STATE OF RHODE ISLAND

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: December 27, 2022)

LEON BROWN	:	
	:	
v.	:	**C.A. No. PM-2017-1904**
	:	
PATRICIA A. COYNE-FAGUE[1] [2]	:	

DECISION

MCGUIRL, J. (Ret.) Before this Court is Petitioner Leon Brown's (Petitioner) Application for Postconviction Relief (Application), challenging several aspects of his conviction and sentencing. Petitioner filed his Application *pro se* and was thereafter appointed counsel to assist in the prosecution of his claims.[3] Jurisdiction is pursuant to G.L. 1956 § 10-9.1-1.

[1] Consistent with Rule 25(d) of the Superior Court Rules of Civil Procedure, Defendant Ashbel T. Wall, II has been substituted with Defendant Patricia A. Coyne-Fague as the current successor in office. *See Benson v. McKee*, 273 A.3d 121, 121 n.1 (R.I. 2022).

[2] Petitioner initially sued Ashbel T. Wall, II in his capacity as Director of the Department of Corrections, as well as Mark Trovato, a prosecutor for the State of Rhode Island. *See* Docket PM-2017-1904. Attorney Trovato has not been mentioned in the body of the Application, none of the allegations in the case concern him, he could not provide the requested relief, and he has not been served as is required under Rule 4(l) of the Rhode Island Rules of Civil Procedure. For these reasons, the Court dismisses Defendant Mark Trovato from the case. *See id.* (allowing the Court to dismiss for improper service on its own motion).

[3] *See generally* Appl. (*pro se* petition); *see also* PM-2017-1904, Apr. 24, 2018 Hr'g on Mot. to Appoint; Apr. 24, 2018 Entry of Appearance.

I

Facts and Travel

A

Trial

The facts underlying Petitioner's conviction and sentencing are set out in *State v. Brown*, 9 A.3d 1232 (R.I. 2010), the Supreme Court's decision affirming Petitioner's conviction and sentence on direct appeal. On August 14, 2004, fourteen-year-old Luis D. attended a birthday party on Public Street in Providence, and, during the party, he went to the corner store to get a snack. *Id.* at 1234-35. On his way out of the store, Luis D. saw three people, including Petitioner, whom he recognized. *Id.* at 1235. As Luis D. was walking around the corner, Petitioner grabbed him by the neck, and when Luis D. asked what he was doing, Petitioner replied, "[d]on't fuck with my family." *Id.* Luis D. later woke up to find himself on the sidewalk bleeding from his head, surrounded by two police cars, an ambulance, and various party guests. *Id.* Luis D. later testified at trial that, upon regaining consciousness, he immediately noticed that his ring and gold chain, both of which he had been wearing that day, were missing.[4] *Id.*

An ambulance transported Luis D. to the hospital, where he was treated for head injuries. *Id.* Upon leaving the hospital, he went to the police station and told the police that "Boogie Brown" attacked him. *Id.* He identified Petitioner from some photos the police showed him. *Id.*

Officer Frank Newton was dispatched to the area of Public Street in Providence in

[4] Luis D.'s testimony was unclear as to how many rings and chains he was wearing at the time, and how many were missing. *State v. Brown*, 9 A.3d 1232, 1235 n.4 (R.I. 2010); *see also id.* at n.5.

response to a 911 call, taking approximately fifteen seconds to arrive, and that upon arrival he saw "'a Spanish male standing up,'" with glassy eyes and blood on the back of his head. *Id.* Officer Newton later testified at trial that the injured male told him that someone had come up behind him and picked him up, causing him to hit the ground and pass out, and that he was missing two necklaces and a ring. *Id.*

Pedro Gutirrez, a clerk at the corner store, testified that he was behind the counter when he heard banging and saw items falling off the shelves. *Id.* He went outside and saw Petitioner hitting a child against the wall and saw Petitioner drop the child on the ground, grab him, bang him against the floor, and then hit him on the head several times with his shoes. *Id.* Gutirrez attempted to push Petitioner off of the child because he thought Petitioner was going to kill the child, which prompted Petitioner to ask Gutirrez if he wanted to fight. *Id.* Gutirrez replied that he did not wish to fight but did not want Petitioner to kill the child, who was unconscious. *Id*. Gutirrez ran back into the store for a knife because Petitioner was chasing him, and Gutirrez testified that Petitioner said, "I'll get you." *Id.*

Three days later, Officer Jose Deschamps was on patrol on Broad Street in Providence when he and his partner saw Petitioner and recognized him as having a warrant out for his arrest for an alleged robbery. *Id.* at 1236. When Officer Deschamps and his partner attempted to arrest him, Petitioner resisted by fighting them off and yelling obscenities. *Id.* Before the officers could tell Petitioner why he was being arrested, he blurted out that he didn't rob anyone. *Id.*

On November 23, 2004, a grand jury indicted Petitioner for first-degree robbery, simple assault of a police officer, and resisting arrest. *Id.* at 1234. He entered a not guilty

plea at his arraignment in Superior Court on February 4, 2005. *Id.* Twelve days later, on February 16, 2005, he received notice that he was subject to an added habitual criminal sentence under G.L. 1956 § 12-19-21. *Id.*

At his December 2006 trial, Petitioner was found not guilty of robbery, *see* G.L. 1956 § 11-39-1, but was found guilty of the lesser-included offense[5] of felony assault with a dangerous weapon, *see* G.L. 1956 §§ 12-17-14 and 11-5-2, simple assault of a police officer, *see* § 11-5-3, and resisting arrest. *See* G.L. 1956 § 12-7-10 and *Brown*, 9 A.3d at 1236.

B

Sentencing

During the May 18, 2007 sentencing hearing, Petitioner's counsel, Joseph DeCaporale, argued that (1) the facts did not support the State's theory of the case, *see* Appl. Ex. A (Tr.) at 306, (2) Petitioner was entitled to leniency, *id*. at 313, and (3) the State's proposed sentence was unreasonable. *See id.* Petitioner made a statement challenging witness accounts of the incident, and expressing contrition. *Id.* at 314.

In support of the State's recommended sentence, *id.* at 308-311, the prosecutor emphasized (1) the severity of the crime, *id.* at 308-309, (2) the age of the victim (fourteen) and the age of Petitioner (forty-two or forty-three) at the time of the assault, *id.* at 309, (3) the fact that Petitioner had attacked the victim and left him "unconscious on the street corner in the middle of the day," *id.* at 309, and (4) Petitioner's criminal record. *Id*. at 310-311.

[5] *See Brown v. Ohio*, 432 U.S. 161, 168 (1977) (defining the term "lesser-included offense") ("As is invariably true of a greater and lesser included offense, the lesser offense [] requires no proof beyond that which is required for conviction of the greater [offense].")

In sentencing Petitioner, the Court weighed sentencing factors[6] such as Petitioner's history, the nature of the crime, and Petitioner's prospects for rehabilitation. *See id.* at 313-319. The Court explained that the jury's verdict was consistent with the evidence. *See id.* at 314.[7]

The Court addressed Petitioner, stating:

> "I don't think you've gone a year or two years without being charged with a crime since you were 18 years old. I'm supposed to be looking at that as far as rehabilitation, remorse. . . . I'm looking at the contacts. You've had contact with the police almost every year you have been an adult you have been in jail. You know, you go to jail for rehabilitation, I'm not sure I see that you're getting rehabilitated or getting any help. You just seem to be getting out and committing new offenses." *Id.* at 314:25-315:13.

The Court continued, stating:

> "The history of [Petitioner] with respect to his contacts with the police, the first one I have is 56 contacts . . . [h]e has seven felony convictions as I count them. . . . I mean the record alone, the convictions he has, alone, and the contact over and over again for a long period of time certainly is enough to put this case way outside the guidelines. This is the third felony type assault upon which he is being sentenced[.]" *Id.* at 317:13-318:24.

Addressing the nature of the crime, the Court stated, "You certainly attacked him. . . . He was 14 years old. You were 42 years old. . . . I think the jury's verdict with respect to the robbery versus felony assault was a correct verdict. . . . it was a brutal attack[.]" *Id.* at 315:24-316:23.

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[6] *See State v. Coleman*, 984 A.2d 650, 655 (R.I. 2009) ("In formulating a fair sentence, a trial justice considers various factors including the severity of the crime, the defendant's personal, educational, and employment background, the potential for rehabilitation, social deterrence, and the appropriateness of the punishment.") (citation and internal quotes omitted).

[7] "The jury found, I think, properly based on the evidence before it, there was not sufficient evidence to find the defendant guilty of a robbery charge. Whether or not he pulled the jewelry off and took the ring, which would have constituted the robbery charge is not here before the Court, because that wasn't found. What we basically have is a felony assault, different versions of it." Appl. Ex. A (Tr.) at 314:2-9.

The Court sentenced Petitioner to twenty years on Count I, one year on Count II, to run concurrently with Count I, *see* Appl. Ex. B. at 1, and one year on Count III, to run concurrently with Counts I and II. *See id.* In sentencing Petitioner, the Court emphasized the violent nature of the attack, (Appl. Ex A (Tr.) at 316), Petitioner's voluminous criminal record, which included numerous convictions for like conduct, *id.* at 316-19, and the seemingly poor prospects for Petitioner's rehabilitation. *Id.* at 315.[8]

After sentencing Petitioner for the crimes of which he was convicted, the Court continued the sentencing to June 14, 2007 to hold a separate hearing on the question of whether to sentence Petitioner as a habitual offender. *See id.* at 321-325; *see also* § 12-19-21. After hearing argument from the parties, the Court sentenced Petitioner to ten years as

[8] In a separate proceeding, a probation violation hearing that took place before Petitioner's trial, the hearing justice ruled that the same course of conduct with which Petitioner was charged in the 2006 case constituted a violation of the terms of Petitioner's probation stemming from his 1991 case. Petitioner was on probation for five prior convictions at the time. The hearing justice imposed fifteen years for violation of one of the probation terms, which was ordered in P2-1991-1599A, for assault with the intent to commit a specified felony. *See Brown*, Docket Sheet No. 2006-137-C.A. at 3; *see also* Docket Sheet P2-1991-1599A; § 11-5-1; Presentence Report, Criminal History Record, Docket Sheet Entry #23 (P2-1991-1599A, Assault with Intent to Murder, noting a 198-month suspended sentence); Appl. Ex. A (Tr.) at 318 (noting an assault with intent to commit murder sentence that was issued in 1993 with a sentence of twenty years, forty-two months to serve and the remainder suspended); Feb. 16, 2005 Probation Hr'g (hearing justice finding that Petitioner failed to "keep the peace and good behavior" as required by his conditions of probation in his 1991 sentence); *State v. Brown*, Docket Sheet No. 2006-137-C.A. 1-3 (denying Petitioner's appeal, which argued that the Superior Court improperly revoked his probation). Petitioner had received a suspended sentence as punishment for the crime that he was convicted of in P2-1991-1599A, but he was allowed to avoid serving the sentence as long as he followed certain conditions. *See id.* Because the hearing justice found by a preponderance of the evidence that Petitioner attacked the fourteen-year-old boy and, in doing so, violated his conditions of probation, he required Petitioner to serve fifteen years of the suspended 1991 sentence. *See id.* When this Court sentenced Petitioner on the charges in the instant case, it ordered Petitioner's sentence to run concurrently with the fifteen-year sentence Petitioner had begun to serve in connection with the 1991 matter. See Appl. Ex. A (Tr.) at 336:22-25.

a habitual offender, explaining: "I think the matter with the habitual offender is in order. I'll sentence him to 10 years on the habitual, as an habitual offender. That would be in addition, consecutive to the sentence he received on this offense." (Appl. Ex. A (Tr.) at 335:23-336:1.) For the purpose of clarity, the Court reiterated that it couldn't "imagine he would get out before [the ten years had elapsed]. He should serve the 10 years. And I'll leave it up to the Parole Board after that." *Id.* at 336:13-16.

In total, this Court sentenced Petitioner to serve thirty years (twenty years for the offenses of which he was convicted and ten years as a habitual offender). *See id.* at 336-337.

C

Appeal to the Rhode Island Supreme Court

Petitioner timely appealed his conviction, *see Brown*, 9 A.3d 1232, raising three issues on appeal: (1) the trial justice should have granted Petitioner's motion for acquittal because the evidence at trial was not sufficient to sustain a robbery conviction, *id.* at 1236-38, (2) the trial justice erred in denying Petitioner's motion to pass the case after a witness's allegedly prejudicial remark, *id.* at 1238-39, and (3) the trial justice should not have imposed a sentence under the habitual offender statute because the requisite notice of intent to seek such a sentence was not timely filed. *Id.* at 1239-40 (interpreting § 12-19-21(b)).

The Supreme Court denied Petitioner's appeal and affirmed his conviction. *See id.*

D

Application for Postconviction Relief

Petitioner filed the instant Application for Postconviction Relief on April 27, 2017. *See generally* Petitioner's Verified Application for Post-Conviction Relief (Application)

and Petitioner's Memorandum of Law in Support of Application for Post-Conviction Relief (Mem. in Supp.). Petitioner puts forth three claims: 1) Petitioner's attorney rendered ineffective assistance at Petitioner's trial and sentencing, 2) Petitioner's habitual offender sentence is illegal because the Court did not make any of the sentence parole eligible, and 3) Petitioner's habitual offender sentence is illegal because he was not given notice that a conviction for a lesser-included felony offense could result in a habitual offender sentence. *See* Mem. in Supp. at 6-7*; see also* Petitioner's Memorandum, filed on Jan. 6, 2020 (Pet'r's Mem.) and Petitioner's Second Memorandum, filed on Nov. 10, 2021 (Pet'r's Second Mem.). Petitioner requests that this Court grant his Application and grant him various forms of relief, including vacating the "habitual offender" sentence that added ten years to his prison term. (Pet'r's Second Mem. 4.)

On July 7, 2017, the State filed an Answer and subsequently filed a Memorandum of Law Supporting Its Objection to Petitioner's Application for Post-Conviction Relief (State's Mem.), arguing that Petitioner's claims are barred by *res judicata* and lack merit.

On October 15, 2021, the Court held a hearing on Petitioner's Application. *See generally* Hr'g Tr. Oct. 15, 2021 (Hr'g Tr.). Petitioner testified about his attorney's performance in the case as well as his claims challenging aspects of his sentence. *See generally* Hr'g Tr. at 3-30.

Petitioner believed Mr. DeCaporale's representation was ineffective insofar as Mr. DeCaporale neglected to obtain sufficiently comprehensive discovery in the case, *see id.* at 5,[9] but Petitioner did acknowledge that his attorney got a 32(f) form for his violation

[9] "Q So . . . you allege that Mr. DeCaporale failed to file a request for discovery, is that correct?

"A. Yes.

hearing that was useful in the criminal case. *See id.* at 6.[10] Petitioner stated that his lawyer did not file a motion to obtain exculpatory evidence, *see id.* at 7, and claimed that he did not receive a discovery packet. *See id.* at 8; *see also id.* at 16.

Petitioner believed it was ineffective for his lawyer not to object to the photo array from which the victim identified him, *see id.* at 8,[11] although he later admitted that it wouldn't have made a difference if Mr. DeCaporale had objected to the photo lineup because the victim testified at trial to personally knowing Petitioner. *See id.* at 25.[12]

Petitioner alleged that Mr. DeCaporale failed to obtain medical records that would have impeached the victim by demonstrating that he lied about the severity of his injuries, *see id.* at 7, although he admitted the State did not need to prove the victim sustained severe injuries to prove Petitioner guilty beyond a reasonable doubt. *See id.* at 24.[13]

"Q. And you feel, as a result of that, it was ineffective assistance of counsel?

"A. That and he didn't file for medical records." Hr'g Tr. 5:19-25.

[10] "Q. When you did the violation hearing, he did the violation, you were presented with a 32(f), is that correct?

"A. Yes, I was.

"Q. And the 32(f) contains the allegations that allege that you violated the law, is that correct?

"A. Yes.

"Q. And those are police reports, is that correct?

"A. Yes.

"Q. Including statements from the victim?

"A. Yes." Hr'g Tr. 6:1-11.

[11] "A. They had one picture, you know, I'd asked him about it and he says 'don't matter.'"

[12] "Q But you were present in court when the victim testified that he actually knew you from the neighborhood, right?

"A. Yes.

". . .

"Q. All right. Okay. So it didn't matter that there was only one picture because they already knew who you were, right?

"A. Yes."

[13] "Q. But you understand there was no injury that needed to be proven because you – the charge was assault with a dangerous weapon, right?

Petitioner raised several issues with his attorney's failure to object at certain points in the trial. These allegations were relevant to his claim that his lawyer didn't care about the case because it was his last trial before retiring and moving to Florida. *See* Appl. at 5.

Petitioner pointed out that his attorney didn't object to, or inform him in advance of, the lesser-included instruction. *See* Hr'g Tr. at 11.[14] He also claimed that his lawyer didn't meaningfully talk to him. *See id.* at 9.[15] Petitioner also testified that he believes his habitual offender sentence was illegally imposed. *See id.* at 27-30.

Petitioner made some concessions that demonstrated that his attorney had not performed poorly. Petitioner testified that, while the violation hearing was still pending, Mr. DeCaporale negotiated an offer to resolve all pending charges (including the capital crime of robbery) and the fifteen-year suspended sentence if Petitioner would plead guilty and accept a twenty-year sentence to serve. *See id.* at 18.[16] Petitioner also conceded that he

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"A. I understand that, but he admitted, he said on the stand he got two stitches. He took all kinds of X-Rays. I presume if the medical records were entered and I had had them, it would have surely proved something that was different. I don't know if they would have changed it, but the jury never heard it." Hr'g Tr. 24:12-20.

[14] "Q. But [Mr. DeCaporale] did talk to you about that [the lesser-included instruction]?

"A. He talked to me, and we had asked the judge about it because I wanted to know where it came from, and he says she done it. She changed my indictment and amended the felony assault with a weapon as a lesser included offense, the first degree robbery, and he didn't object to it.

". . .

"Q. Your lawyer failed to object to the jury charge?

"A. Yes." Hr'g Tr. 11:5-25.

[15] "Q. So your testimony is now, that for three days Mr. DeCaporale did not speak to you during the course of the trial?

"A. No, we talked -- nothing about nothing though, just what's going to happen and we was going to pick a jury and this and that, but nothing else." Hr'g Tr. 9:12-17.

[16] "Q. Mr. DeCaporale negotiated with the attorney general's office and they agreed to a 20-year sentence if you admitted that you were a violator and plead to the new charge, is that correct?

"A. If I admitted to being a violator and plead to the new charge, yes." Hr'g Tr. 18:20-25.

was only sentenced to ten years as a habitual offender, when the State was asking for twenty-five years. *See id.* at 26.[17] Petitioner acknowledged that he had admitted to being factually guilty of the assault charge at the sentencing. *See id.* at 23.[18] Crucially, Petitioner acknowledged that he was found not guilty on the capital crime of burglary, a charge that could have resulted in a life sentence.

> "Q. All right. But you weren't convicted of a robbery?
> "A. Yes, I was -- no, I got found not guilty for first degree robbery." *Id.* at 23:24-24:1.

Petitioner concluded his testimony by pleading with the Court for help in light of the fact that he is in poor health and has been in jail for a very long time. *See id.* at 27-30.[19]

Mr. DeCaporale was an experienced attorney with years of experience as a prosecutor, public defender, and attorney in the private sector. *See* Appl. Ex. A (Tr.) at 338.[20] After many years as a criminal attorney in Rhode Island, Mr. DeCaporale moved to

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[17] "Q. Right. And you actually were only sentenced to ten years on the habitual?
"A. Yes, I was.
"Q. Okay. So, Mr. DeCaporale argued in your favor, and the State actually asked for the 25 years, didn't they? . . . And Mr. DeCaporale asked for less than that and he was successful because the judge only imposed a ten-year habitual sentence, is that right?
"A. The judge gave me ten years." Hr'g Tr. 26:5-14.

[18] "Q. Okay. And so you admitted that there was a fight?
"A. Yes.
"Q. Okay. And that's what you actually were convicted of, what is a fight, right?
"A. The injuries -- I guess the felony assault with a weapon, yes." Hr'g Tr. 23:18-23.

[19] "Q. Anything else that you want to say, sir?
". . .
"A. I'm 60 years old . . . I got heart disease. I got Cirrhosis of the liver. I got high blood pressure. I got Diabetes . . . I ain't got too long left . . . I'm saying I did enough time, Your Honor . . . This is my life . . . I just can't take it any more. Hr'g Tr. 27:21-30:9.

[20] "Thank you for your years of service . . . You served the State in both capacities [as a prosecutor and public defender], never mind the many people you helped in your private practice[.]" Appl. Ex. A (Tr.) at 338:1-6.

Florida immediately following Petitioner's trial.[21] When this Application was filed, Christopher Gontarz, Petitioner's attorney, tried to contact Mr. DeCaporale with respect to the issues in the case. After many telephonic attempts, Attorney Gontarz confirmed to the Court that Mr. DeCaporale was not able to discuss or remember the case. Attorney Gontarz attempted to meet with Mr. DeCaporale at his home but was unable to obtain any information about the case. It became clear that Mr. DeCaporale would not be able to testify about his performance and approach to the State's case.[22] By the time the hearing took place he was deceased. As the trial counsel was unavailable, and given the unusual circumstances of the case and the importance of the issues, the Court appointed an attorney as an independent expert to review the entire transcript and testify regarding the actions of Mr. DeCaporale. After securing permission from the Presiding Justice and after agreement of counsel, the Court appointed Mr. Montecalvo to read and prepare a report on the actions of Mr. DeCaporale at trial and sentencing.[23]

Both parties agreed to Attorney Montecalvo's appointment. The State did not object to his review and his testimony. Petitioner's counsel characterized Mr. Montecalvo as "experience[d] as a prosecutor and as a defense attorney." *See* Hr'g Tr. at 31:16-17. The

[21] *See* Appl. Ex. A (Tr.) at 337:24-338:8 (acknowledging that Mr. DeCaporale was about to leave the state and that the case was his last).

[22] *See* Hr'g Tr. 47:1-3 (pointing out that "the typical procedure is that trial counsel themselves would answer these allegations made against him or her").

[23] *See* Hr'g Tr. 31:22-25 ("[Mr. Montecalvo] [is] testifying as independent counsel to review Mr. DeCaporale's actions because early on he was not able to testify. And, as we noted, he's since deceased"); *see also id.* at 47:4-10 ("Q. Why is it Mr. DeCaporale isn't answering these questions, sir? A. He's not here today because he's recently passed away. . . Before that, before his recent passing, I understand that he was very ill and incapacitated and unable to participate in the proceedings."); State's Mem. at 8 ("As trial counsel is now deceased and therefore unavailable, the Court appointed attorney Craig Montecalvo to review the trial record.").

Court indicated that Mr. Montecalvo would be testifying as an independent court-appointed witness. Mr. Montecalvo testified as to his review of the record and the issues Petitioner raised in his pleadings and testimony and explained Mr. DeCaporale's actions at trial. *See* Hr'g Tr. 33:2-22.

In his written report, Mr. Montecalvo reviews the relevant legal standard applicable to claims alleging the ineffective assistance of counsel, *see* Independent Counsel's Report to the Superior Court (Report) at 5-6 (describing cases which have defined the reasonableness and prejudice prongs of the claim under the State and Federal Constitutions), and also applies the factual allegations in the case to the legal standard. *See id.* at 7-8. In his report, Mr. Montecalvo explained that, in his opinion, Petitioner's ineffective assistance of counsel claim lacks merit. *See id.* at 7. He believed that the Petitioner was adequately represented by defense counsel. Mr. Montecalvo testified that when,

> "[c]onsidered against the relevant standard, it is the opinion of this reporter that the Petitioner's assertion of ineffective assistance of counsel is without merit. Contrary to the Petitioner's assertion that a review of the transcripts would establish that trial counsel didn't participate in the trial, a review of said transcripts reveals the opposite [report goes on to identify the myriad ways in which trial counsel participated in the trial]." *Id.*[24]

Consistent with his Report submitted to the Court, *see* Joint Ex. 1, Mr. Montecalvo testified at the hearing that trial counsel performed competently. *See generally* Hr'g Tr. at 32-60. On the stand, Mr. Montecalvo described Mr. DeCaporale as a "seasoned defense attorney, formerly a prosecutor," *id.* at 36:22-23, who made conscious strategic choices and was not failing to act out of carelessness.

[24] *See also infra* III.A at 22 (describing the witness's conclusions in greater detail).

The independent counsel disputed Petitioner's contention that his lawyer should have gotten him a discovery packet, *see id.* at 8:15-17 (Petitioner noting that his attorney didn't secure a discovery packet) ("I said: 'Did you get . . . [a] discovery package?' And he said there wasn't one"), by explaining that such packets aren't produced in this type of case. *See id.* at 35:23-36:10 ("With respect to -- first, to the issue of requesting discovery. There's no, so there's no discovery package, of course, because this case was an indictment. So the traditional information package that's prepared when the attorney general's office formally brings charges in Superior Court on a felony, that does not require to go to Grand Jury, such as a capital case, certain drug offenses, that is when a criminal information package is prepared and often provided to a defendant at the time of arraignment. This case, which charged Count 1, first degree robbery was required to be presented to the Grand Jury because it is a capital offense.").

The witness explained that Mr. DeCaporale could have requested discovery, and it is generally a good approach, but that doing so triggers the defense's obligation to provide certain information. *See* Super. R. Crim. P. 16(b). It can be strategically wise in some instances not to seek discovery. *See* Hr'g Tr. at 36. Mr. Montecalvo noted that, even though Mr. DeCaporale did not obtain discovery, he was able to skillfully impeach witnesses by obtaining and using documents that were available through means other than a formal discovery request, implying that trial counsel obtained the benefits of seeking discovery without suffering any disadvantage. *See id.* at 37. Mr. Montecalvo defended Mr. DeCaporale's decision not to independently seek discovery as follows:

> "[L]awyers do occasionally, myself included, do often have occasion not to request discovery in cases. For example, and that strategy or approach may be appropriate, is when defense counsel believes that he or she knows enough about the allegations in the case to mount a defense without having

> to turn over information of their own to the Prosecution, triggering what is so-called 'reciprocal discovery.' I don't know because I wasn't able to speak with him due to a number of factors, but I suspect that Mr. DeCaporale, who is a seasoned defense attorney, formerly a prosecutor, made that decision with knowledge of its consequences. I'll also note that my review of the transcript of the trial in question here reveals that, in my estimation, Mr. DeCaporale performed a very effective cross-examination of the complainant in this case, including he was able to discredit and establish inconsistencies within that testimony using documents from prior proceedings, namely, prior testimony I presume from the violation hearing, but also, and more importantly, maybe the Grand Jury testimony. So although Mr. DeCaporale didn't formally request discovery, as I understand it, he did have access to these materials and was able to employ them in his cross-examination of the Petitioner, to good effect, in my mind. So, on the issue of failure to request discovery, I don't, in my respectful opinion, I don't believe that the Petitioner has sustained his burden in terms of ineffective assistance of counsel." *Id.* at 36:13-37:16.

On the issue of medical records, the witness opined that Mr. DeCaporale did a good job of discrediting witness accounts of how serious the beating was without requesting medical records. *See id.* at 38-39. The witness explained trial counsel's decision not to follow through on a subpoena for medical records, noting that trial counsel did address the issue of the victim's injuries, even though it didn't directly bear on any elements of the offense:

> "So on the issue of the medical records, it wasn't an element of the offense, but I took particular interest on Page 194 of the transcript when Mr. DeCaporale was cross-examining the complainant in this matter, who, at the time of the incident was, I believe, a fourteen-year-old boy. I'm not sure how old he was at the time of his testimony, but he made a point to cross-examine that witness on this very issue, namely: 'Had you sustained a beating, a sort of which that you've described here to the jury?' . . . He also -- he, Mr. DeCaporale, also established that the hospital prescribed no medication to the complaining witness other than Tylenol. So on the point of whether or not the injuries actually sustained were consistent with the type of beating that was described, was not an issue that went unaddressed by Mr. DeCaporale, so I'll point that out as well." *Id.* at 38:12-39:6.
>
> The witness went on to say that,
>
> "Lastly, on the issue of the medical records, I think Mr. Brown maybe said

> it best himself. Is it best practice to have medical records? Maybe. Usually. But Mr. Brown in his testimony before mine said, pertaining to this issue: '[m]aybe it would have made a difference, maybe it wouldn't.' [referencing h'rg at 28] And that's one of the keys, to me, in this case, that he, the Petitioner, in his ineffective assistance claim, carries the burden of establishing that in fact it would have made a difference, that there would have been a different result but for his trial counsel's constitutionally ineffective representation." *Id.* at 40:6-16.

The witness also explained Mr. DeCaporale's decision not to object to the lesser-included instruction. While the Court acknowledged that the "jury's verdict with respect to the robbery versus felony assault was a correct verdict," *see* Appl. Ex. A (Tr.) at 316, our Supreme Court found that it was not error to deny a motion of acquittal in Petitioner's case because sufficient evidence was presented at trial to support the charge. *See Brown*, 9 A.3d at 1236-39. Given that the charge should not have been dismissed, the witness stated that it was smart for defense counsel to leave the jury with an alternative, lest it might hear the jarring facts and prefer a robbery conviction to an acquittal if not given a middle ground charge that better suited the facts. *See* Hr'g Tr. at 39, 48. On the question of whether trial counsel erred by failing to object to the lesser-included charge, the expert explained as follows:

> "I'll offer this remark on the failure, Mr. Gontarz, you asked whether Mr. DeCaporale objected to the jury charge as it was provided by the Court. On that issue, that's, as you know, for defense counsel that's an extremely challenging decision to make, that is whether to invite the Court to provide a lesser, a so-called lesser included instruction or, on the other hand, whether to object to it. In this case, Mr. Brown faced a capital offense of first degree robbery. It's, in my mind, to my mind, no surprise at all that he did not object to a lesser included instruction." *Id.* at 39:7-17.

He added that,

> "It was an interesting question in this case, for me, . . . even whether I would have objected to a lesser included instruction. . . . to me, it was a close call. Way above the standard. In any event, either approach is certainly within the contemplation of competent counsel, either approach. But when a

> person faces a conviction on a capital offense such as a first degree robbery, there's a real advantage in terms of strategy to defense counsel, to give them an alternative. So, in a case where the jury is considering a charge like this, first degree robbery, but maybe there was some deficiency on the one issue of taking a personal property, there's a worry that because the description of the events in the case are so individual, that the jury will convict that person of the crime as charged if not given an alternative. So, in this case, the jury was given an alternative and took that invitation to Mr. Brown's benefit, as far as I can see." *Id.* at 48:1-20.

Insofar as Petitioner argues that his lawyer didn't actively participate in the trial or make appropriate objections, Mr. Montecalvo opined that the expert did participate actively in all stages of the trial and generally extolled his performance as not merely adequate but quite skilled. *See, e.g., id.* at 41. He explained,

> "So, to my mind, trial counsel was a very active participant in all aspects of the case, including the jury selection process. He posed both general and specific questions to specific jurors, participated effectively in side-bar conferences. He thoroughly cross-examined the witnesses presented in the State's case-in-chief, especially, I'll note, the testimony of the complaining witness. I thought, for what it's worth, with the benefit of -- even with the benefit of hindsight, that it was a very good, very good cross-examination, for a number of reasons. In particular, Mr. DeCaporale was able to confront the complainant with his prior testimony from previous proceedings on the issue of timing. And to me that was an important issue in the case." *Id.* at 41:4-18.

Mr. Montecalvo offered extensive testimony on the subtle ways in which Mr. DeCaporale effectively defended his client. For example, the witness described that trial counsel did a good job of preserving objections for further review, explaining that when a witness made an allegedly prejudicial remark,

> "Trial counsel immediately made a motion to pass the case. He preserved the issue, the issue was addressed in the Supreme Court on the Petitioner's direct appeal of his conviction. So that's another concern to me that belies the representation by Mr. Brown, that defense counsel was somehow not invested in this case." *Id.* at 43:10-15.

Mr. Montecalvo described how trial counsel vigorously questioned numerous of

the State's witnesses, and effectively challenged a State witness who appeared to be under the influence at trial. *See id.* at 41-42. The witness then described trial counsel's sentencing strategy in great detail by going through the effective arguments Mr. DeCaporale used to paint Petitioner in a sympathetic light at sentencing, *see id.* 45-46, and describing why they were persuasive. He described that,

> "[D]efense counsel employed a two-prong approach when arguing sentencing to the Court in this case. And he was, if I may be frank, he was forced -- confronted with a difficult task, given the violent nature of the offense which was before the Court for sentencing, and Mr. Brown's extensive record, including a record for prior felony assaults. So, Mr. DeCaporale seemed to take a two pronged approach: The first is he made, to my mind, a very effective argument about the inherent inequities and inefficiencies in the system, that somebody who came out of the background that Mr. Brown did, without the benefit of certain guidance and structure, who had been sentenced to the ACI and served sentences many times in his past, that the system itself had failed him, and that the system ought to look at itself in deciding what role it should play in terms of the rehabilitating of offenders and whether or not we've, as a selective system, have failed Mr. Brown. I thought that was a compelling argument, given the extent of Mr. Brown's criminal history. The second prong of the argument that Mr. DeCaporale made was that, and he argued this quite aggressively, is that Judge Darigan, who was the judge who conducted the violation hearing, the triggering offense for which was the substantive crime in the case that we've been talking about, would not have sentenced Mr. Brown to the maximum on the violation that he did, namely, 15 years to serve, had he heard more testimony and had he had the benefit of the knowledge that Mr. Brown would be acquitted on Count 1, first degree robbery. And instead, Mr. DeCaporale argued that the sentence should therefore be something less, perhaps much less. So I thought that dual-prong approach to sentencing argument, given the challenges in this case, was effective." *Id.* at 45:11-46:19.

The witness provided testimony to the Court about whether the habitual offender statute required the Court to order some of its sentence to be parole eligible, *see id.* at 51-53, and also whether Petitioner was put on notice that a felony conviction for a lesser-included offense could lead to a habitual offender sentence. *Id.* at 53-54.

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[.]" Section 10-9.1-1(a)(1), (4).

Chapter 9.1, section 1, of title 10 of the Rhode Island General Laws provides:

> "[a]ny person who has been convicted of, or sentenced for, a crime, a violation of law, or a violation of probationary or deferred sentence status and who claims [various enumerated defects in a conviction or sentence][25] may institute, without paying a filing fee, a proceeding under this chapter to secure relief." Section 10-9.1-1.

An 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)). As required by the statute, "[t]he court shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented." Section 10-9.1-7.

[25] The enumerated criteria are: "(1) That the conviction or the sentence was in violation of the constitution of the United States or the constitution or laws of this state; (2) That the court was without jurisdiction to impose sentence; (3) That the sentence exceeds the maximum authorized by law, or is otherwise not in accordance with the sentence authorized by law; (4) That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice; (5) That his or her sentence has expired, his or her probation, parole, or conditional release unlawfully revoked, or he or she is otherwise unlawfully held in custody or other restraint; or (6) That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding, or remedy[.]" Section 10-9.1-1.

III

Analysis

A. Petitioner's Issue I: Ineffective Assistance of Counsel

The Court first addresses Petitioner's claim for ineffective assistance of counsel. The Sixth Amendment provides in pertinent part that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel[26] for his defence." U.S. Const. amd. VI. Because the right to counsel "is needed, in order to protect the fundamental right to a fair[27] trial[,]" *Strickland v. Washington*, 466 U.S. 668, 684 (1984), the Court in *Strickland* recognized that '"the right to counsel is the right to the effective assistance of counsel."' *Id.* at 686 (quoting *McMann v. Richardson*, 397 U.S. 759, 771, n.14 (1970)).

"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*,

[26] This language has been interpreted to secure to all felony criminal defendants the right to an attorney regardless of their ability to pay. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) ("in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."); *see also Scott v. Illinois*, 440 U.S. 367, 369-73 (1979) (holding that the right only attaches in cases in which actual imprisonment is imposed) (*reaffirming Argersinger v. Hamlin*, 407 U.S. 25 (1972)). The requirement is applicable against the states and applies with full force in state criminal proceedings. *See Argersinger*, 407 U.S. at 30.

[27] Because a denial of the right to counsel is a "structural error" without which a fair trial cannot exist, *see United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006), if a criminal defendant is denied the effective assistance of counsel, the conviction is not valid and must be overturned. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984).

> 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).

Petitioner contends that his counsel provided ineffective assistance in several respects: (1) his attorney failed to raise issues concerning insufficient notice of the habitual criminal sentencing and Petitioner's parole eligibility, (Mem. in Supp. 8-9), (2) his attorney didn't participate in the trial or sentencing, (Appl. 5), and (3) his attorney didn't follow through obtaining medical records. (Mem. in Supp. 8-9.) The State, relying on a fourteen-page report prepared by a court-appointed independent expert tasked with reviewing the record in this case, argues that Petitioner's attorney's performance was more than adequate and was very effective. *See* State's Mem. at 8 (citing Joint Ex. 1, the Report).[28]

Petitioner's claims do not satisfy either prong of the *Strickland* inquiry.

First, Petitioner fails to demonstrate that counsel's performance was so deficient

[28] "As trial counsel is now deceased and therefore unavailable, the Court appointed attorney Craig Montecalvo to review the trial record. Attorney Montecalvo prepared a written report to the Court . . . and also provided testimony at the evidentiary hearing. The State asserts that Attorney Montecalvo's assessment of the record as to the effectiveness of trial counsel is correct in that counsel's performance was well within the standard set forth by *Strickland*. The State has nothing further to add on this issue as the report and testimony speak for themselves." (State's Mem. 8.)

that "trial counsel did not function at the level guaranteed by the Sixth Amendment." *Barros*, 180 A.3d at 829 (internal quotation omitted). Petitioner fails to establish that his lawyer made poor strategic choices that negatively affected the trial. On the contrary, based on the Court's review of the record, and as outlined in the independent expert's report—which concluded that trial counsel participated actively and skillfully in all stages of the trial (Joint Ex. 7, the Report)—the Court determines that Mr. DeCaporale mounted a vigorous and capable defense on his client's behalf. Mr. DeCaporale successfully litigated the issue of whether Petitioner stole any jewelry and persuaded the jury that Petitioner did not. The Court finds that Petitioner's counsel appropriately questioned witnesses to pursue that theory of the case. He exploited inconsistencies between the shopkeeper's testimony and the victim's injuries. He impeached the victim on the extent of his injuries, and successfully discredited him to Petitioner's advantage. The Court concludes that Mr. DeCaporale's ability to impeach key witnesses resulted in a not guilty verdict on the charge of robbery, a capital charge on which Petitioner faced life in prison. The Court further finds that Mr. DeCaporale made a motion to strike in a timely manner so that the issue could be preserved for appellate review. Mr. DeCaporale also, through his vigorous and persuasive argument during sentencing, convinced the Court not to impose the State's desired sentence. The Court finds that Mr. DeCaporale was a capable and dedicated trial counsel. The record reflects that Petitioner's attorney performed beyond the minimally required level of skill and judgment required by the Sixth Amendment right to the effective assistance of counsel.

Second, Petitioner fails to demonstrate that counsel's allegedly 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[,]" a standard that "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." *Barros*, 180 A.3d at 829 (internal quotation omitted). Petitioner fails to identify anything that would have been different if trial counsel had taken the steps that Petitioner suggests in his Application, namely objecting to certain notice issues and procuring certain medical reports. *See* Appl. at 5; *see also* Pet'r's Mem. at 8-9. Failing to object to the notice issue and the parole eligibility issue could not have prejudiced Petitioner because the Court, after reviewing these claims, concludes that they have no legal validity and thus no merit. Moreover, there is no "reasonable probability" that securing certain medical records would have resulted in a different outcome at trial. Indeed, such medical records would not have made any difference in the case, because felony assault merely requires that a person inflict physical injury that "[c]reates a substantial risk of death[.]" *See* § 11-5-2(c)(1). Even if medical reports showed that the victim wasn't seriously injured, the Court finds that, given the direct evidence of the crime presented at trial from the victim and from a neutral witness, there is not a reasonable probability that the outcome would have been different. This conclusion includes the sentencing phase, during which the Court's judgment did not rest heavily upon the amount of damage that Petitioner caused to the victim.

B. Petitioner's Issue II: Eligibility for Parole on Habitual Offender Sentence

Before addressing Petitioner's remaining claims, the Court considers the threshold issue of whether, as the State argues, they are barred. *See* State's Mem. at 3 (arguing the fact Petitioner raised an objection to the adequacy of notice that he was due and received under § 12-19-21(b), *see Brown*, 9 A.3d at 1239 (rejecting Petitioner's notice argument

under the habitual offender statute), shows that he could have raised this different issue under the same statute on direct appeal.).

The Legislature has made clear that the doctrine of *res judicata* applies to petitions for postconviction relief. *See* § 10-9.1.8.[29] Under that doctrine, issues that were raised in prior applications for postconviction relief, *see, e.g.*, *Ramirez v. State*, 933 A.2d 1110, 1112 (R.I. 2007), as well as those that could have been raised on direct appeal, *see Taylor v. Wall*, 821 A.2d 685, 688 (R.I. 2003), cannot be raised in subsequent cases arising from the same nucleus of operative facts. To determine whether Petitioner's claim is barred, the Court first asks whether it could have been raised on direct appeal. The State argues that issues concerning the time when Petitioner would become eligible for parole could have been raised on direct appeal. *See* State's Mem. at 3.

The Court is persuaded that the State is correct. Petitioner is not arguing that the law has changed since conclusion of his appeal. Furthermore, there isn't anything that would have prevented Petitioner from appealing any issue with his sentence at the time that it was entered. The Court determines that the issue could have been raised and is barred.

The next question is whether any exception applies. There exists an exception to *res judicata*. This "limited and narrow exception to this bar under § 10-9.1-8" is contained within the statute itself. *See Brown v. State*, 32 A.3d 901, 910 (R.I. 2011) (interpreting the statute's language). The text permits the Court to overlook the fact that an issue has been

[29] "All grounds for relief available to an applicant at the time he or she commences a proceeding under this chapter must be raised in his or her original, or a supplemental or amended, application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief, 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.

forfeited or waived,[30] and allows a party to raise it, notwithstanding that the issue is barred if "the court finds [that doing so would] be 'in the interests of justice'" *Brown*, 32 A.3d at 910 (quoting *Mattatall v. State*, 947 A.2d 896, 905 (R.I. 2008)) (interpreting § 10-9.1-8). The Court here finds that the claim is barred and is not within the exception, although it will nonetheless address the merits of Petitioner's claim to show that, even if they were not barred, they would not entitle him to relief.

Petitioner's claim fails on the merits because the Court complied with § 12-19-21(b) when it issued its sentence, and the Court made clear that the Petitioner would become eligible for parole after ten years. Petitioner is incorrect in his contention that the Court did not specify what portion of the ten-year habitual offender sentence must be served before the Defendant becomes eligible for parole.

Petitioner alleges that "the Court never set the minimum number of years before the Petitioner was eligible for parole." *See* Pet'r's Second Mem. at 2; *see also* Appl. at 4 (arguing that the Court did not specify what portion of the ten-year habitual offender sentence must be served before Petitioner becomes eligible for parole); Mem. in Supp. at 2 (same).

Section 12-19-21(b), in pertinent part, states that:

> "If it appears by a preponderance of the evidence presented that the defendant is a habitual criminal under this section, he or she shall be sentenced by the court to an additional consecutive term of imprisonment not exceeding twenty-five (25) years; and provided further, that the court shall order the defendant to serve a minimum number of years of the sentence before he or she becomes eligible for parole." Section 12-19-21(b).

[30] *See United States v. Olano*, 507 U.S. 725, 733 (1993) ("Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right.") (citations and internal quotations omitted).

Pursuant to the statute, the Court determined at sentencing that Petitioner was a habitual criminal and sentenced him to ten years. *See* Appl. Ex. A (Tr.) at 335-336. In doing so, it noted that it was adding an "additional 10 years consecutive [] on the habitual." *See id.* at 337:5. The Court left "it up to the Parole Board after" the expiration of the ten-year term. *Id.* at 336:15. The Court's unmistakable intention was for the entire sentence to be served.

Our Supreme Court has already held that "[t]he statutory language [of section 12-19-21(b)] does not require that a sentencing justice set a particular date when a defendant will be eligible for parole." *State v. Paiva*, 200 A.3d 665, 667 (R.I. 2019). Here, consistent with *Paiva*, the Court did not set a date certain, but did provide that the full ten-year term would be served. *See* Appl. Ex. A (Tr.) at 335:23-25.

Further, this Court is not required under the habitual offender statute to make some of the sentence parole eligible. *See* Hr'g Tr. at 50-52; *see also State v. Werner*, 851 A.2d 1093, 1099 (R.I. 2004) (discussed at Hr'g). The statute provides that the Court is required to state how much of a sentence a defendant is required to serve before becoming eligible for parole. *See* § 12-19-21(b). The Court complied with the statute by explaining that none of the sentence would be parole eligible. This reading is consistent with the statutory text, as well as with common sense. Why would the Court have to make some of the ten-year sentence eligible for parole when it could have issued a twenty-five-year sentence with one year of parole eligibility, or a fifteen-year sentence with five years eligible for parole? Both sentences would have been less lenient. The sentence here did state the minimum number of years Petitioner would have to serve before he became eligible for parole. The Court chose to require that all ten years be served.

This conclusion does not mean Petitioner will not be eligible for parole throughout the duration of his prison term. He will be eligible as otherwise provided by law. General Laws 1956 § 13-8-9 provides that:

> "The parole board, in the case of any prisoner whose sentence is subject to its control, unless that prisoner is sentenced to imprisonment for life, and unless that prisoner is confined as a habitual criminal under the provisions of § 12-19-21, may, by an affirmative vote of a majority of the members of the board, issue to that prisoner a permit to be at liberty upon parole, whenever that prisoner has served not less than one-third (⅓) of the term for which he or she was sentenced. The permit shall entitle the prisoner to whom it is issued to be at liberty during the remainder of his or her term of sentence upon any terms and conditions that the board may prescribe." Section 13-8-9(a).

In this case, Petitioner is no longer subject to the habitual offender bar to parole. The habitual offender designation was issued at the June 14, 2007 hearing, *see generally* Appl. Ex. A (Tr.) at 327-338, and began to run on that date. *See* § 12-19-22 (providing that a sentence begins when issued); *cf. also State v. Brown*, 821 A.2d 695, 697 (R.I. 2003) (noting that the time clock to correct a sentence under the rules starts on the day a sentence is handed down). Section 12-19-5 provides that,

> "Whenever any person shall be convicted of any offense punishable by imprisonment, that person being at the time under sentence of imprisonment on a former conviction, the court passing the subsequent sentence may sentence the person to the term of imprisonment provided by law to commence at the expiration of the term of imprisonment under the former sentence or sentences." Section 12-19-5.

The Court ordered, pursuant to this subsection, that the reimposed fifteen-year felony sentence would run concurrent with the twenty-year sentence, and the ten-year habitual sentence would run consecutive with the twenty-year sentence. *See* Appl. Ex. A (Tr.) at 336:1 ("consecutive to the sentence he received on this offense"); *see also* § 12-19-2(a) (authority of court to impose sentence); *id.* G.L. 1956 § 13-8-10 (acknowledging that

consecutive and concurrent sentences may enter); *State v. Coleman*, 984 A.2d 650, 656 (R.I. 2009) (acknowledging that courts may impose consecutive sentences).

The Court intended, when it said that it would be "up to the Parole Board" after ten years, *see* Appl. Ex. A (Tr.) at 336:15, that the ten-year habitual sentence would be mandatory, and would be served first, and that the remaining sentences would impact Petitioner's parole eligibility as otherwise provided by law. *See* § 13-8-9 (Issuance of Parole) (dictating Petitioner's parole eligibility). Under the statutory scheme, Petitioner was ineligible for parole for ten years from 2007 (when the sentence was issued) until 2017 (ten years thereafter). *See* § 13-8-9 (providing that the time calculations don't apply while a defendant is confined on a habitual criminal sentence). In 2017, the ten-year bar ended, and Petitioner is now eligible to seek parole pursuant to the otherwise applicable statutes.

Under those statutes, the result is as follows. Petitioner had concurrent sentences, which under the parole eligibility statutes are added together for a total of twenty-two years on the charges arising from the factual nucleus of conviction (three counts for attacking a fourteen-year-old boy and resisting arrest) plus the fifteen-year reimposed sentence, for a total of thirty-seven years. *See* § 13-8-10(a) (providing that concurrent sentences are added together for the purpose of parole eligibility). The thirty-seven years are then added to the ten-year habitual sentence for a total of forty-seven years. *See* § 13-8-10(b) (consecutive sentences added together for the purpose of parole eligibility). One-third of forty-seven is fifteen and two-thirds years, which would put the Petitioner's eligibility date near February 12, 2023. *See* § 13-8-10 (requiring that a person serve one-third of their term before becoming eligible for consideration by the parole board).

Petitioner contends that the Court is somehow required to grant him parole and

order that he is at liberty. *See* Mem. in Supp. at 5. This is not a correct interpretation of the statutory scheme. Because the discretion to order parole is vested by law in the parole board, *see* § 13-8-9 (Issuance of Parole) (providing that the parole board *may* issue parole once a person becomes eligible), the Court has limited discretion to alter its sentence once entered. *See* § 10-9.1-1 (allowing the Court to rectify illegal sentences); *see also* Super. R. Crim. P. 35(a) (allowing the Court to reduce sentences upon motion within 120 days). When Petitioner becomes eligible pursuant to the legal authorities which determine he qualifies for parole, he will have to persuade the Parole Board to order his release.

Because the Court's order requiring Petitioner to complete his ten-year sentence as a habitual offender was lawful and clear, the Court declines to extend relief on Petitioner's claim. Finally, because Petitioner has already served the ten-year habitual offender sentence, this issue is moot. *See State v. Isom*, 62 A.3d 1120, 1124 (R.I. 2013) (serving a sentence rendered moot an issue in a criminal case).

C. Petitioner's Issue II: Notice of Petitioner's Habitual Offender Sentence

Petitioner argues that the "ten (10) year consecutive sentence violates his state and federal due process rights, was incomplete (and improperly) imposed, and thus rendered illegal[.]" *See* Mem. in Supp. at 2. Petitioner's claim fails on the merits, for the reasons set forth below.

1. Petitioner's Claim that Habitual Offender Sentence Is Unlawful

Petitioner first argues that the sentence was illegal because the habitual offender sentence allegedly depends in part upon his fifteen-year suspended sentence. *See id.* at 7.

Petitioner's argument fails because the fifteen-year sentence was issued pursuant to a valid felony conviction. *See* Appl. Ex. A (Tr.) at 318 (noting that the sentence

originated from a 1993 Assault with Intent to murder charge); *see also* § 11-5-1. Section 12-19-8 permits courts to order suspended sentences. *See* § 12-19-8(a) ("[T]he court may impose a sentence and suspend the execution of the sentence, in whole or in part, or place the defendant on probation without the imposition of a suspended sentence."). However, § 12-19-9 permits a sentencing court to reimpose that sentence if there has been a violation of probation. *See* § 12-19-9(a)-(b).[31] Petitioner does not dispute that he actually committed the felony of assault with the intent to murder, nor that it is a felony, nor that he violated probation. Our Supreme Court has also confirmed that the parole revocation was lawful. *See State v. Brown*, 915 A.2d 1279, 1280-83 (R.I. 2007).

Petitioner is also incorrect that the felony conviction underlying his fifteen-year suspended sentence cannot serve as a predicate for his sentence as a habitual offender. The statute says that:

> "If any person who has been previously convicted in this or any other state of two (2) or more felony offenses arising from separate and distinct incidents and sentenced on two (2) or more occasions to serve a term in prison is, after the convictions and sentences, convicted in this state of any offense punished by imprisonment for more than one year, that person shall be deemed a "habitual criminal." Section 12-19-21(a).

The prior conviction was for a felony charge, *see* P2-1991-1599A; *see also* § 11-5-1. It was a 1991 case concerning totally different facts, so it concerned a separate and distinct instance. The only question is whether, because Petitioner had not completed the

[31] "Whenever any person who has been placed on probation pursuant to § 12-19-8 violates the terms and conditions of his or her probation as fixed by the court . . . Upon a determination by a fair preponderance of the evidence that the defendant has violated the terms and conditions of his or her probation, the court, in open court and in the presence of the defendant, may[r]emove the suspension and order the defendant committed on the sentence previously imposed, or on a lesser sentence[.]" Section 12-19-9(a)-(b).

fifteen-year sentence, the sentencing at issue here was "after" the sentence in the assault with intent to murder case. Our Supreme Court in *State v. Tregaskis*, 540 A.2d 1022, 1025-26 (R.I. 1988) held that the language in the statute means that the term "after the [] sentences" really means "after sentencing[,]" *id.*, and therefore his argument is foreclosed.

The statute only requires two prior felony convictions arising from two separate sets of facts. *See id.* The Court had evidence before it of numerous other separate and distinct felonies arising from separate conduct. *See* Appl. Ex. A (Tr.) at 330-331 (listing P1-79-1094, P2-80-0225, P2-82-495, P2-85-1099, P2-95-2558, P2-98-1630, P2-98-3664, P2-2001-2387, P2-03-2192); *see also generally* Presentence Report, Criminal History Record (listing convictions of record). Petitioner does not dispute that he was sentenced for these offenses, nor that they were felonies, nor that the Court had valid evidence before it demonstrating the fact of conviction. Section 12-19-21(b). He did argue that he was not given proper notice of the State's intent to pursue the habitual offender sentence under § 12-19-21(b), but that claim lost on direct appeal and is precluded here. *See Brown*, 9 A.3d at 1239-40. Therefore, he was properly subject to the habitual offender statute.

2. Petitioner's Claim of Inadequate Notice under the Due Process Clause of the Fourteenth Amendment. [32]

Petitioner argues that the habitual offender sentence violated his federal Due Process rights because it attached to his fifteen-year probationary term and does not grant him probation at any point throughout the ten-year habitual offender term. *See* Mem. in Supp. at 2. Part of Petitioner's argument concerns the fact that the Court no longer has the

[32] Petitioner does not invoke any notice or other rights under the Sixth Amendment and the Court accordingly does not consider whether they would apply. *See* U.S. Const. amd. VI. ("In all criminal prosecutions, the accused shall enjoy the right to . . . be informed of the nature and cause of the accusation[.]"

paper notice that Petitioner received, which told him that the State would pursue a Habitual Offender sentence. *See* Hr'g Tr. at 56:19 ("No one was able to find the notice, sir."). Petitioner's attorney acknowledged that Petitioner had received notice at sentencing. *See* Appl. Ex. A (Tr.) at 319-22.

The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution provides that, "No State shall make or enforce any law which . . . deprive[s] any person of life, liberty, or property, without due process of law[.]" U.S. Const. amd. XIV. The clause has been interpreted to guarantee fundamentally fair state criminal proceedings. *Brown v. State of Mississippi*, 297 U.S. 278, 285 (1936);[33] *see also Powell v. State of Alabama*, 287 U.S. 45, 67 (1932). The statutes here provide notice to the ordinary person that their conduct may result in the punishments listed. *See Johnson v. United States*, 576 U.S. 591, 595 (2015) (holding that the residual clause of the Armed Career Criminal Act is unconstitutionally vague); *see also Musser v. Utah*, 333 U.S. 95, 97 (1948) (laws must provide "adequate guidance to those who would be law-abiding, to advise defendants of the nature of the offense with which they are charged"). The habitual offender statute complies with the Due Process Clause because it put Petitioner on notice that he could be subject to a twenty-five-year sentence if he committed any more felonies. *See* § 12-19-21(b).

[33] "The state is free to regulate the procedure of its courts in accordance with its own conceptions of policy, unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." (internal quotations and citation omitted); *see also Brown v. State of Mississippi*, 297 U.S. 278, 286 (1936) ("The due process clause requires that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.") (internal quotations and citation omitted).

Moreover, while disregarding a penal statute would violate Petitioner's procedural due process rights, *State v. Carter*, 827 A.2d 636, 643-44 (R.I. 2003), the Court correctly interpreted the habitual offender statute and followed its terms. While it is true that "[n]o principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge," *Cole v. State of Arkansas*, 333 U.S. 196, 201 (1948), here Petitioner did know that he might be subject to the habitual offender statute because the Court bifurcated his sentencing to ensure that the statutory notice was provided. *See* Appl. Ex. A (Tr.) at 337. Accordingly, his habitual offender sentence afforded him both the case-specific and generally applicable notice to which he was entitled.

Petitioner has not identified any authorities that demonstrate that the notice he received violated his federal constitutional rights, and the Court is not aware of any which so hold, and there is nothing fundamentally unfair in the process afforded by the habitual offender law. *See generally Ewing v. California*, 538 U.S. 11 (2003) (upholding California's "three-strikes" law against an Eighth Amendment challenge).

3. Petitioner's Claim of Inadequate Notice Under State Due Process

Petitioner invokes the same arguments under the State Due Process Clause. *See* Pet'r's Mem. at 2. Article I, section 2 of the Rhode Island Constitution provides that "[n]o person shall be deprived of life, liberty or property without due process of law[.]" The Rhode Island Supreme Court in *State v. Tregaskis* held that the habitual offender statute does not violate due process. *Tregaskis*, 540 A.2d at 1026.

Petitioner attempts, in two ways, to distinguish the *Tregaskis* case, *see* Pet'r's Second Mem. at 1, neither of which is persuasive. *See also State v. Edwards*, 810 A.2d 226

(R.I. 2002), *cert. denied* 538 U.S. 980 (2003).

First, Petitioner says that he was not given paper notice that he would be pursued as a habitual offender. *See* Pet'r's Second Mem. at 1. Petitioner identifies no specific authorities—aside from the invocation of due process generally—that would entitle him to written, as opposed to actual, notice. Our Supreme Court ruled that he was given notice as required by the statute, so he is estopped from making the argument. *See Brown*, 9 A.3d 1232. Even if he weren't, under due process principles, actual notice would suffice. Criminal defendants are generally not entitled, as a matter of federal constitutional law at least, to a paper copy of the indictment. *See United States v. Van Duzee*, 140 U.S. 169, 173 (1891) ("[I]n cases not capital the prisoner is not entitled to a copy of the indictment at government expense."). The habitual offender enhancement is just that, a sentencing enhancement, not a separate crime. *See State v. Sitko*, 457 A.2d 260, 261 (R.I. 1983) ("§ 12-19-21 does not establish a separate crime but constitutes a sentencing-enhancement measure"). Petitioner is not entitled to more notice for a sentencing enhancement than for a charged crime.

Petitioner also argues that he was deprived of notice because he was charged with robbery and given notice twelve days after the arraignment that he could be sentenced as a habitual offender, *see Brown*, 9 A.3d at 1239 (our Supreme Court ruling that Petitioner was given notice within twelve days of arraignment), but was convicted of the lesser included offense of Felony Assault (§ 11-5-2). *See* Pet'r's Second Mem. at 1. Neither party has identified, and the Court is not aware of, any authorities that consider whether a notice under one statute comprises all lesser-included charges which might be contained within it. The actual notice is not available to the Court.

The Court rules that notice of a greater offense necessarily gives notice that penalties could obtain under the lesser. The State notified Petitioner that it intended to pursue him as a habitual offender. Assuming the notice didn't specify that he might be a habitual offender under a lesser-included charge, the Court still finds Petitioner was put on notice. The statute doesn't require a conviction for any specific charge but rather any felony, *see* § 12-19-21, and Petitioner was convicted of a felony, § 11-5-2. A lesser-included charge is *included* within the broader crime and by definition does not require any proof beyond that which would prove the greater charge. Therefore, it is not clear that Petitioner, even if he did not know that the lesser included charge would have made him a habitual offender, would have done anything different if he had been noticed.[34]

IV

Conclusion

For the reasons stated above, this Court concludes that Petitioner has failed to meet his burden of establishing by a preponderance of the evidence that postconviction relief is warranted. Accordingly, Petitioner's Application for Postconviction Relief is DENIED.

[34] The only circumstance in which such would be the case would be if a defendant went to trial intending to beat the greater charge and thinking that a conviction on the lesser-included offense would permit him to escape the habitual offender designation. Such a gambit might lead one to proceed to trial. Yet a simple consultation of the habitual offender statute and the felony assault statute would show that the lesser-included charge was within the statute's scope. Notably, the Petitioner does not argue that his attorney misadvised him on this score. *See generally Lafler v. Cooper*, 566 U.S. 156 (2012).

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**Leon Brown v. Patricia A. Coyne-Fague**
CASE NO:	**PM-2017-1904**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**December 27, 2022**
JUSTICE/MAGISTRATE:	**McGuirl, J. (Ret.)**
ATTORNEYS:	
For Plaintiff:	**Christopher S. Gontarz, Esq.**
For Defendant:	**Judy Davis, Esq.** **Daniel Guglielmo, Esq.**