawn] came in here and testified the way he did." *Id.* at Tab 9 (Trial Tr.) 668:5-11.

It is therefore clear that Mr. Corley did litigate this issue and, as a result, Petitioner cannot establish the prejudice required under the second *Strickland* prong. *Barros*, 180 A.3d at 829.

The Court also finds that any further claim by Petitioner that Mr. Corley colluded with the prosecution and police is not credible. *Fontaine v. State*, 602 A.2d 521, 524 (R.I. 1992) ("It is the trial court's function to weigh the evidence and assess the credibility of the witnesses[.]"). At the time of Petitioner's 1984 trial, Mr. Corley was an experienced attorney who was murder-certified by our Supreme Court and who had been a public defender for five years and a criminal defense trial attorney for ten years. (Hr'g Tr. 82:21-87:22, Oct. 7, 2021.) Mr. Corley is afforded a presumption of competency, *Barros*, 180 A.3d at 829; and the Court credits his testimony that he never delayed trial to allow the State to manipulate Shawn's testimony, which is supported by

statements in the record that trial scheduling was impacted by Petitioner's irreconcilable differences with his original defense attorney and other various scheduling conflicts. *See* Hr'g Tr. 101:16-18, Oct. 7, 2021 (Mr. Corley's testimony); Sept. 9, 2021 Hr'g Ex. 5A, Tab 1 (June 6, 1994 Hr'g Tr.) 6:10-10:25 (discussing reasons for delays). Petitioner has brought forward nothing more than his own unsubstantiated allegations, which are contradicted by the trial record and by Mr. Corley's credible testimony.

(I)(5): Failure to Argue for Pretrial Bail

Petitioner next contends that Mr. Corley's assistance was ineffective in failing to argue for pretrial bail. (Hr'g Tr. 16:15-25, Sept. 9, 2021.) Again, this claim is contradicted by the record. *See* Sept. 9, 2021 Hr'g Ex. 5A, Tab 1 (June 6, 1994 Hr'g Tr.) 6:9-7:1. At a June 6, 1994 pretrial hearing, Mr. Corley argued his motion for bail on behalf of Petitioner. *Id.* He referenced the length of time Petitioner had been held pending trial, Petitioner's lack of a prior criminal record, and that any delay caused by irreconcilable differences between Petitioner and his prior counsel should not be held against Petitioner. *Id.* The mere fact that the Court disagreed with Mr. Corley's arguments does not constitute a serious error of counsel under the first prong of the *Strickland* standard. *See Barros*, 180 A.3d at 829; *see also Fountaine v. Mullen*, 117 R.I. 262, 270, 366 A.2d 1138, 1143 (1976) (bail determination is a discretionary decision of the trial justice).

(I)(6): Failure to Investigate

At the September 9, 2021 hearing before this Court, Petitioner testified that Mr. Corley failed to investigate various individuals who could have been suspects in Ms. Bazinet's murder or who could have at least offered relevant information to investigators, including: (1) the Burke family, a local family that Petitioner claims had a feud with Ms. Bazinet (Hr'g Tr. 17:1-19, Sept. 9, 2021); (2) David Twohig, a possible ex-boyfriend of Ms. Bazinet, *id.* at 17:24-19:9; and (3)

Petitioner's neighbors at 447 West Avenue. *Id.* at 19:10-25. Petitioner further testified that Mr. Corley failed to obtain complete discovery, including:

> "[T]he police phone log, the negatives or proof sheets of the [crime scene] photographs, and the photographs of [Petitioner] and the clothing at the time of [his] arrest, [his] typed and signed statement at the police station, a video of [Petitioner] in a holding cell, and the audio of [his] interrogation, as well as the results of Benzidine tests done at the police station." *Id.* at 22:7-18.

Petitioner also claims his attorney was ineffective in failing to investigate the blood stains in the stairwell and the blood-stained section of carpet from the living room, *id.* at 31:11-32:25; as well as in failing to present expert evidence that Shawn Bazinet was "brainwashed" or at least in failing to question Shawn's counselor. *Id.* at 33:1-25.

As the United States Supreme Court "indicated in *Strickland* . . . attorneys have a duty to undertake 'reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.'" *Larngar v. Wall*, 918 A.2d 850, 859 (R.I. 2007) (quoting *Strickland*, 466 U.S. at 691). The Court also emphasized, however, "that the reasonableness of a particular decision by counsel not to investigate must be assessed in light of all of the circumstances of the case, and it further stated that a reviewing court should apply 'a heavy measure of deference to counsel's judgments.'" *Id.* (quoting *Strickland*, 466 U.S. at 691).

Even assuming *arguendo* that any alleged failure to investigate was deficient—which the Court does not decide—the second *Strickland* prong requires Petitioner "to demonstrate that the deficient performance was so prejudicial to the defense and the errors were so serious as to amount to a deprivation of the applicant's right to a fair trial." *Barros*, 180 A.3d at 829 (internal quotation omitted). Here, Petitioner was convicted based on the weight of the evidence against him, and he fails to show how any possible evidence pertaining to a feud with the Burke family, a relationship with David Twohig, information from his neighbors, or any of the alleged unobtained items of

physical evidence would overwhelm that outcome.[4] Beyond stating his conjecture that the "proof sheets" could have shown that "the photos were not all taken at the same time, and things were being moved around while the photos were taken," (Hr'g Tr. 20:17-20, Sept. 9, 2021), Petitioner offered no evidence of the exculpatory value of these various individuals and items. *See Brown v. State*, 964 A.2d 516, 531 (R.I. 2009) (mere speculation about "the importance and assumed impact" of unprocured evidence does not satisfy the second *Strickland* prong); *see also Knight v. Spencer*, 447 F.3d 6, 15 (1st. Cir. 2006) ("A defendant's failure to satisfy one prong of the *Strickland* analysis obviates the need for a court to consider the remaining prong.").

As previously stated, an attorney is afforded a presumption of competence, *Barros*, 180 A.3d at 829, and "tactical errors . . . arising from careful and professional deliberation," although ultimately unsuccessful, do not amount to ineffective assistance. *State v. D'Alo*, 477 A.2d 89, 92 (R.I. 1984). Petitioner offers no evidence to show why Mr. Corley's decision not to assert a wide-ranging conspiracy to fabricate evidence and brainwash a child witness involving police, family members, child services, the prosecution, counselors, and foster parents was ignorant and neglectful as opposed to the result of careful and professional deliberation. *Id.*

[4] Before this Court, Petitioner also stated: "a lot of these things that I know now [regarding David Twohig], I learned subsequent to" trial. (Hr'g Tr. 18:18-19, Sept. 9, 2021.) As to the failure to question his neighbors, Petitioner stated: "I don't know what information they would have . . . they lived on the other side . . . and nobody was ever questioned there." *Id.* at 19:21-24.

(I)(7): Ineffective Assistance at Trial

Petitioner next puts forward a constellation of claims that his counsel was ineffective at trial, including that trial counsel: (1) attempted to force Petitioner to accept a plea; (2) stopped meeting with Petitioner after Petitioner declined the plea offer; (3) refused to review evidence with Petitioner; and (4) never prepared Petitioner to testify. (Hr'g Tr. 23:15-35:3, Sept. 9, 2021.)

Petitioner's first two claims are contradicted by his own testimony. Petitioner stated before this Court that Mr. Corley advised him of the terms of the plea as compared to Petitioner's chances at trial. *Id.* at 24:21-25:6 (recounting that Mr. Corley told Petitioner that the plea would involve "15 years, and you'll be out in seven and a half" and that Petitioner was unlikely "to go home before that" if he went to trial). Such counseling is simply not undue force or coercion. *See United States v. Green*, 388 F.3d 918, 923 (6th Cir. 2004) ("accurate information regarding the possible ramifications of proceeding to trial cannot be construed as coercive"). Petitioner informed Mr. Corley that he preferred to go to trial, a preference that Mr. Corley immediately honored. (Hr'g Tr. 25:2-10, Sept. 9, 2021.) After Petitioner declined the plea offer, he further testified that he met with Mr. Corley on multiple occasions at the courthouse and at the Adult Correctional Institutions, countering Petitioner's assertion in his Second PCRA that Mr. Corley stopped meeting after Petitioner declined the plea offer. *Id.* at 25:13-17.

As to Petitioner's claim that Mr. Corley refused to review evidence with Petitioner, Petitioner testified that he reviewed the evidence and videos with his prior attorney, Dale Anderson. *Id.* at 26:7-20. Petitioner then requested to view the evidence again with Mr. Corley but was refused. *Id.* at 26:3-4. Mr. Corley testified that his usual practice was to request an evidence viewing and that it would generally be unnecessary to undertake the effort to have an incarcerated client attend that viewing, absent extenuating circumstances. (Hr'g Tr. 102:6-14, Oct.

7, 2021.) Petitioner fails to explain why this second viewing was necessary and how its denial prejudiced his right to a fair trial, as required by *Strickland*. *Barros*, 180 A.3d at 829.

Finally, as to Petitioner's claim that Mr. Corley failed to prepare him to testify at trial, Petitioner has offered only that, "who is believing me if my attorney is not saying anything?" (Hr'g Tr. 27:6-7, Sept. 9, 2021.) Petitioner therefore argues, not that Mr. Corley failed to prepare him to testify, but that Mr. Corley's lines of questioning and closing argument at trial did not focus on the evidentiary issues that Petitioner now wishes to emphasize, such as inconsistencies in testimony about Ms. Bazinet's time of death and the authenticity of the 911 tape. *Id.* at 27:24-29:13. Our Supreme Court has stated that "a court must distinguish between tactical errors made as a result of ignorance and neglect and those arising from careful and professional deliberation[.]" *D'Alo*, 477 A.2d at 92. Mere tactical decisions, even if ill-advised, "do not by themselves constitute ineffective assistance of counsel." *Bustamante v. Wall*, 866 A.2d 516, 523 (R.I. 2005). Mr. Corley's tactical choices not to focus on an inconsistent time of death in the medical examiner's report—which was arguably an inconsequential detail—and not to claim that the 911 tape was a forgery by the police—which would likely have undermined defense counsel's credibility with the jury in light of the fact that Petitioner admitted at trial that he called 911 and the Coogans and was waiting outside the crime scene for medical personnel (Sept. 9, 2021 Hr'g Ex. 5B, Tab 9 (Trial Tr.) 601:9-604:14)—were reasonable tactical decisions informed by common sense and Mr. Corley's years of professional experience.

Further, Mr. Corley credibly testified before this Court that, given the gravity of a defendant testifying in his own murder trial, he "would have had [a] conversation with [Petitioner], and I would have brought to his attention all of the evidence that could be used if he testified," specifically including the "telephone calls that the State [was] alleging were made by [Petitioner],

statements from police officers . . . and . . . [Petitioner's] formal statement taken at the police station[.]" (Hr'g Tr. 95:7-23, Sept. 9, 2021.)

In any event, as discussed above, a review of the full trial transcript shows that Mr. Corley proceeded with the theory that the police had quickly settled on Petitioner as a prime suspect, failed to investigate other viable alternatives, and otherwise coached the prosecution's key witness, Shawn Bazinet, to confirm Petitioner's guilt. *See generally* Sept. 9, 2021 Hr'g Ex. 5B, Tab 9 (Trial Tr.) 652-673 (defense closing argument). In the Court's considered judgment, Mr. Corley's cross-examination of Shawn and the police witnesses ably advanced that theory. As Mr. Corley testified to this Court, "I don't have any specific memory of being successful in locating a witness to advance the third party perpetrator [theory]. However, that does not mean that there was no attempt." (Hr'g Tr. 100:16-19, Oct. 7, 2021.) The mere fact that Mr. Corley was unsuccessful in obtaining an acquittal of his client does not mean that his assistance was constitutionally ineffective. *D'Alo*, 477 A.2d at 92 ("'Thus, a choice between trial tactics, which appears unwise only in hindsight, does not constitute constitutionally-deficient representation under th[is] . . . standard.'" (quoting *United States v. Bosch*, 584 F.2d 1113, 1121 (1st Cir. 1978))).

(I)(8): Filing a "Blanket" Motion for a New Trial

Petitioner next takes issue with the fact that, in his opinion, defense counsel filed a constitutionally infirm "blanket" motion for a new trial. (Hr'g Tr. 35:4-36:3, Sept. 21, 2021.) Petitioner also testified that counsel should have included additional claims of error such as inconsistent testimony as to the sink trap, false testimony regarding knives on the kitchen table, and "numerous things in discovery that [Petitioner] didn't do. It just goes on and on." *Id.*

As to Petitioner's claim of a "blanket" motion that lacked specificity, that contention is once again belied by the record. Defense counsel argued that the State's evidence was insufficient

and its witnesses were not credible. (Sept. 9, 2021 Hr'g Ex. 5B, Tab 10 (Mot. Hr'g Tr.) 729:7-9.) He argued that the police failed to properly investigate and mishandled physical evidence. *Id.* at 729:14-20. Further, he adopted by reference the issues and concerns raised in his closing argument, which addressed in more detail how police mishandled evidence and failed to secure the crime scene. (Sept. 9, 2021 Hr'g Ex. 5B, Tab 9 (Trial Tr.) 653:9-662:12.) Such claims are sufficiently specific and plainly do not constitute a "blanket" motion.

As to the knives, their presence or absence on the kitchen counter was relevant only to the issue of whether the responding officer had probable cause to arrest Petitioner at the scene—an issue already addressed on appeal in *Johnson*, 667 A.26 at 527 and therefore barred by *res judicata*. *See Taylor v. Wall*, 821 A.2d 685, 688 (R.I. 2003) (*res judicata* applies to petitions for postconviction relief, thus "bar[ring] the relitigation of any issue that could have been litigated in a prior proceeding"); *see also* § 10-9.1-8. In any event, the motion justice's probable cause ruling did not reference or rely upon the alleged knives on the table. (Sept. 9, 2021 Hr'g Ex. 5A, Tab 3 (Mot. Tr.) 44:2-45:7.) As a result, Petitioner also fails to satisfy the second *Strickland* prong that, "*but for* counsel's unprofessional errors, the result of the proceeding would have been different." *Barros*, 180 A.3d at 829 (internal quotation omitted).

As to the sink trap, Petitioner argues that Mr. Corley should have explicitly raised the inconsistencies of the seizure of the item and its authenticity, both when questioning witnesses and in the motion for a new trial. While Petitioner now argues that Mr. Corley erred in not questioning Det. Harrold regarding the sink trap inconsistencies, he fails to show how avoiding that line of questioning was ignorant or neglectful as opposed to a reasonable tactical decision. *D'Alo*, 477 A.2d at 92. Pursuing a line of questioning that implied—without evidentiary support beyond Petitioner's own statement—that the police, the prosecution, and the court clerk had clumsily

colluded to fabricate at least three, and possibly four, different nonmatching sink traps likely would have worked against Petitioner's interests by focusing the jury's attention on the incriminating presence of blood in the sink trap and otherwise undermining defense credibility. Petitioner has therefore failed to prove by a preponderance of the evidence that his trial attorney's performance was so deficient that he was "not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment." *Strickland*, 466 U.S. at 687. It is also worth noting that Petitioner himself raised this issue at trial, such that the jury would have been aware of Petitioner's allegation that the sink trap presented at trial was substituted, a fact that further militates against any finding of prejudice under the second *Strickland* prong. (Sept. 9, 2021 Hr'g Ex. 5B, Tab 9 (Trial Tr.) 618:17-619:4.)

(I)(9): Ineffective Assistance of Appellate Counsel

Petitioner broadly claims that it is inappropriate to have the same appellate counsel as trial counsel. (Hr'g Tr. 12:14-17, Dec. 13, 2019.) More specifically, Petitioner alleges that Mr. Corley was deficient as appellate counsel because he failed to argue that the trial transcript transmitted to our Supreme Court on appeal was incomplete or that evidence presented at trial was falsified, manipulated, and unreliable. *Id.* at 11:18-12:3.

Our Supreme Court has stated that "the *Strickland* standard for reviewing claims of ineffective assistance of counsel applies to appellate counsel as well as trial counsel." *Barros*, 180 A.3d at 839. "[F]or appellate counsel's performance to pass muster under the *Strickland* test, appellate counsel . . . need not (and should not) raise every nonfrivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal." *Page v. State*, 995 A.2d 934, 943 (R.I. 2010) (internal quotation omitted). "Thus, to show that appellate counsel has been ineffective, 'an applicant must demonstrate that the omitted issue was not only

meritorious, but clearly stronger than those issues that actually were raised on appeal.'" *Barros*, 180 A.3d at 839 (quoting *Page*, 995 A.2d at 944).

First, this Court can find no authority—and Petitioner has not offered any—that stands for the proposition that there exists a *per se* constitutional violation when trial counsel acts as appellate counsel. Nevertheless, having determined that Petitioner has failed to satisfy the *Strickland* standard as to Mr. Corley's performance as trial counsel, the mere fact that Mr. Corley served as appellate counsel cannot support an ineffective appellate assistance claim.

Second, as to the trial transcript on appeal, Petitioner has not shown how any alleged missing or "manipulated" testimony prejudiced his appeal. *Barros*, 180 A.3d at 829.

Third, as to appellate counsel's failure to challenge various evidentiary issues on appeal, the Supreme Court has "note[d] with approval the following quote . . . 'A brief that raises every colorable issue runs the risk of burying good arguments—those that, in the words of the great advocate John W. Davis, "go for the jugular," . . . in a verbal mound made up of strong and weak contentions.'" *Id.* at 839 n.9 (quoting *Jones v. Barnes*, 463 U.S. 745, 753 (1983)). In other words, it is not ineffective assistance for appellate counsel to tactically determine the select issues to press on appeal. *Larngar*, 918 A.2d at 861. At trial, Mr. Corley challenged police witnesses on their collection and handling of evidence and on the inconsistencies in their investigation and testimony. *See, e.g.*, Sept. 9, 2021 Hr'g Ex. 5A, Tab 8 (Trial Tr.) 351:16-356:18, 368:17-377:16, 476:20-482:22. In convicting Petitioner, the jury nevertheless chose to give weight and credibility to the police witnesses' testimony and the State's evidence. "The determination of the truthfulness or credibility of a witness lies within the exclusive province of the jury." *State v. Haslam*, 663 A.2d 902, 905 (R.I. 1995). It was therefore a permissible tactical decision by appellate counsel not to raise Petitioner's theory of evidence tampering on appeal, a theory without objective evidentiary

support that was already rejected by the jury and otherwise unlikely to be considered by the Supreme Court. *Larngar*, 918 A.2d at 861.

Petitioner's Issue II: Due Process Violations by the Court

Petitioner next asserts that the Court violated his right to due process when it failed to administer a fair hearing on the issue of the voluntariness of Petitioner's statement to the police. *See* Pet'r's Summ. Mem. 2 (item number (II)(3)). The trial justice held a suppression hearing on July 21, 1994 in which Petitioner claims he was prohibited from testifying. *See* Hr'g Tr. 31:3-6, Sept. 9, 2021 (claiming "judge just told me to sit down and shut up"). At that hearing, after the Court denied Petitioner's motion to dismiss for lack of probable cause for his arrest, Petitioner interjected:

> "[PETITIONER]: I'd like this motion to be heard.
> "THE COURT: Do I hear another voice beside Mr. Corley?
> "[PETITIONER]: The State is afraid to hear this motion.
> "THE COURT: Would you please keep quiet. You're represented by counsel.
> "[PETITIONER]: Who refuses to do what I ask.
> "THE COURT: Just a minute. You can talk to him on the side. I'm not going to have a conversation with you during the course of a hearing now or before the jury. If you do this before a jury, I will tell you to go back downstairs and wait for the jury to act. If you have something to say to Mr. Corley, you can speak to him." (Sept. 9, 2021 Hr'g Ex. 5A, Tab 3 (July 21, 1994 Hr'g Tr.) 45:8-25.)

Mr. Corley then clarified that the motion to which Petitioner referred had been submitted to the Court as part of defense counsel's motion to dismiss. *Id.* at 46:1-10. The trial justice confirmed, "[i]t was attached and I read it . . . That motion is denied in its entirety." *Id.* at 46:14-16.

"It is well established that evidentiary rulings are addressed to the sound discretion of the trial justice . . . . Nonetheless, we have held that the trial justice's 'discretion must be exercised in a manner consistent with the constitutional guarantees involved.'" *State v. Lomba*, 37 A.3d 615, 621 (R.I. 2012) (quoting *State v. Patriarca*, 112 R.I. 14, 37, 308 A.2d 300, 315 (1973) (internal

citations omitted)). "The criminal due process clause of article 1, section 10, of the Rhode Island Constitution sets forth several procedural due process protections afforded to criminal defendants in this state that parallel or are in addition to those protections provided by the United States Constitution." *State v. Barros*, 24 A.3d 1158, 1165 n.8 (R.I. 2011). Article 1, section 10 of the Rhode Island Constitution provides, in pertinent part, that "accused persons . . . shall be at liberty to speak for themselves[.]" R.I. Const. art. 1; § 10. "The right to testify is not absolute, however, and may be limited 'to accommodate other legitimate interests in the criminal trial process.'" *State v. Feole*, 797 A.2d 1059, 1064 (R.I. 2002) (quoting *Rock v. Arkansas*, 483 U.S. 44, 55 (1987)).

There is no evidence that Petitioner attempted to testify at the July 21, 1994 hearing and was denied. Petitioner requested that the Court consider and rule on his *pro se* motion to dismiss, and the Court confirmed, "[i]t was attached and I read it . . . That motion is denied in its entirety." (Sept. 9, 2021 Hr'g Ex. 5A, Tab 3 (Trial Tr.) 46:14-16.) To the extent the trial justice also advised Petitioner not to speak out during a court proceeding, such advice was not a denial of the right to testify. The Court may exercise its discretion when fashioning appropriate rules to maintain order and decorum. *See, e.g.*, *State v. Snell*, 892 A.2d 108, 117-18 (R.I. 2006). Cautioning Petitioner—who was otherwise represented by counsel—not to speak out of turn in open court did not constitute a denial of due process. *Id.* at 119.

Petitioner's Issue III: Due Process Violations by the Prosecution

Petitioner initially identified ten alleged due process violations by the prosecution, two of which were dismissed by prior order of this Court. *See supra* note 3. The Court next addresses Petitioner's eight remaining challenges of prosecutorial misconduct.

(III)(1): Presentation of Perjured Testimony

Petitioner alleges that the State knowingly elicited false testimony from Officer Dolan, Det. Harrold, Detective Sergeant Michael Malloy, Lieutenant William Sisson, Captain James Condon, Dr. George Lauro, and Shawn Bazinet. (Hr'g Tr. 16:5-23, Dec. 13, 2019.) Specifically, Petitioner's attorney argued that Dr. George Lauro, the medical examiner, never testified as to an accurate time of death, the victim's blood loss, the manipulation of wounds at the hospital, how each of Ms. Bazinet's injuries were caused, or as to the false testimony of the wound on the victim's left shoulder. *Id.* at 16:12-22. At a May 11, 2021 hearing, Petitioner also alleged that the police and the medical examiner provided false testimony as to Ms. Bazinet's time of death. (Hr'g Tr. 25:9-22, May 11, 2021.) At a June 16, 2021 hearing, this Court stated that Petitioner would be required to make some offer of proof beyond his own allegations of perjury and fabrication. (Hr'g Tr. 15:1-18, June 16, 2021.) To that end, Petitioner testified before this Court on September 9, 2021 and identified the following as proof: (1) in Petitioner's opinion, Det. Harrold and Officer Dolan lied about the presence of knives in the kitchen (Hr'g Tr. 37:9-15, Sept. 9, 2021); and (2) also in Petitioner's opinion, Shawn Bazinet's testimony was improperly influenced as a result of the prosecution showing Shawn a video, made several years earlier, of Shawn speaking with police officers. *Id.* at 39:19-40:8.[5]

[5] At another point in the hearing, Petitioner briefly discussed the timeline of a Family Court proceeding through which Petitioner's parental rights were terminated as support for his allegation

"The law is clear that a prosecutor cannot knowingly present perjured testimony." *State v. Gomes*, 604 A.2d 1249, 1254 (R.I. 1992). "'Where the prosecutor has deliberately caused false evidence to influence some part of the criminal trial, he [or she] has violated the most basic precepts of due process.'" *Powers v. State*, 734 A.2d 508, 515 (R.I. 1999) (quoting *In re Ouimette*, 115 R.I. 169, 175, 342 A.2d 250, 253 (1975)). The standard for prosecutorial misconduct with regard to perjured testimony therefore involves three requirements: (1) elicitation of false testimony; (2) knowledge of its falsity; and (3) material influence on the outcome of the proceeding. *Accord Bucci v. United States*, 662 F.3d 18, 39-40 (1st Cir. 2011).

A thorough review of the trial record does not reveal any evidence of perjury by any of the seven witnesses Petitioner has identified. Petitioner's perjury claims rely on his theories that multiple individuals colluded to alter the crime scene and to influence Shawn Bazinet to lie at trial. *See, e.g.*, Hr'g Tr. 49:24-50:21; 33:10-14, Sept. 9, 2021. These unsubstantiated theories do not provide a preponderance of evidence upon which postconviction relief can be granted. *Barros*, 180 A.3d at 828. Further, defense counsel's cross-examination at trial tested the veracity and reliability of each witness, including by identifying inconsistencies—and in the case of Shawn, possible coaching—and the jury was permitted to form its own conclusions about witness credibility. *See Gomes*, 604 A.2d at 1255 (inconsistent testimony, unless known to be perjurious, should be put to the jury); *State v. Lynch*, 854 A.2d 1022, 1030 (R.I. 2004) ("[A]ny doubt concerning minimum credibility of the witness should be resolved in favor of allowing the jury to hear the testimony and judge the credibility of the witness themselves.").

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that the prosecutor in his murder trial improperly intervened in the Family Court matter. (Hr'g Tr. 14:2-15:3; 42:16-45:12, Sept. 9, 2021.) The mere recitation of the timing of the Family Court matter does not establish by a preponderance of the evidence that the criminal prosecution team inappropriately intervened. *See Barros v. State*, 180 A.3d 823, 828 (R.I. 2018). Apparent delays can occur in court proceedings for any number of reasons.

(III)(2): Presentation of Unreliable Testimony of Audrey Coogan

Petitioner takes issue with prosecution witness Audrey Coogan's reference to a prior statement while testifying. *See* Sept. 9, 2021 Hr'g Ex. 5A, Tab 6 (Trial Tr.) 156:22-157:7. "The only foundational requirement for refreshing a witness's recollection is that the witness clearly must be 'unable to remember something of relevance to the matter being litigated.'" *State v. Briggs*, 886 A.2d 735, 746 (R.I. 2005) (quoting *State v. Presler*, 731 A.2d 699, 704 (R.I. 1999)). The trial transcript reflects that Audrey Coogan was asked on direct examination about a conversation she had with Petitioner on the night of the murder, to which she responded, "[n]o, I don't [remember] because it's been awhile, and I don't remember everything." (Sept. 9, 2021 Hr'g Ex. 5B, Tab 6 (Trial Tr.) 156:20-21.) The prosecutor then asked, "[w]ould it help your memory if you had a chance to look at your statement?" *Id.* at 156:22-23. This proper refresh of a witness's recollection with a prior written statement did not violate Petitioner's due process rights.

(III)(3): Presentation of Inconsistent Testimony of Gerald Johnson

Petitioner next challenges his brother's testimony, specifically that Gerald Johnson was inconsistent about the timing of various phone calls as between his statement to police and his trial testimony. (Hr'g Tr. 38:20-39:19, Sept. 9, 2021.) "It is axiomatic that while there may exist inconsistencies in testimony given by a witness during trial, the mere presence of those inconsistencies does not, standing alone, constitute perjury *per se*." *State v. Anderson*, 752 A.2d 946, 949 (R.I. 2000). As such, there was no prosecutorial misconduct in eliciting trial testimony that differed from the witness's prior statement.

(III)(4) & (III)(7): Improper Burden Shifting & Improper Remarks in Closing Arguments

Petitioner claims that the prosecution improperly shifted the burden of proof by asking in closing arguments, "If [Petitioner] didn't do it, who did?" (Hr'g Tr. 40:9-18, Sept. 9, 2021); by stating, "[w]hen you discussed the evidence, the presumption of innocence vanishes . . . He's been sending the police on a wild goose chase for years . . . He's been looking for a way out for two years, for two years he's been trying to say 'how can I fool the jury'" (Hr'g Tr. 32:25-33:6, May 11, 2021); and by referencing various facts allegedly not in evidence during closing arguments. *Id.* at 33:8-34:17.

After careful review of the trial transcript, this Court cannot identify any quote by the prosecution resembling, "If [Petitioner] didn't do it, who did," and Petitioner provides no transcript citation. As for the remaining alleged improper statements, defense counsel made no objections at trial, and Petitioner did not raise these issues on appeal. *Res judicata* applies to petitions for postconviction relief, thus "bar[ring] the relitigation of any issue that could have been litigated in a prior proceeding[.]" Taylor, 821 A.2d at 688; *see also* § 10-9.1-8. Petitioner's failure to raise these issues on appeal forecloses their consideration at this stage. *Accord Jaiman v. State*, 55 A.3d 224, 232 (R.I. 2012).

In any event, "[a] prosecutor is permitted to respond to defense counsel's remarks made during closing argument." *State v. Cavanaugh*, 158 A.3d 268, 278 (R.I. 2017). Here, Mr. Corley reminded the jury to presume Petitioner's innocence, and the prosecution responded by permissibly summarizing the evidence against Petitioner and "reasonable inferences from the record." *Id.* (internal quotation omitted). Mr. Corley further suggested that Shawn Bazinet's testimony was coached, and the prosecution responded in kind by asking the jury to consider evidence that corroborated Shawn's testimony when determining his credibility. Shawn's

credibility as a child eyewitness was critical to the case and, as such, the prosecutor's comments were neither inappropriate nor prejudicial. *See State v. Boillard*, 789 A.2d 881, 886 (R.I. 2002).

(III)(8) & (III)(9): Failure to Disclose or Preserve Exculpatory Evidence

Petitioner claims that the prosecution failed to disclose or preserve various pieces of exculpatory evidence including the "proof sheets," a section of carpet removed from under the victim's body, the victim's undergarments and shirt, and blood samples from the hallway. (Hr'g Tr. 40:19-42:9, Sept. 9, 2021.) Petitioner's only explanation of the exculpatory value of this evidence is that it "could have went toward proving me innocent." *Id.* at 42:7-8.

"A violation of a criminal defendant's due-process right to a fair trial occurs whenever, upon request by a criminal defendant, the prosecutor intentionally or unintentionally suppresses evidence that has a material bearing on questions of guilt or punishment." *State v. Garcia*, 643 A.2d 180, 184 (R.I. 1994) (citing *Brady v. Maryland*, 373 U.S. 83, 87 (1963)). "Even in the absence of a defendant's request, the state has a constitutional duty to disclose any exculpatory evidence." *Id.* "When the failure to disclose is deliberate, this [C]ourt will not concern itself with the degree of harm caused to the defendant by the prosecution's misconduct; we shall simply grant the defendant a new trial." *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 *United States v. Keogh*, 391 F.2d 138, 146-47 (2d Cir. 1968)).

Here, there is no evidence of deliberate suppression or destruction. At a July 21, 1994 evidentiary hearing, Petitioner's attorney stated that he was informed that Ms. Bazinet's clothes were cut off by the emergency worker at the scene and never seized by the police, and the section of rug was also never seized. (Sept. 9, 2021 Hr'g Ex. 5A, Tab 3 (July 21, 1994 Hr'g Tr.) 2:1-9.)

Defense counsel then stated, "I have received the discovery for all of the items requested." *Id.* at 2:8-9. As Petitioner made no further request for "proof sheets" or blood samples and failed to raise these issues on appeal, Petitioner's request for postconviction relief on these grounds is barred by *res judicata*. *Taylor*, 821 A.2d at 688.

Even if this Court were to further consider this issue, Petitioner has failed to demonstrate the exculpatory value of the evidence at issue. "Exculpatory evidence includes evidence that is favorable to an accused and is material to guilt or punishment." *State v. Roberts*, 841 A.2d 175, 178 (R.I. 2003). "'The possibility that [the evidence] could have exculpated [defendant] if preserved or tested is not enough to satisfy the standard of constitutional materiality[.]'" *State v. Werner*, 851 A.2d 1093, 1105 (R.I. 2004) (quoting *Arizona v. Youngblood*, 488 U.S. 51, 56-57 n.* (1988)). "[T]he exculpatory value of the evidence must [have been] 'apparent *before* the evidence was destroyed.'" *Youngblood*, 488 U.S. at 56 n.* (quoting *California v. Trombetta*, 467 U.S. 479, 489 (1984)). As observed in *Youngblood*, evidence that "could" conceivably and speculatively be beneficial to Petitioner does not satisfy the requirement that the exculpatory value be "apparent."

(III)(10): Failure to Properly Investigate the Case

A "prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police," *Kyles v. Whitley*, 514 U.S. 419, 437 (1995); and—more broadly—"[t]he primary duty of a prosecutor is to achieve justice, not to convict." *State v. Powers*, 526 A.2d 489, 494 (R.I. 1987). Petitioner provides no legal authority for his further contention that a prosecutor has a constitutional duty to continue proactive investigation of a case even after he is satisfied that he has probable cause to bring a criminal complaint against a specific defendant and evidence beyond a reasonable doubt to convict that

defendant. In the absence of any legal authority or argumentation in support of this claim, it requires no further consideration by this Court.

Petitioner's Issue IV: Due Process Violations by the Police

Petitioner's Second PCRA identifies eleven categories of evidence summarized in his July 15, 2019 memorandum as being "[p]erjured, [a]ltered[,] and [f]abricated" such that the police violated his right to due process.[6] (Pet'r's Summ. Mem. 3.) In hearings before this Court, Petitioner further asserted these same complaints against: (1) trial counsel as a claim of ineffective assistance in failing to investigate the alleged tampering; (2) the prosecution, in knowingly introducing these tampered items; and (3) the Court, in permitting such introduction. (Hr'g Tr. 57:17-58:10, Sept. 9, 2021.)

No matter how Petitioner frames this issue or against whom it is asserted, the outcome is the same—these evidentiary issues are barred by *res judicata*. *Taylor*, 821 A.2d at 688. The availability through discovery of the bloodstained section of carpet and proof sheets of crime scene photographs is addressed *supra* in the discussion of items (III)(8) and (III)(9). Although these items were not produced to Petitioner, there is no evidence of any deliberate tampering or withholding, nor is there evidence of their apparent exculpatory value. As to the remaining items, defense counsel cross-examined the police at trial about their handling and control of each item, and Petitioner voiced his concerns to the jury about the veracity of the sink trap specifically and the State's evidence generally. *See, e.g.*, Sept. 9, 2021 Ex. 5B, Tab 9 (Trial Tr.) 610:20-22

[6] Petitioner identifies the following categories of evidence: (1) Bathroom Sink Trap, Pipe, and Canister (State's 27A and B); (2) Ceramic Plaque of a Horse (State's 19); (3) Telephone with Blood Spot (State's 20); (4) Bloodstained Section of Carpet; (5) Crime Scene Photographs; (6) Dishtowel (State's 46); (7) Pocketbook (State's 21); (8) Knife (State's 11); (9) Photographs of the Victim (State's 15A-D); (10) Audio Tape from Answering Machine and Transcript (State's 13 and 30); and (11) 911 Audio Tape and Transcript (State's 14 and 31). (Pet'r's Summ. Mem. 3.)

(Petitioner stated during cross-examination, "I'm saying evidence has been fabricated in this case. Evidence has been tampered with in this case. Evidence has been lost and destroyed in this case."); *id.* at 610:7-15 (Petitioner's testimony that his voice could have been imitated in the Coogans' answering machine messages); *id.* at 618:17-619:4 (Petitioner testified that "[t]his is not the same sink trap we viewed July 15, 1993"); *id.* at 626:21-627:5 (Petitioner testified that photographs of the crime scene do not accurately depict the blood at the scene and that there was no blood on the phone on the night of the murder); *id.* at Tab 8 (Trial Tr.) 374:2-22 (defense counsel questioned Detective Sergeant Michael Malloy about fingerprinting the knife); *id.* at Tab 9 (Trial Tr.) 495:24-496:19 (defense counsel cross-examined Det. Harrold about police handling of the ceramic plaque).

The reliability of these items and their evidentiary value is a fact-finding function of the jury that Petitioner could have challenged in his motion for a new trial and on appeal. As a result, this claim is also barred by *res judicata*. *Taylor*, 821 A.2d at 688.

Petitioner's Issue V: Newly Discovered Evidence

Finally, Petitioner claims that he has newly discovered evidence of brainwashing, alienation, and manipulation of Shawn Bazinet, which was revealed to him only in 2005 in *In re Shawn B.*, 864 A.2d 621 (R.I. 2005). In that opinion, the Supreme Court noted that Petitioner's "children were sent to live with relatives initially but then moved in with David and Karen Wyman's family (collectively the Wymans), where they have been living ever since." *In re Shawn B.*, 864 A.2d at 623.

"When conducting the analysis of an application for postconviction relief based on newly discovered evidence, the hearing justice utilizes the same standard used for considering a motion for a new trial due to newly discovered evidence." *Reise v. State*, 913 A.2d 1052, 1056 (R.I. 2007).

> "That standard consists of two parts. The first part of this analysis requires that a postconviction-relief applicant establish that (a) the evidence is newly discovered or available only since trial; (b) the evidence was not discoverable prior to trial despite the exercise of due diligence; (c) the evidence is not merely cumulative or impeaching but rather is material to the issue upon which it is admissible; and (d) the evidence is of a kind which would probably change the verdict at trial. Should an applicant meet this preliminary threshold, the hearing justice must then determine, in his or her discretion, whether or not the newly discovered evidence is sufficiently credible to warrant relief." *Graham v. State*, 229 A.3d 63, 69 (R.I. 2020) (internal citations and quotations omitted).

"In summary the trial justice must find that the new evidence satisfies both the threshold test and the credibility test before the application for postconviction relief may be granted." *McMaugh v. State*, 612 A.2d 725, 732 (R.I. 1992).

Here, Petitioner fails to satisfy the threshold test. The fact that the children were in State custody was known to Petitioner at trial. *See* Sept. 9, 2021 Hr'g Ex. 5B, Tab 9 (Trial Tr.) 683:19-23 (prosecutor stated in closing argument that Petitioner's children were in the custody of the Department of Children, Youth, and Families (DCYF)); *id.* at Tab 8 (Trial Tr.) 320:9-15, 322:10-18 (Detective Sergeant Michael Malloy testified that the children were taken by Michelle Garritt of DCYF on the night of the murder and that Shawn was at a temporary foster home). Further, Petitioner offers this alleged new evidence solely to impeach Shawn's credibility. Finally, Petitioner offers no further evidence that Shawn's placement with the Wymans was for the purpose of, or contributed to, any manipulation or brainwashing.

Evidence of Shawn's foster placement while in DCYF custody was therefore discoverable at the time of trial, goes to an issue of mere impeachment, and likely would not have altered the verdict at trial. *Graham*, 229 A.3d at 69.

IV

Conclusion

For the reasons stated above, this Court finds that Petitioner has failed to meet his burden of establishing by a preponderance of the evidence that postconviction relief is warranted. Accordingly, the remaining claims in Petitioner's Second PCRA are denied.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**Thomas Johnson v. State of Rhode Island**
CASE NO:	**PM-2008-3183**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**December 12, 2022**
JUSTICE/MAGISTRATE:	**McGuirl, J. (Ret.)**
ATTORNEYS:	
For Plaintiff:	**Kara Hoopis Manosh, Esq.**
For Defendant:	**John E. Sullivan, III, Esq.** **Jeanine P. McConaghy, Esq.**