STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: February 2, 2016)

ESTEBAN CARPIO	:	
	:	
v.	:	**PM/12-3716**
	:	**(P1/05-2086 AG)**
STATE OF RHODE ISLAND	:	

DECISION

KRAUSE, J. In this postconviction relief application Esteban Carpio, convicted of murdering a Providence police detective and stabbing an elderly woman, claims that he was victimized by substandard representation by his trial attorney because he did not make a motion for acquittal or file a post-verdict motion for a new trial. Carpio asserts that those omissions cost him the right to argue on appeal what he says was a compelling claim which would have corrected the jury's unfair rejection of his insanity defense.

He is mistaken. For the reasons set forth herein the Court denies his petition.

Facts and Travel

On April 16, 2005, Esteban Carpio stabbed eighty-four-year-old Madeline Gatta with a knife when he attempted to steal her handbag. Suspecting Carpio of that assault, the Providence police brought him to headquarters. He was brought without handcuffs to a conference room, where he was interviewed by Det. James Allen, who openly wore his handgun on his hip. At the outset Carpio gave a false name, denied that he had ever been arrested in his life and said that he had done nothing wrong. When Det. Allen admonished Carpio that he knew his real identity and was aware of his lengthy arrest record, Carpio became agitated and asked Det. Timothy McGann, who was also in the conference room, for some water.

After McGann left the room, Carpio immediately shut and locked the door from the inside. Within moments, Det. McGann heard Det. Allen shout for help, yelling that Carpio was going to kill him. Gunshots followed, and when the locked door was finally forced open, Det. Allen lay dying from two fatal wounds (one in his chest and the other through his forehead) inflicted by Carpio using Det. Allen's weapon. Carpio was gone, having escaped by shooting out a window in an adjoining room, dropping to the lawn below, and fleeing into the Providence night. City, state and federal officers descended upon the city in an all-out manhunt. Eventually, Carpio was apprehended after a violent struggle when an alert taxi driver, who had been dispatched to take a fare to Boston or New York, became suspicious and warned the police.

At his June 2006 trial for murdering Det. Allen and assaulting Mrs. Gatta, trial counsel, Robert L. Sheketoff,[1] interposed an insanity defense after the state had presented a *prima facie* case supporting the substantive charges. No motion for judgment of acquittal was offered under Rule 29, Super. R. Cr. P. The defense then offered two expert witnesses, psychiatrist Dr. Steven Heisel and neuropsychologist Paul Spiers, Ph.D., who opined that Carpio lacked the *mens rea* to commit the charged offenses because he was suffering from severe effects of schizophrenia and could not be held criminally responsible.

In rebuttal, the state presented Professor David Faust, a University of Rhode Island neuropsychologist, and psychiatrist Dr. Martin Kelly of Boston, both of whom concluded that Carpio was a manipulative, antisocial criminal, whose actions were not at all the result of any

[1] Mr. Sheketoff, a Boston attorney, was privately retained by Carpio and entered his appearance via a pro hoc vice application through local counsel, Kirsten Wenge (now O'Brien), a Rhode Island attorney whose participation in the proceedings was minimal. Carpio has not included her in this postconviction relief application, and the terms "trial counsel" or "trial attorney" herein refer only to Mr. Sheketoff.

mental deficiency or defect. The case was submitted to the jury, again without a Rule 29 motion for judgment of acquittal.[2]

The jury rejected the insanity defense and convicted Carpio of first degree murder of Det. Allen; the separate firearm offense of discharging a firearm during a crime of violence resulting in his death; and, assaulting Mrs. Gatta with a dangerous weapon. The Court offered to hear a new trial motion, pursuant to Rule 33 Super. Ct. R. Cr. P., after the Fourth of July holiday. After considering that option, trial counsel sent an email message to the Court on July 5, 2006, stating that he would not file such a motion.[3] On October 6, 2006, this Court sentenced Carpio to two consecutive life sentences (one of them without parole) for murdering Det. Allen and a consecutive twenty-year prison term for the felony assault upon Mrs. Gatta.

The Rhode Island Supreme Court has affirmed Carpio's convictions and denied his request to reduce his sentence of life without parole. State v. Carpio, 43 A.3d 1 (R.I. 2012). The Court refused, however, to consider Carpio's challenge to the sufficiency of the evidence on "the pivotal question in this case - the rejection of the insanity defense," which Carpio conceded (through appellate counsel from the Public Defender's office) "was not properly positioned for appellate review." Id. at 8. Because trial counsel had pressed neither a motion for judgment of acquittal nor a motion for a new trial, the Supreme Court held that under its settled raise-or-waive rule, Carpio had forfeited the opportunity to pursue the sufficiency claim.[4]

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[2] The defendant has never challenged, either in his direct appeal or in his postconviction relief application, the sufficiency of the evidence to support the substantive offenses of murder and felony assault. The principal thrust of his claim has always been aimed at the jury's rejection of his insanity defense.

[3] Counsel's message stated: "I apologize for not writing sooner. I do not intend to file a motion for a new trial at this time. I guess a sentencing date is in order."

[4] The Supreme Court also rejected Carpio's request to adopt a plain error rule in order to consider the sufficiency issue. Carpio, 43 A.3d at 9.

In his application for postconviction relief, Carpio claims that his trial attorney's failure to make those motions deprived him of effective representation. The Court disagrees.

Standard of Review

General Laws 1956 § 10-9.1-1 creates a postconviction remedy "available to any person who has been convicted of a crime and who thereafter alleges either that the conviction violated the applicant's constitutional rights or that the existence of newly discovered material facts requires vacation of the conviction in the interest of justice." DeCiantis v. State, 24 A.3d 557, 569 (R.I. 2011). "An applicant for such relief bears '[t]he burden of proving, by a preponderance of the evidence, that such relief is warranted' in his or her case." Brown v. State, 32 A.3d 901, 907 (R.I. 2011) (quoting State v. Laurence, 18 A.3d 512, 521 (R.I. 2011)). The proceedings for such relief are considered civil in nature. Ouimette v. Moran, 541 A.2d 855, 856 (R.I. 1988) (citing State v. Tassone, 417 A.2d 323 (R.I. 1980)); DePina v. State, 79 A.3d 1284, 1288-89 (R.I. 2013) (citing G.L. 1956 §§ 10-9.1-1; 10-9.1-7).

Ineffective Assistance of Counsel

The benchmark for a claim of ineffective assistance of counsel is Strickland v. Washington, 466 U.S. 668 (1984), which has been adopted by the Rhode Island Supreme Court. LaChappelle v. State, 686 A.2d 924, 926 (R.I. 1996); Brown v. Moran, 534 A.2d 180, 182 (R.I. 1987). Whether an attorney has failed to provide effective assistance is a factual question which a petitioner bears the "heavy burden" of proving. Rice v. State, 38 A.3d 9, 17 (R.I. 2012); Padilla v. Kentucky, 559 U.S. 356, 371 (2010) (noting that Strickland presents a "high bar" to surmount).

When reviewing a claim of ineffective assistance of counsel, the question is whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. Heath v. Vose, 747 A.2d 475, 478 (R.I.

2000). A Strickland claim presents a two-part analysis. First, the petitioner must demonstrate that counsel's performance was deficient. That test requires a showing that counsel made errors that were so serious that the attorney was "not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687; Powers v. State, 734 A.2d 508, 522 (R.I. 1999).

The Sixth Amendment standard for effective assistance of counsel, however, is "very forgiving," United States v. Theodore, 468 F.3d 52, 57 (1st Cir. 2006) (quoting Delgado v. Lewis, 223 F.3d 976, 981 (9th Cir. 2000)), and "a defendant must overcome a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance and sound trial strategy." Hughes v. State, 656 A.2d 971, 972 (R.I. 1995); Gonder v. State, 935 A.2d 82, 86 (R.I. 2007) (holding that a "strong (albeit rebuttable) presumption exists that counsel's performance was competent").

Even if the petitioner can satisfy the first part of the test, he must still pass another sentry embodied in Strickland. He must also demonstrate that his attorney's deficient performance was prejudicial. Thus, he is required to show that a reasonable probability exists that but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S. at 694; Hazard v. State, 968 A.2d 886, 892 (R.I. 2009).

Ordinarily, tactical decisions by trial attorneys do not, even if hindsight proves the strategy unwise, amount to defective representation. "As the Strickland Court cautioned, a reviewing court should strive 'to eliminate the distorting effects of hindsight.'" Clark v. Ellerthorpe, 552 A.2d 1186, 1189 (R.I. 1989) (quoting Strickland, 466 U.S. at 689). "Thus, a choice between trial tactics, which appears unwise only in hindsight, does not constitute constitutionally-deficient representation under the reasonably competent assistance standard."

United States v. Bosch, 584 F.2d 1113, 1121 (1st Cir. 1978); Linde v. State, 78 A.3d 738, 747 (R.I. 2013) ("'[T]actical decisions by trial counsel, even if ill-advised, do not by themselves constitute ineffective assistance of counsel,'" quoting Rivera v. State, 58 A.3d 171, 180–81 (R.I. 2013) and Rice v. State, 38 A.3d 9, 18 (R.I. 2012)).

Although the Supreme Court characterized trial counsel's declination to move for a new trial as "a conscious, and indeed strategic, decision," Carpio, 43 A.3d at 9, that Court only had before it the isolated July 5, 2006 email in which counsel stated, without explication, that he would forego a new trial motion. At the September 2, 2015 hearing on Carpio's postconviction relief application, however, counsel explained that his decisions to forego those motions were not trial strategies; rather, he had eschewed both the Rule 29 and Rule 33 motions because he frankly believed that there was no basis to support either of them. To be sure, he made considered and purposeful choices not to press the motions, but those decisions were not calculated trial tactics or strategic maneuvers designed to assist his client. To the contrary, his decision not to pursue the motions was based upon his genuine belief that they were groundless. At the September 2, 2015 hearing, the following colloquy ensued between Carpio's trial counsel and his court-appointed postconviction relief attorney:

> "Q. [BY MR. MILLEA]: … Did you raise a motion for a judgment of acquittal and/or a motion for a new trial in Mr. Carpio's trial matter?
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> "A. [BY MR. SHEKETOFF]: So I specifically remember that I did not file a motion for a new trial. I've read the Rhode Island Supreme Court decision, so I am refreshed that I did not file a motion for a judgment of acquittal.
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> "Q. And did you read the language on page 10 (sic), and subsequent, regarding the raise or waive rule that we have here in the State of Rhode Island?
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> "A. Yes.
>
> "Q. Back in 2006, or thereabouts, when this trial proceeded . . . were you aware of the raise-or-waive rule?

"A. I would have to say not specifically because reading that decision, I see that Rhode Island does not have a plain error concept, and while I have no real memory of this, that came as a surprise. So I assumed, I guess, that there was a plain error concept in Rhode Island. But I'm generally aware that absent a plain error you have to object to something that goes on at trial if you want to appeal it.

"Q. And did you, on your own behalf and as counsel for Mr. Carpio back in 2006, make a strategic decision to not raise this motion or was it just done because you weren't aware that it was—would have fallen under the raise-or-waive rule?

"A. So it's hard to answer that answer yes or no. I did not believe I had a meritorious motion for judgment of acquittal so I didn't file it, and if that was a mistake, it was a mistake. But it wasn't because of lack of knowledge of procedure. It was a decision that it was not meritorious.

"Q . . . [W]ould you have termed it a frivolous motion in your terms?

"A. I'm not sure I would call it a frivolous motion, but I personally didn't think it had merit. I mean, the way the case proceeded is the government put on its case, and they certainly are over the rail on whether or not my client committed a murder, and so I'm not going to file a motion for judgment of acquittal then. Then I put on an insanity defense and the State responds with their own expert witness and their evidence. And it was my view, right or wrong, that unless I could say, as a matter of law, no reasonable juror could conclude that he was not insane or did not meet the standard, then I don't have a motion for judgment of acquittal. So it's a decision that I made which, you know, depends on your view of the law.

"Q. And in that same respect and based on that same answer, what was your reason for not filing or not pursuing a motion for new trial?

"A. Well, it's been my view that you file a motion for a new trial if you have some issue that you want to raise, that you think is meritorious, that you'd like a trial judge to address before you go up on appeal. And I couldn't figure out an issue that I wanted raised, so I didn't file one."

On cross-examination by the prosecutor, further inquiry of trial counsel included the following dialogue:

"Q. [BY MS. McCONAGHY]: You were aware of the standard that the Court would employ if you were to file a motion for a judgment of acquittal, correct?

"A. Correct.

"Q. And you were also aware of your obligation as a member of the Bar to not file motions that are frivolous or that in your opinion are meritorious?

"A. I – there's – there's a gap between meritorious and frivolous. I mean, so have I ever filed a motion for judgment of acquittal where I personally thought it's extremely likely it's going to be denied, but there's a potential issue there that someone might disagree with me? Sure. But I just didn't see an issue here.

"The state had an expert who said that he did not meet the legal standard of lack of criminal responsibility. And the State's case in chief clearly met that standard of sufficient evidence to get over the rail. So, you know – so, I mean, I was either right or wrong. This wasn't a strategic decision. It was, there actually was a motion that should have been filed and I missed it or, you know, I was correct in my assessment that there was no legitimate motion.

"Q. And you made the decision not to file the judgment of acquittal based on your assessment of the case that the State had presented, correct?

"A. Correct.

"Q. And you made that decision based on your, at the time, 34 years of experience as a criminal attorney, correct?

"A. I did. But the Supreme Court, unfortunately, tells me oftentimes I'm often wrong.

"Q. And you made that decision based on your experience nonetheless.

"A. I did. It was a decision based on my training, background and experience.

"Q. And regarding the new trial, you made the decision not to file that because you felt there wasn't a meritorious issue, again, based on the evidence during the trial, correct?

"A. Correct." (Tr. at 8-14, Sept. 2, 2015)[5]

Trial counsel believed, quite correctly, that there was no purpose in filing a Rule 29 motion for judgment of acquittal, which sets a high bar for a defendant, as it obliges a trial justice

[5] Trial counsel's decisions not to pursue the Rule 29 and Rule 33 motions were not born of naiveté or inexperience in the criminal arena. He is an experienced defense attorney, having tried and argued on appeal scores of cases throughout the country for forty years, including 100 murder cases, several insanity trials and a death penalty case in Florida. Tr. at 6, 13, 15-19, Sept. 2, 2015.

to "view the evidence in the light most favorable to the state, according full credibility to its witnesses, and [drawing] 'all reasonable inferences consistent with guilt.'" State v. Abdullah, 967 A.2d 469, 474 (R.I. 2009) (quoting State v. Day, 925 A.2d 962, 974 (R.I. 2007)). If a reasonable juror, under that skewed standard, could find the defendant guilty beyond a reasonable doubt, the motion must be denied. Id.

At the close of all of the evidence, the state and defense experts, all of whom were well-credentialed, had offered markedly different opinions on the issue of Carpio's criminal responsibility. Trial counsel was well warranted in concluding that under the arduous Rule 29 test and the contrary evidence presented by the prosecution, no trial judge could have justifiably jettisoned the state's case. See State v. Norman, 507 N.W.2d 522, 525 (N.D. 1993):

> "[Defendant] did not dispute that he fired the shots that killed Pamela; rather, his defense was that he lacked criminal responsibility for his actions. At the conclusion of the State's case it was obvious that the State had presented a prima facie case in support of the class AA felony murder charge against [defendant]. Therefore, we conclude that trial counsel's failure to move for judgment of acquittal at the close of the State's case did not fall below reasonable standards of practice so as to constitute ineffective assistance of counsel."

See United States v. Greer, 440 F.3d 1267, 1272 (11th Cir. 2006) (holding that counsel's failure to move for judgment of acquittal "did not matter" because the government had presented sufficient evidence to convict Greer and "[h]is conviction would have been upheld even if there had been a timely acquittal motion"); United States v. Allen, 390 F.3d 944, 950 (7th Cir. 2004) (rejecting an ineffective assistance claim which targeted counsel's failure to renew a motion for acquittal, because the evidence was sufficient to support a conviction).

The test in the context of a Rule 33 new trial motion is more stringent than that of a Rule 29 motion for judgment of acquittal. When considering a new trial motion, the trial judge acts as a so-called thirteenth juror and, in light of the jury charge and exercising independent judgment

of the credibility of witnesses and the weight of the evidence, must determine whether he or she would have reached a different result. If the trial justice concludes that reasonable minds could differ, or if the court reaches the same conclusion as the jury did, the motion will be denied and the verdict affirmed. The new trial motion only has legs if the trial justice disagrees with the verdict and does not believe that reasonable minds could differ, to the point that the verdict is against the fair preponderance of the evidence and fails to do substantial justice. State v. Silva, 84 A.3d 411, 416-17 (R.I. 2014).

It is apparent from the September 2, 2015 hearing that trial counsel erroneously assumed that the Rhode Island Supreme Court, like many other jurisdictions, including his home state of Massachusetts, embraced a plain error rule as a safety net for significant missteps not addressed by the trial court. Although trial counsel certainly knew that "absent a plain error, you have to object to something that goes on at trial if you want to appeal it," Tr. at 9, he was apparently not aware that a failure to move for a new trial would, because of the absence of a plain error rule in Rhode Island, thereby waive a sufficiency issue on appeal.[6] Whether that miscue constituted deficient representation under the first prong of Strickland need not be immediately explored.

The Court will, instead, address the second component of Strickland's bipartite test, which requires a petitioner to demonstrate the prejudice of counsel's alleged deficiency. After all, if Carpio falters on either one of Strickland's hurdles, that failure dooms an ineffectiveness

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[6] This Court is well satisfied from trial counsel's explanation for not filing a new trial motion that he was not engaging in "sandbagging" or gamesmanship – *i.e.*, remaining silent and withholding the motion so that Carpio could later raise the issue on appeal under a plain error theory. See Puckett v. United States, 556 U.S. 129, 134 (2009). "If there is a lawyer who would deliberately forgo objection *now* because he perceives some slightly expanded chance to argue for 'plain error' *later,* we suspect that, like the unicorn, he finds his home in the imagination, not the courtroom." Henderson v. United States, ___ U.S. ___, 133 S. Ct. 1121, 1129 (2013) (emphasis in original).

claim. Hazard, 968 A.2d at 892. "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." Strickland, 466 U.S. at 697; accord Barbosa v. State, 44 A.3d 142, 146 (R.I. 2012); Grayson v. Thompson, 257 F.3d 1194, 1225 (11th Cir. 2001).

Accordingly, if Carpio cannot show that a reasonable probability exists that but for his trial attorney's alleged deficiency, the result of the proceeding would have been different, i.e., that he is entitled to a new trial, his postconviction claim fails. Strickland, 466 U.S. at 694; Hazard, 968 A.2d at 892.

The Insanity Defense

In State v. Johnson, 121 R.I. 254, 399 A.2d 469 (R.I. 1979), Rhode Island adopted the Model Penal Code's (MPC) standard by which to determine whether a defendant ought to be shielded from criminal responsibility because of mental instability:

> "A person is not responsible for criminal conduct if at the time of such conduct, as a result of mental disease or defect, his capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law is so substantially impaired that he cannot justly be held responsible.
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> "The terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct." Johnson, 121 R.I. at 267, 399 A.2d at 476.

An insanity trial is one of the few instances in our criminal jurisprudence when a defendant is obliged to shoulder the ultimate burden of proof. Unquestionably, the state has a responsibility to prove, beyond a reasonable doubt, all of the elements of the substantive offenses charged, but in order to shield himself from criminal responsibility, the defendant bears the burden of proving, by a fair preponderance of the evidence, that he meets the MPC insanity test. State v. Collazo, 967 A.2d 1106, 1111 (R.I. 2009). "The fact that a defendant engaged in unusual behavior or made bizarre or delusional statements does not compel a finding of insanity,

and a defendant may suffer from a mental illness without being legally insane." State v. Barrett, 768 A.2d 929, 938 (R.I. 2001). Although the state may, and typically does, present testimony to rebut the defendant's evidence, it is not obliged to disprove the defendant's assertions as it would, say, in a self-defense case. See State v. Urena, 899 A.2d 1281, 1288 (R.I. 2006) (burden of persuasion is on the prosecution to negate self-defense claim beyond a reasonable doubt).

Insanity trials are typically balanced on a fulcrum of expert testimony. "Ideally, psychiatrists - much like experts in other fields - should provide grist for the legal mill, should furnish the raw data upon which the legal judgment is based. It is the psychiatrist who informs as to the mental state of the accused - his characteristics, his potentialities, his capabilities." State v. Gardner, 616 A.2d 1124, 1127 (R.I. 1992) (quoting Johnson, 121 R.I. at 266-67, 399 A.2d at 476, quoting United States v. Freeman, 357 F.2d 606, 619-20 (2d Cir. 1966)). In the end, however, it is society as a whole, through the factfinders, whether jury or judge, who ultimately determines if the defendant should be held accountable for his criminal acts. Id. By adopting the MPC standard, "this Court recognized that '[t]he greatest strength of our test is that it clearly delegates the issue of criminal responsibility to the jury, thus precluding possible usurpation of the ultimate decision by the expert witnesses.'" Carpio, 43 A.3d at 11 (quoting Johnson, 121 R.I. at 267-68, 399 A.2d at 476).

* * *

After a two week trial, much of which was consumed by the testimony of mental health professionals, the jurors rejected Carpio's insanity defense. They were well justified in doing so. It is the view here that by the time Professor Faust and Dr. Kelly had concluded their forceful testimony, Carpio's fate was foreordained.

Professor Faust pointed out flawed methods by which Dr. Spiers had administered and scored various diagnostic tests which Carpio took, including the Minnesota Multiphasic Personality Inventory, Second edition (MMPI-2), which he labeled "probably the most informative" diagnostic means of determining whether a test taker is malingering or minimizing.[7] The test was, in Professor Faust's view, the "core piece of information" among the battery of psychometric tests administered, but Carpio was inappropriately left alone, unmonitored and unobserved by a qualified professional when he took it. Faust deemed that an unacceptable practice, which was significantly compounded by unreliable scores resulting from Dr. Spiers' mistaken reliance on an obsolete (by almost ten years) scoring manual. When Professor Faust examined the test answers under the proper scoring method, the results vaulted Carpio into the unacceptable range of test takers who attempt to feign mental disorders.

Dr. Kelly, a psychiatrist from Boston's Brigham and Women's Hospital with several impressive years of forensic psychiatry and courtroom expertise in criminal responsibility cases, criticized the notion that Carpio was suffering from a mental disease or defect at the time of the events. He spotlighted Carpio's reasoned thought processes and actions before, during and after he had committed the offenses and found them entirely inconsistent with mental illness. Spotting Det. Allen's handgun, and realizing that his lies about his identify and criminal history offered him no advantage, Carpio locked the door when Det. McGann left, wrested Det. Allen's weapon, shot him, and then chose the most favorable exit strategy. Avoiding hallways filled with police officers and using Det. Allen's gun, he shot out a window in an adjoining room which offered a grassy, and safer, landing area than all of the other windows, which overlooked cement and more precarious drops.

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[7] See State v. Gardner, 616 A.2d 1124, 1129-31 (R.I. 1992) (noting that the MMPI has been a widely used and reliable test since 1939).

He then headed directly to the residence of Harmony Boise, a trusted friend. He purposely did not tell her what he had just done and persuaded her to call a taxi to take him out of Rhode Island. That kind of cognitive awareness and structured thought process does not reflect a man in the throes of a psychotic episode. See Barrett, 768 A.2d at 934, 937. Indeed, the Supreme Court, in rejecting Carpio's request to reduce the sentence of life without parole, also emphasized that Carpio's carefully orchestrated actions - from the time he stabbed Mrs. Gatta to his calculated escape from the police station - did not demonstrate mentally unstable conduct. Carpio, 43 A.3d at 14. See page 16, *infra.*

After studying the police, medical and defense experts' reports, and having interviewed hospital staff as well as Carpio himself on two occasions, Dr. Kelly came away well convinced that Carpio's misconduct stemmed not from mental illness but from his abuse of controlled substances, his antisocial and criminal behavior, along with life's general stresses. He, like Professor Faust, also assessed Carpio as a manipulative malingerer, noting that he exhibited no disturbance in his thought processes or cognition, unlike real schizophrenics, who cannot organize their thoughts in a logical or sequential manner. Also significant to Dr. Kelly was Carpio's lack of reaction to medications which target psychotic conditions. Patients who truly suffer from those conditions, he said, exhibit responses to such prescriptions; Carpio displayed none.

Dr. Kelly also exposed, as fictional, Carpio's assertions that the hallucinations and voices, which he claimed to see and hear sporadically, caused him to think he was insane. He explained that individuals with mental illness, particularly those with the schizophrenia condition which the defense witnesses had assigned to Carpio, have no self-diagnostic perception and do not believe that they are delusional or hear voices; rather, Dr. Kelly explained, true

schizophrenics resolutely believe that they are not delusional and that the voices they hear are very real.

If all of those objurgations of Carpio's supposed mental illness were not enough to convince a factfinder to reject Carpio's insanity defense, Dr. Kelly also pointed to a letter Carpio had written from prison to his friend Ms. Boise, whose assistance he sought immediately after having escaped from the police station. In that letter Carpio complained of his confinement conditions: "23 hours lockdown and still no privileges. This shit is a bitch." He then added a quietus: "I sound crazy but I'm not crazy." [8]

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Carpio's claim that trial counsel's failure to file a new trial motion prevented the Supreme Court from examining his insanity defense is inaccurate. Carpio proffered the same mental health arguments which he espoused during the criminal responsibility phase of the trial as professed mitigation factors on direct appeal in support of his sentence reduction.[9] The Supreme Court conducted what it described as "a measured and independent" examination of the record, including a careful review of Carpio's mental health condition in the context of its de novo review of Carpio's life without parole sentence. Carpio, 43 A.3d at 13, 15. It is clear that the Supreme Court, like the jury and this trial Court, was notably unimpressed by Carpio's

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[8] Even if Carpio had displayed mental aberrations on prior occasions, as suggested by the defense witnesses, Dr. Kelly was convinced that the instant criminal conduct was not a result of any such disorder. This Court agrees. See Barrett, 768 A.2d at 937, where the Supreme Court acknowledged one psychiatrist's aphorism that "not all crazy people are crazy all the time."

[9] Carpio's September 2, 2010 Brief on Appeal, at pp. 92-96, and his October 4, 2011 Reply Brief, at pp. 16-20. See G.L. 1956 § 12-19.2-5, which allows a defendant to request the Supreme Court to review a trial court's imposition of a sentence of life without parole: "In considering an appeal of a sentence [of life imprisonment without parole], the court, after review of the transcript of the proceedings below, may, in its discretion, ratify the imposition of the sentence of life imprisonment without parole or may reduce the sentence to life imprisonment."

insanity defense. The Court first acknowledged, at page 14 of its decision, that Carpio was "an offender who abused drugs and has a history of violent crime." Then, parsing Carpio's conduct and considering Dr. Kelly's opinion with favor, the Court remarked:

> "In passing on the evidence in this case, the jury was required to assess defendant's mental state in light of the expert testimony presented; the jury found that defendant did not suffer from a mental disease or defect that would have warranted a finding of not guilty by reason of insanity."
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> "A fair reading of the transcript discloses Carpio's calm, calculated, and often cunning behavior throughout that fateful day - including his several conscious efforts to escape and evade arrest. From the time he placed a hat and a scarf over his face to conceal his identity before attacking Mrs. Gatta, until he ran from the cab driver, Carpio acted shrewdly and decisively. His mental prowess also was manifest when, after assaulting Mrs. Gatta, he exchanged the red van - the getaway vehicle - for another vehicle, indicating that he was aware of his wrongful conduct and that he deliberately tried to evade apprehension. The defendant repeatedly lied to police about his identity and criminal history. His sly request for a drink of water in order to cause Det. McGann to be absent from the conference room, as well as his savvy escape from police headquarters, also are noteworthy. After locking the door from the inside and shooting Det. Allen, Carpio had three possible means of egress; the first two options, running into the hall where many armed officers were waiting or jumping four stories from the conference room window onto concrete, would have led to capture or severe injury, whereas the third option—shooting out the window of the adjoining office and jumping onto a grassy surface—afforded a slightly safer getaway."
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> "Additionally, Dr. Kelly's testimony, which the trial justice relied on, revealed that there was no evidence that defendant suffered a mental defect or disease that interfered with his thought process. Doctor Kelly concluded that Carpio 'did not have a mental disease which substantially impaired his capacity to conform his conduct' and that his behavior was 'not the type of behavior one would expect of someone who is acutely in the throes of a mental illness.'" Carpio, 43 A.3d at 14-15.

The Supreme Court's close analysis of Carpio's mental prowess and his considered conduct - variously described by the Court, *inter alia,* as calculated, cunning and shrewd - together with its approbation of Dr. Kelly's assessment, negate Carpio's complaint that the merits of his insanity claim were never examined on appeal. To the contrary, it is evident that

they were scrutinized and found thoroughly lacking. Indeed, Carpio's deliberative conduct is reflective of other such cases where a defendant's measured and cogent behavior has disaffirmed a professed defense of mental incapacity. Barrett, 768 A.2d at 937 (observing that immediately prior to and after the shooting, the defendant had behaved with a degree of composure and had displayed the presence of mind and ability to avoid detection); State v. Jimenez, 882 A.2d 549, 556 (R.I. 2005) (noting that "the record is replete with concrete examples of defendant's ability to act in a rational and purposeful manner at all relevant points in time").

Accordingly, trial counsel's omission in not filing a new trial motion was harmless. Had the motion been filed, this Court most assuredly would have denied it, and trial counsel was keenly, and correctly, aware that there was no basis or merit in pursuing the motion. Tr. at 10-11, 15, Sept. 2, 2015. Where, as here, it would be futile to pursue a new trial motion, its omission, whether by inadvertence or by design, is of no moment under Strickland. See United States v. Tawik, 391 Fed. Appx. 94, 98 (2nd Cir. 2010) (holding that "it can hardly constitute ineffective assistance to fail to present a claim via a Rule 33 motion that [ ] is without merit," quoting United States v. Castillo, 14 F.3d 802, 805 (2nd Cir. 1994)); United States v. Banks, 405 F.3d 559, 568-69 (7th Cir. 2005) (Looking at "the substantive record as a whole," and finding "nothing warranting a new trial, we do not believe that [defendant] was prejudiced by his counsel's failure to file the motion."); Jacobs v. Sherman, 301 Fed. Appx. 463, 470 (6th Cir. 2008) (holding that where there was sufficient evidence supporting a finding of guilt, "failing to make a futile motion is neither unreasonable nor prejudicial" under Strickland).

In the end, the jury was left with widely divergent opinions: the defense witnesses' conclusion that Carpio suffered from a significant schizophrenic disorder which fell within the MPC standard and insulated him from criminal responsibility; and, the state's experts, who

found Carpio to be a significantly antisocial criminal and a malingerer, well outside of the protection of the MPC shield. "In this case it is perfectly obvious that the trial jurors opted to accept the opinion testimony offered by [the state's expert] and to reject in great part the opinion testimony proffered by [the defendant's experts]. That was the trial jury's choice to make." Barrett, 768 A.2d at 938. Credibility determinations are, after all, quintessentially within the exclusive province of the jurors, and their appraisals "will 'not be lightly questioned by this [C]ourt.'" State v. DiCarlo, 987 A.2d 867, 872 (R.I. 2010), quoting Almeida v. Red Cap Constr., Inc., 638 A.2d 523, 524 (R.I. 1994). Moreover, our Supreme Court has been especially respectful of the difficult assessments which jurors have been obliged to make in criminal responsibility cases.

> "Whether a defendant lacks criminal responsibility due to a mental illness is a question of fact, the determination of which we give considerable deference to the fact-finder. '[T]he insanity defense place[s] great burdens on the trier of fact . . . . [I]t ask[s] the factfinder to look into the psyche of the defendant and discern its innermost workings. It is a most difficult assignment. As an appellate court with only the cold, lifeless record to guide us, we naturally defer to the trier of fact who heard the witness' tone of voice, saw their facial expressions and presumably caught the trial's subtleties – all of which may be lost in the written word.' . . . 'In determining the issue of responsibility the jury has two important tasks. First, it must measure the extent to which the defendant's mental and emotional processes were impaired at the time of the unlawful conduct. The answer to that inquiry is a difficult and elusive one, but no more so than numerous other facts that a jury must find in a criminal trial. Second, the jury must assess that impairment in light of community standards of blameworthiness. The jury's unique qualifications for making that determination justify our unusual deference to the jury's resolution of the issue of responsibility.'" Collazo, 967 A.2d at 1110 (citations and ellipses omitted).

Plainly, the jury in this case was persuaded by the facts as well as the compelling testimony of the state's experts. It is the view here that no fair-minded observer of this trial could have rationally reached a different conclusion.[10]

* * *

Lastly, this Court adds a post script. Trial counsel was personally selected and retained by Carpio. Disparagement of one's retained attorney has not been met with approbation by our Supreme Court. "[C]hallenges to the performance of private counsel in post-conviction relief proceedings rarely succeed, and when a person selects his or her own attorney, any alleged deficiencies seldom amount to an infringement of one's constitutional rights." Hassett v. State, 899 A.2d 430, 434 n.3 (R.I. 2006). Accord Brown v. State, 964 A.2d 516, 527 n.15 (R.I. 2009); Vorgvongsa v. State, 785 A.2d 542, 549 (R.I. 2001).

Unless trial counsel's efforts are "so lacking that the trial has become a farce and a mockery of justice" (most certainly not the case here), "rarely, if ever, following conviction has any federal or state court permitted a defendant who has been represented by private counsel to later question, in post-conviction proceedings, the ineffectiveness or inefficiency of the trial counsel that the defendant chose and selected to represent him or her at trial." State v. Dunn, 726 A.2d 1142, 1146 n.4 (R.I. 1999).

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[10] As trial counsel himself acknowledged at the September 2, 2015 hearing, the insanity defense is (and has historically been) "the defense of absolute last resort." Tr. at 19. "Prosecutors and defense attorneys generally recognize that insanity is a defense of last resort that betokens an otherwise weak defense and that rarely succeeds." Stephen J. Morse, Excusing the Crazy: The Insanity Defense Reconsidered, 58 S.Cal.L.Rev. 777, 797 (1985). See United States v. Webster, 649 F.2d 346, 351-52 (5th Cir. 1981) (equating the defense of entrapment to that of insanity: "a defense of last resort, employed when all else is hopeless"); State v. Scott, 49 La. Ann. 253, 258, 21 So. 271, 273 (La. 1897) ("the last resort of desperate criminals"); State v. Hurst, 39 P. 554, 555 (Idaho 1895) ("the last refuge – the plea of insanity").

In all, Carpio has failed to present evidence which sufficiently overcomes his "prodigious burden" of demonstrating that even if his attorney's efforts were somehow substandard (and this Court expressly finds that they were not), the result would have been different. Evans v. Wall, 910 A.2d 801, 804 (R.I. 2006). Trial counsel provided Carpio with as able a defense as possible in the face of overwhelming factual circumstances and compelling, contradictory expert opinions which dislocated his insanity defense.

A review of the record in this case leads this Court to the same conclusion which the Supreme Court reached in Anderson v. State, 878 A.2d 1049, 1050 (R.I. 2005): "The conviction in this case was not a result of petitioner's attorney but, rather, the weight of the credible evidence against [him]."

The within application for postconviction relief is denied.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**Carpio v. State of Rhode Island**
CASE NO:	**PM/12-3716 (P1/05-2086 AG)**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**February 2, 2016**
JUSTICE/MAGISTRATE:	**Krause, J.**
ATTORNEYS:	
For Plaintiff:	**Christopher T. Millea, Esquire**
For Defendant:	**Jeanine McConaghy, Esquire**