STATE OF RHODE ISLAND

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: August 4, 2023)

TERREL BARROS,	:	
Petitioner,	:	
	:	
v.	:	**C.A. No. PM-2017-4915**
	:	
STATE OF RHODE ISLAND,	:	
Respondent.	:	

DECISION

MATOS, J. This matter is before the court following a hearing on Petitioner, Terrel Barros's (Petitioner or Barros), application for postconviction relief. Petitioner claims several bases for relief. First, Barros alleges that his attorney provided ineffective assistance of counsel by failing to appeal adverse rulings from a suppression hearing and by failing to subpoena a witness. Second, Barros alleges that postconviction relief is warranted due to newly discovered evidence. Third, Barros argues that his Fourteenth Amendment due process rights were violated because the State presented false or misleading DNA evidence at trial. Fourth, Barros asserts that he is entitled to a new trial because the State failed to introduce statistical probability evidence when it presented DNA evidence. Finally, he maintains his actual innocence.

The court exercises jurisdiction pursuant to G.L. 1956 §§ 10-9.1-1 and 10-9.1-2.

I

Facts and Travel

The facts underlying this case are set forth in *State v. Barros*, 148 A.3d 168 (R.I. 2016), and are incorporated by reference and are expanded upon as warranted. In summary, Petitioner was indicted as a result of the early morning shooting of Jamal Cruz (Cruz) and Rokiem Henley (Henley) on August 26, 2012, in a parking lot adjacent to the Monet Lounge in Providence, R.I. *See Barros*, 148 A.3d at 170. Cruz eventually died from his wounds, Henley did not.

The events of the night commenced as many of these do, with significant drinking and an eventual exchange of words. Specifically, Barros and Stephen Bodden (Bodden) were at the club with a group of friends. At some point, Barros and/or Bodden exchanged words with Cruz and Henley while inside the club. The dispute, unfortunately, did not end there but extended to a confrontation outside the club after it closed and the eventual shooting of Cruz and Henley. *Id.*

Barros was charged in an eight count Indictment with murder, assault with a dangerous weapon, and six firearm charges. Bodden was charged with receiving stolen goods, carrying a pistol without a license, and a common law felony. *See* Docket, State v. Bodden, P1-2013-0592AG.

Barros went to trial on July 9, 2013. *See generally Barros*, 148 A.3d at 170. The primary issue at trial was whether Barros or Bodden was the shooter. The State presented evidence that, prior to succumbing to his wounds, Cruz identified Barros as the shooter. *See id.* Specifically, the State introduced evidence that Cruz identified Barros as the shooter while taking part in a show-up with one detective, and the State further presented evidence that Cruz verbally identified Barros as the shooter to a second detective. *See generally id.* In addition, the State presented the testimony of a parking lot attendant, Gregory Zorabedian, who, on the eve of trial, came forward

and claimed that he saw a gun in Barros's hand after the shots were fired. *See* Trial Tr. at 1311-1314, 1357. Zorabedian had also testified at a hearing prior to trial that he did not see Barros with a gun. *Id.* In addition, Mr. Henley, who was also shot, but survived, testified that he did not see a gun in Bodden's hand. Trial Tr. at 1357.

The State also presented evidence of DNA that was found on the gun recovered at the scene. The evidence was that Bodden was a contributor to a mixture of DNA found on the gun, but that Barros was excluded as a contributor. However, as will be discussed, the DNA evidence, as presented, may have implied to the jury that Barros's DNA was on the murder weapon, nonetheless. *Barros*, 148 A.3d at 170, 170 n.2.

In addition, there was evidence that when Barros and Bodden were apprehended by Providence Police, Bodden stated, "It's me. It's all me. It's all mine." *See id.* at 170. Barros attempted to call Bodden as a witness at trial but Bodden invoked his Fifth Amendment right against self-incrimination. U.S. Const. Amend. 5. Barros challenged the invocation but was unsuccessful. *Id.* at 171.

On July 22, 2013, Barros was found guilty on six counts, including the first-degree murder of Jamal Cruz. *See id.* at 169. *See* Docket. He was sentenced to two consecutive life sentences for first-degree murder and using a firearm during a violent crime; three consecutive ten-year terms for possessing a firearm after being convicted of a violent crime, carrying a handgun without a license, and discharging a firearm during a violent crime; and one concurrent twenty-year term for felony assault. *See id.* at 169-70.

Bodden eventually entered a plea to the charges of carrying a pistol without a license and common law felony. The receiving stolen goods charge was dismissed. On October 24, 2014, he was sentenced to ten years at the ACI, with four to serve on the charge of carrying a pistol without

a license, and a full term of five years on the common law charge. *See* Docket, State v. Bodden, P1-2013-0592AG.

Barros filed an appeal with the R.I Supreme Court but submitted only one issue to the court—that the trial court improperly excluded Bodden's testimony upon his invocation of his Fifth Amendment privilege. The appeal was unsuccessful. *See generally Barros*, 148 A.3d at 171-76.

A

The Motion to Suppress Hearing

Prior to trial, Barros filed a motion to suppress. A three-day hearing was conducted on June 24, 25, and 27, 2013. *See generally* Suppression Hearing Transcript (Hr'g Tr.) 1-393, June 24, 25, 27, 2013. The focus of the hearing was upon the admissibility of three statements: (1) head nod gestures by Cruz during the show-up; (2) Cruz's verbal statement to Detective Sean Maxwell; and (3) Bodden's statement to Patrolman Michael Pattie that, "It's me. It's all me. It's all mine." *See, e.g.*, *id.* at 112:24-113:3.

Six witnesses testified at the suppression hearing: (1) Patrolman Daniel Sirignano (Patrolman Sirignano); (2) Patrolman Michael Pattie (Patrolman Pattie); (3) Detective Charles Matracia (Detective Matracia); (4) Detective Sean Maxwell (Detective Maxwell); (5) Firefighter Bryan Hawkins (Captain Hawkins); and (6) Firefighter Derek Lopez (Firefighter Lopez). *See generally id.* at 2-299, 305-38.

1. Patrolmen Sirignano and Pattie

Patrolmen Sirignano and Pattie were both working as detail officers assigned to the Monet Lounge on the night of the incident. *Id.* at 2:9-3:11, 87:2-18. As patrons exited the Monet Lounge, a club promoter told the patrolmen that a problem might be brewing in the parking lot. *See id.* at

12:20-24, 84:25-85:3. Shortly thereafter, Patrolmen Sirignano and Pattie heard gunshots. *See id.* at 18:8-9, 85:4-5; 94:17-19. After hearing the gunshots, Patrolman Pattie immediately made a radio transmission stating that shots had been fired, and he requested additional units. *See id.* at 95:5-19. At the same time, Patrolman Sirignano entered the parking lot and saw two people on the ground with gunshot wounds and two others nearby getting into a Chevrolet Impala. *See id.* at 20:19-25, 23:11-13.

As Patrolman Sirignano approached the Impala from the driver's side, he saw Barros in the driver's seat and Bodden in the front passenger's seat with a handgun in his right hand. *See id.* at 21:20-25, 23:11-13. Specifically, Patrolman Sirignano stated that as he approached the vehicle, Bodden was concealing the gun in the pocket of the passenger door. *See id.* at 28:14-16. Each officer then removed the occupant on their respective side of the vehicle and handcuffed and detained them. *See id.* at 30:20-31:2. Patrolman Pattie testified that as he removed Bodden from the vehicle, Bodden stated, "It's me. It's all me. It's all mine." *See id.* at 112:24-113:3. According to Patrolman Sirignano, police officers arrived on the scene within two minutes of Patrolman Pattie's radio transmission and detectives arrived about five minutes after Patrolman Sirignano called for additional units. *See id.* at 31:23-32:3, 33:10-16.

2. Detective Matracia

Detective Charles Matracia testified that he responded to Patrolman Pattie's radio transmission and arrived at the Monet Lounge after possibly only one minute, but no more than a couple of minutes. *See id.* at 158:20-25. Additionally, Detective Matracia testified that while he was en route to the scene, he heard a second radio transmission stating that two subjects had been detained. *See id.* at 206:16-22.

Upon arriving at the Monet Lounge, Detective Matracia saw two men over by a vehicle, one on his back, later identified as Henley, and one on his knees, later identified as Cruz. He observed Cruz in a dire state, and he believed Cruz might die. *See id.* at 158 to 162. Detective Matracia testified that he considered the scene to be active and he was concerned that the shooter might still be at large. *See id.* at 170:27-171:2. Nevertheless, Detective Matracia testified that the scene was under control. *See id.* at 213:8-10.

As Detective Matracia was standing beside a seated or kneeled Cruz, a show-up was conducted. *See id.* at 178:1-4, 180:6-7. First, Bodden was presented to Cruz. Detective Matracia asked Cruz if Bodden was the person who shot him. *See id.* at 172-80. Cruz looked at Bodden, looked back toward Detective Matracia, and subsequently put his head down. *See id.* at 179:16-23. Although Cruz never actually stated anything or shook his head in a negative manner, Detective Matracia interpreted Cruz's downward look as a negative answer to his question, i.e., Bodden was not the person who shot Cruz. *See id.* at 179:25-180:5.

Next, Barros was presented to Cruz, and Detective Matracia asked Cruz if Barros was the person who shot him. *See id.* at 182:12-14. This time, Cruz looked at Barros, looked back toward Detective Matracia, and nodded his head up and down in a manner consistent with an affirmative head nod. *See id.* at 182:14-17. Detective Matracia again asked Cruz if Barros was the shooter and Cruz took a second look at Barros before nodding his head in an affirmative manner yet again. *See id.* at 182:25-183:1. Altogether, Cruz nodded his head up and down in an affirmative manner between five and seven times. *See id.* at 239:16-240:6. However, Cruz never actually spoke to him during the show-up or at any other time other than stating, "I'm fading. I'm fading." *See id.* at 238:4-5. He was also bleeding, gasping for air, and having trouble breathing. *See id.* at 185-

189. Concurrently, rescue units arrived, and Cruz was taken to be attended to by rescue personnel. *Id*.

Detective Matracia testified that he later saw Detective Maxwell go to the doorway on the side of the rescue vehicle. *See id.* at 194:3-16, 195:2-6. However, while on-scene, Detective Matracia did not tell Detective Maxwell that someone had been identified as the shooter. *See id.* at 195:7-10. He did not speak to Detective Maxwell at all on scene about what happened but did so back at the police station. *Id.* at 195, 196.

3. Detective Maxwell

Detective Sean Maxwell testified that he responded to Patrolman Pattie's radio transmission and arrived on scene in about five minutes. *See id.* at 244:18-22. When he arrived at the scene, he saw two men on the ground near a blue car. *Id.* at 246, 258. One man (later identified as Cruz) was injured in the stomach and "looked the worst." *Id.* at 247:6-8. He then went over to the ambulance where Cruz was receiving attention "[p]robably a minute or two" after arriving on scene. *Id.* at 250:3-7.

Detective Maxwell testified that the first time he got close to Cruz was when Cruz was in the back of the rescue vehicle. *See id.* at 249:3-6. Detective Maxwell stated that when he arrives at a shooting scene, he "always ask[s] the same question, 'Who shot you[,]'" *Id.* at 252:4. While he was standing in the side doorway of the rescue vehicle, he repeatedly asked Cruz, "Who shot you?" *See id.* at 252:20-21. Cruz responded, "It was the second person the police had showed him. The second guy." *See id.* at 252:8-9.

Detective Maxwell exited the rescue vehicle and "briefly" spoke to Detective Matracia on the scene. *See id.* at 253:12-25. Detective Maxwell testified that he walked over to Detective Matracia and told him "something to the effect of, 'This guy is saying something about a second

guy." *Id.* at 253:16-20. He also clarified that he spoke to Detective Matracia briefly at the scene and then more in depth back at the police station. *Id.* at 253.

He testified on redirect examination that time was of the essence because Cruz didn't look good and he "wanted to get a broadcast out" and "get [him] to the hospital." *Id.* at 273:7-8. He explained that he wanted to get the information out because he didn't know if there were other weapons and he was concerned for public safety. *Id.* at 275.

Detective Maxwell did not speak to any other detective or officer in charge at the scene prior to questioning Cruz. *See id.* at 255:8-17. He was not aware of any show-up or any prior statements at the time that he asked Cruz who shot him. *See id.* at 252. "I wasn't aware of a show-up . . . Not at all." *Id.* at 256:14.

He also did not know who the shooter was or if other weapons were still unaccounted for. *See id.* at 275:8-10. He "wasn't even sure what was going on," and he made no attempt to apprehend any suspects. *Id.* at 255, 276. It was only later, when he reported to the police station, that Detective Matracia filled him in on the details of the show-up. *See id.* at 255:15-23.

4. Captain Hawkins and Firefighter Lopez

Captain Bryan Hawkins and Firefighter Derek Lopez were part of the rescue crew that responded to the scene at the Monet Lounge. *See id.* at 280:9-12, 24-25, 328:12-15. Firefighter Lopez testified that they arrived on scene about five minutes after receiving the dispatch call. Captain Hawkins testified that they arrived on scene in less than ten minutes, but possibly within five to six minutes. *See id.* at 329:10-16, 281:7-10. Both men testified that the standard operating procedure when responding to a shooting scene is to stay away from the scene until it has been secured. *See id.* at 281:15-16, 328:16-329:2. Both also testified that dispatch confirmed to them

that the scene was secure upon their arrival. *See id.* at 329:3-5, 281:14-15. Captain Hawkins also described the scene as having a heavy police presence upon his arrival. *See id.* at 281:11-14.

Captain Hawkins testified that he had no problems understanding Cruz, and he found Cruz to be remarkably alert under the circumstances. *See id.* at 285:10-15. Additionally, Captain Hawkins testified that he did not hear Cruz make any statements to anyone other than emergency rescue personnel. *See id.* at 310:21-23. Likewise, Firefighter Lopez testified that he had no recollection of Cruz identifying a shooter. *See id.* at 341:8-10. In fact, Firefighter Lopez testified that the only words he heard Cruz say were, "Help me, help me. I can't breathe." *See id.* at 340:3-4. Cruz was, in fact, deteriorating rapidly and died shortly after being taken to the hospital. *Id.* at 318.

5. The Trial Justice's Decision

After hearing the testimony and each party's argument, the court issued a bench decision. *See generally id.* at 399-423. First, the court denied the motion to suppress Cruz's head nod gestures and verbal statement because the court was convinced that the State had produced satisfactory proof as to three hearsay exceptions. *See id.* at 404:2-9. Second, the court declined to suppress Bodden's statement to police that, "It's me. It's all me. It's all mine." *See id.* at 112:24-113:3; 421:1-9.

More pertinently to this petition, the court analyzed Cruz's gestures and verbal statement against the backdrop of the United States Supreme Court's holdings in *Crawford v. Washington* and *Michigan v. Bryant*. *See id.* at 400, 403. Specifically, the court analyzed whether the statements were testimonial and, hence, inadmissible, under the Confrontation Clause. The court concluded that there was no *Crawford* violation because the statements were non-testimonial. Rather, they were obtained to address an ongoing emergency. *See id.* at 413.

The court found that the potential presence of additional firearms or shooters was "very real," lending support to an ongoing emergency theory. *See id.* at 415:19-20. While the scene was under control such that the rescue vehicle could enter, a general threat remained. *See id.* at 415:25-416:15. Further, the court found that the exigency of the situation did not dissipate merely because a firearm was located nearby. *See id.* at 417:25-418:4.

Regarding Cruz's verbal statement to Detective Maxwell, the court specifically found that the primary purpose of Detective Maxwell's questioning was to deal with the ongoing emergency. *See id.* at 418:9-12. In fact, the court declared that it would have been a dereliction of duty if the police assumed that no other gunman was on the loose or that merely finding a person with a firearm ended the ongoing emergency. *See id.* at 417:25-418:4. Thus, the court concluded that the principal purpose of Detective Maxwell's question was not investigative. *See id.* at 418:9-12.

Regarding Bodden's statement, the court concluded that the statement was not an excited utterance. *See id.* at 419:8-14. But the court did find that Bodden's statement was a statement against Bodden's penal interest. *See id.* at 391:14-16. Accordingly, the court declined to suppress Bodden's statement. *See id.* at 6-7.

B

New Witnesses

Barros claims that newly discovered evidence warrants a new trial. As a subpart of that challenge, he also claims that one witness was known to defense counsel, who was ineffective in obtaining his presence at trial. *See generally* Postconviction-Relief Hearing Transcript (PCR Hr'g Tr.) 1-597.

At the postconviction hearing, the court heard testimony from several witnesses who did not testify at trial, in addition to testimony from Barros's trial counsel (hereinafter Defense

Counsel)[1] and testimony about the DNA evidence and gun powder residue. The context to most of the testimony related to the central issue at trial—whether Barros or Bodden was the shooter. It also centered, in part, at least in regard to the newly discovered evidence claim, upon Bodden's apparent well-earned reputation for violence and mayhem.

The evidence is, generally, that Bodden either confessed to the crime to certain trusted associates or that certain associates saw him with the gun on the evening of the shooting but failed to testify at trial. All the witnesses, except for his cousin Gloria Parajon, ascribe their failure to come forward at the time of trial to their fear of retribution by Bodden. Parajon failed to come forward presumably due to her loyalty to her cousin. Critically, Bodden is now deceased. His reckless and violent life caught up to him when he was murdered in October of 2017.[2] Unencumbered by the threat of Bodden's presumed retaliation, his associates and family now freely profess his guilt.

1. Those Present at the Scene

i. Austin Gonsalves

Austin Gonsalves was part of the group that congregated at the Monet Lounge with Barros and Bodden. *Id.* at 9. The group, which was a group of friends from New Bedford, also included

[1]At trial, Barros was represented by two attorneys. One of Barros's trial attorneys is now deceased.
[2] There was, at best, a disjointed effort during the hearing to highlight Bodden's path through the judicial system after the shooting. In summary, it appears that following the shooting at the Monet Lounge, Bodden was arrested on Monday, August 27, 2012. *See* PCR Hr'g Tr. at 215:12-18, 52:16-25. Bodden was released on bail on August 27, 2012, but he was subsequently arrested in Massachusetts for violating his probation, and he was incarcerated in Massachusetts on September 1, 2012. *See id.* at 52:16-18. Bodden remained incarcerated throughout the pendency of Barros's trial, and he was subsequently released in June of 2014. *See id.* at 92-93, 52:16-25, 217:17-20. A few weeks after being released, Bodden was reincarcerated. *See id.* at 52:19-25. In fact, Bodden was in and out of jail from the date of his release in June of 2014 until the time of his death in October of 2017. *See id.* More specifically, from August 27, 2012 to the time of his death, Bodden was incarcerated for approximately 1,671 days and was only out of jail for approximately 200 days. *See id.*

Jorge Dias and Amos Delgado. *Id.* at 10. Gonsalves was known to Defense Counsel at the time of trial and, as will be discussed, Defense Counsel attempted to have him testify, but Gonsalves failed to appear. He was viewed as a critical witness because, according to him, he saw Bodden shoot Cruz while holding a gun at his waist. *Id.* at 8. The reason for his failure to help exonerate his friend Barros was because of his purported fear of retribution from Bodden.

Gonsalves did testify at the postconviction-relief hearing once the coast was clear, because his other friend Bodden had been murdered. He testified to travelling to the Monet Lounge with Amos Delgado and getting drunk with his friends. *Id.* at 10, 11. He was aware of an issue brewing among his group and the individuals who eventually became known as Henley and Cruz. *Id.* at 11, 12.

He described leaving the club after it closed, around 2:18 a.m., and that Jorge Diaz was with him. *Id.* at 15, 16. He saw Bodden and Cruz, whom he recognized from the altercation in the club, somewhat approaching each other in the parking lot, and he claims that he saw Bodden shoot Cruz. *Id.* at 8, 9. He heard gunshots and ran toward the car in which he had arrived with Amos Delgado, who had already put the car in motion. *Id.* at 17, 18. He also saw Barros jump into the driver's side of the car that Barros and Bodden had arrived in, and where the shooting happened, and Bodden jumped into the passenger's side. *Id.* at 18-19. At the same time, he saw police officers running toward the scene as he was scampering toward Amos Delgado's car. *Id.* at 20.

Gonsalves met with Defense Counsel on several occasions prior to Barros's trial and told him that he had seen Bodden shoot Cruz. *Id.* at 22-23. He claimed to have even sold his car and used the proceeds to help with Barros's legal fees. *Id.* at 23. However, he would not testify at trial because he didn't trust Bodden and was fearful that it would put him and his family in danger,

especially in light of what he knew of Bodden's gang affiliations. *Id.* at 23-24. Once Bodden was killed in October of 2017, and well after Barros's trial in 2012, he eventually started talking to Barros by telephone at the ACI, in approximately 2018. He thereafter met with the Attorney General's office and told his story in approximately 2019 or 2020. *Id.* at 20, 54.

Defense Counsel testified that he planned to present Gonsalves as a witness at Barros's trial. *See id.* at 158:12. In fact, Defense Counsel had arranged for the courtroom to be cleared so that Gonsalves would not have to testify in front of the public. *See id.* at 158:25-159:3. Additionally, Defense Counsel testified that Gonsalves repeatedly told him that he would testify. *See id.* at 159:8-9. When asked why he did not subpoena Gonsalves, Defense Counsel stated that Gonsalves "made it unequivocally clear to me on more than one occasion, he said 'If you give me a subpoena, I'll never show up, I'll never show up.'" *See id.* at 159:9-11. Defense Counsel also testified that Barros's mother played a role in Barros's trial preparation. *See, e.g., id.* at 145:13-16, 158:9-10. In fact, Defense Counsel testified that Barros's mother was his "main contact" person. *See id.* at 176:7-8. Despite Defense Counsel and Barros's mother's efforts, Gonsalves did not appear for trial.

ii. Jorge Dias

Jorge Dias testified that he was present on the night of the shooting as part of Barros's friend group. *See* PCR Hr'g Tr. at 101:8-12. He knew that there had been some "words" exchanged inside the club with some guys that were starting trouble. *Id.* at 102. He, like Gonsalves, also claims to have seen Bodden shoot Cruz outside the club. *Id.* at 98.

According to Dias, he left the club with Gonsalves. *Id.* at 99. As he was approaching, from about eighteen feet away from the eventual scene of the crime, he saw Cruz approach Bodden near

their cars. *Id.* at 97-98.[3] Barros was on the driver's side of the car and Bodden was on the passenger's side. He saw that Bodden had a gun at his waist level and that he shot Cruz as Cruz approached. *Id.* at 98-100.

Dias never met with Defense Counsel and just assumed Barros "should be all right" once the police conducted its investigation. *Id.* at 109, 128. He also did not come forward because he believed he would be in danger because Bodden "lived by the rules and he died by the rules." *Id.* at 110. He admitted that Bodden never explicitly threatened him but "[h]e didn't have to say anything." *Id.* at 140. Dias was in contact with Barros's mother, who called him all the time regarding his unwillingness to testify, but never came forward. *See id.* at 137:23-138:5.

iii. Amos Delgado

Amos Delgado was also among Barros's friend group at the Monet Lounge on the night of the shooting. *See id.* at 62:18-22. He was outside the Monet Lounge at the time of the shooting and heard gunshots but did not see what happened. *Id.* at 67-68. He ran to his car when he heard the gunshot and saw Gonsalves also run to the car. *Id.* at 69-71. Once in the car, Gonsalves told him "Terrel's all right, Terrel's all right" and that Bodden had been the shooter. *Id*. at 76. He also claimed that he would not be testifying if Bodden was still alive. *Id.* at 79. Delgado met with Defense Counsel before Barros's trial, but he did not recall providing Defense Counsel with any relevant information. *See id.* at 72:25-73:9.

[3] One of the tragic coincidences of the evening is that Barros and Cruz's cars had been parked facing each other in the parking lot which, presumably, facilitated their encounter. *Id.* at 99, 105, 106.

2. The "Admissions"

i. Gloria Parajon

Gloria Parajon is Bodden's first cousin. *See* PCR Hr'g Tr. at 346:18-19. They grew up together and were very close. *See id.* at 346:20-24. In fact, Bodden was living with her at the time of his murder in 2017. *Id.* at 348.

A few days after the shooting, she was not exactly sure how many, Parajon and her father picked Bodden up from the ACI, after he had made bail, and returned to Parajon's father's house. *Id.* at 351-52. Parajon was so close and knowledgeable of Bodden's way of life that she expected Bodden to be charged with Cruz's murder even though she had not yet spoken to him about the events. *Id.* at 364.

Once back at the house, Bodden discussed the incident with Parajon. He told her that he tried to scare "the guys" away by shooting in the air and, when that didn't work, he shot at them. "[H]e said that that didn't do anything, so the guy got closer to him and he shot the guy." *Id.* at 352-53. Bodden told her that Barros was at the "wrong place at the wrong time." *See id.* at 353:8-9.

Further, Parajon testified to having between five and ten conversations with Bodden over the course of a five-year period where Bodden admitted to being the shooter at the Monet Lounge. *See id.* at 357-58. She also testified to Bodden's love of guns and that he always had a gun on him. *Id.* at 355.

Parajon claimed that she was not threatened but did not come forward during the time of Barros's trial because her family told her not to get involved. *Id.* at 362. Eventually, after Bodden was killed, she reached out to Barros's mother by contacting her on Facebook. *Id.* at 370.

ii. Marcus DePina

Marcus DePina had known Bodden for more than twenty years. *Id.* at 207. In fact, DePina testified that he was in a gang with Bodden. *See id.* at 221:9-10. DePina knew Bodden "well enough to know when he was telling the truth and when he was lying." *See id.* at 208:11-12.

DePina was not present at the Monet Lounge. However, Bodden happened to encounter him at a mutual female friend's house in New Bedford just after he was released from the ACI. *Id.* at 203.[4] They retreated to a bathroom in the woman's house and:

> "[Bodden] said that he had got into some trouble, I'm not sure if it was over the weekend or just a couple of nights before, but he told me he got into some trouble. I asked him what happened. He said that there was a shooting, he had actually shot somebody, and he brought a gun to the club. And there was just a whole bunch of stuff; but he said that he actually had shot somebody, he wasn't sure if they was dead, but that he had actually done it." *Id.* at 205.

Bodden felt bad because Barros "didn't have anything to do with it[.]" *See id.* at 205:20-24. In addition, Bodden told him that Barros was simply at the "wrong place at the wrong time." *See id.* at 206:2-4. Further, DePina stated that Bodden was "clearly upset" and crying while admitting to being the shooter at the Monet Lounge. *See id.* at 208:16-19. DePina claimed that he encouraged Bodden to go to the authorities with his information and Bodden said that he would. *Id.* at 209. However, although Bodden told him about the shooting, he didn't give any details. *Id.* at 215.

Like Bodden's other friends, DePina claimed that he did not come forward with his information because "Stephen Bodden [is] a killer and [DePina] didn't want to get killed." *Id.* at 219. Although DePina was in a gang with Bodden, DePina stated that he had removed himself

[4] The female with whom he was staying was an acquaintance of both of them, and Bodden just went over and told him he wanted to talk to him. *Id.* at 211.

from that life and was then working to help at-risk youth. *See id.* at 218, 221, 230.[5] [6] However, like the others, DePina only came forward after Bodden's death. *Id.* at 224, 225.

C

DNA Testimony

Barros also claims that the DNA evidence at trial was inappropriately prejudicial. Cara Lupino was qualified as an expert in DNA extraction and interpretation at trial. *See* Trial Tr. at 976. At the time, she was the supervisor of the Rhode Island Department of Health, Forensic DNA Laboratory. *Id.* at 974. She testified to the results of DNA testing in her role as the supervisor of the analyst who performed the testing. *Id.* at 983.

Specifically, Providence Police provided the State DNA Lab with the following items recovered from the crime scene for testing: (1) two spent cartridge casings; (2) a rear grip from the handgun; (3) a swab from the front grip of the handgun; (4) a swab from the handgun trigger; and (5) a swab from the gun barrel. *Id.* at 984. Providence Police also submitted buccal swabs they obtained from Bodden and Barros for comparative testing. *Id.*

Generally, Ms. Lupino testified about the nature of DNA; that it is contained in cells and can be extracted from blood, saliva, skin cells, etc. *Id.* at 978. She testified that in developing a DNA profile, or strand, from a person, the analysts review fifteen different loci (which are referred to as markers) on the strand. *Id.* at 977. She testified and agreed with various questions that established that some people shed more skin cells than others. *See, e.g. id.* at 980. And she testified

[5] There was also disputed testimony throughout the hearing about whether Barros was in a gang. *See, e.g.* Hr'g Tr. at 221.

[6] Although he testified that he has redirected his life, DePina also admitted that he has at least one pending possession of narcotics charge which he claimed had been amended from a possession with intent to deliver charge. *Id.* at 242.

that when comparing a person's DNA profile to DNA extracted from an item, all fifteen markers from the person's profile must be present. *Id.* at 981-82.

Ms. Lupino testified that the analyst was able to extract a partial DNA profile from the gun barrel. *Id.* at 991. The testing revealed that Bodden was included as a person who touched the gun. *Id.* at 998. Ms. Lupino further testified that the review of alleles found on the gun showed that at least three people handled the gun. *Id.* at 999. [7]

In regard to Barros, Ms. Lupino's conclusion was as follows:

> "Q: And did you come -- did you come to a conclusion with respect to the profile of Terrel Barros?
>
> "A: We reported that as an exclusion.
>
> "Q: And why – I'm sorry, go ahead.
>
> "A: Because Mr. Barros's DNA profile was not represented at all the locations. It's lab policy to report that as an exclusion.
>
> "Q: So that's part of your policy; correct?
>
> "A: Yes, it is.
>
> "Q: And you're not saying to this jury that Terrel Barros didn't handle that gun, are you?
>
> "A: I can't say that." *Id.* at 1004-1005.

Prior to testifying to Barros's exclusion, however, Ms. Lupino responded to extensive questions about Barros's DNA profile and how Barros's DNA alleles matched certain alleles found on the handgun. *See id.* at 1000-1004. For instance, she testified as follows:

[7]According to Ms. Lupino, "[a] mixture would tell you that more than one person touched an item. Each individual person would only have what we call two alleles, one from your mother, one from your father. So if there's more than two alleles at a particular location on an item, it would indicate more than one person touched that item." *Id.* at 981.

> "Q: And what did you determine when you looked at the profile for Terrel Barros when you compared his profile to the DNA, specifically the mixture of DNA located on item number 4?
>
> "A: At some of the locations the alleles that Terrel Barros has are represented in that mixture, but not at all the locations." *Id.* at 1000-1001.

In closing arguments, the prosecutor addressed Barros's exclusion by redirecting the jury to testimony about the alleles:

> "When you look at the defendant's DNA and you look at the numbers, compare them. Compare the defendant's DNA to the mixture of DNA that's found on that gun. Many of the defendant's alleles are on that mixture. Much more than Jamal Cruz. We know Jamal didn't touch it. But we know the defendant touched that gun because Jamal Cruz told us he touched that gun. And you can use that when evaluating this case." *Id.* at 1350.

At the postconviction-relief hearing, Ms. Lupino admitted that some of her trial testimony was incorrect. *See, e.g.*, PCR Hr'g Tr. at 436:2-5, 437:16-20. Specifically, Ms. Lupino admitted that it is incorrect to assert that a mixture of DNA found on an item indicates that more than one person touched the item, since there is no way to tell if DNA is deposited directly or by secondary transfer. *See id.* at 435:12-436:5.

She explained that secondary transfer refers to the principle that a person's DNA may be found on an item even though that person never touched the item because it could have been "transferred" from an item or person with whom or with which that item or person did have contact. *See id.* at 424-30. At the time of trial, Ms. Lupino knew that secondary transfer occurred between materials. *See id.* at 431:14-16. However, she didn't "believe" that secondary transfer was a major concern. *Id.* at 433. She also clarified that technology has improved such that it is much more sensitive and, hence, so is the understating of secondary transfer. *Id.* at 428.

In contrast to her 2013 testimony, Ms. Lupino testified that she would no longer say that a mixture of alleles indicates that more than one person touched an item. *Id.* at 458-59. She affirmed that she testified in 2013 that lab policy was that all fifteen alleles found on an item had to match a person's DNA profile for them to be included as a match. *Id.* at 472-73. She nonetheless agreed that she answered numerous questions that indicated that Barros's DNA was consistent with some of the markers found on the gun. *See id.* at 473-77. She agreed at the PCR hearing that that testimony was "meaningless" in "this context" because there was not a full match of alleles. *Id.* at 477.

According to Ms. Lupino, she was not trying to mislead the jury but agreed that the jury was never informed that the testimony about Mr. Barros's alleles being consistent with certain markers found on the gun was meaningless. *Id.* at 480-91. She claimed that she never intended to infer that Barros had fired the gun. *Id.* at 512. She was simply answering the prosecutor's questions. *See, e.g., id.* at 491. She noted, in response to questions on cross-examination, that she also testified that some of Cruz's alleles were consistent with some of those from the mixture found on the gun. *Id.* at 512. And she reiterated that she, in fact, testified that Barros was excluded. *Id.* at 513.

Barros also called a DNA expert at the hearing. Eric Carita testified generally to the principle of DNA transfer and criticized Ms. Lupino's testimony. *See generally id.* at 520-581. More specifically, he testified that in 2012 there were already a number of studies being performed on the concept of transfer DNA. *Id.* at 538-42. He also opined that Ms. Lupino's trial testimony should have focused on the fact that Barros was excluded and not on the testimony about the alleles which he deemed confusing. *Id.* at 549, 568. He did agree, however, that the testing conducted in 2013 was correct. *Id.* at 574.

D

Gunshot Residue Evidence

Barros also submitted evidence at the hearing that he claimed would help establish his innocence. He relied primarily on testimony from a forensic scientist, and the State countered with its own witness.

1. Adam Hall

Adam Hall testified as an expert in gunshot residue (GSR) analysis. Hall testified to GSR found on items of clothing taken from Bodden and Barros on the night of the shooting. The items had been previously analyzed by state laboratories in Rhode Island and Connecticut. *Id.* at 252. Hall did not examine the items himself. He found that there were two and one-half more particles found on Bodden's clothes than on Barros's clothes. *Id.* at 262. From that numerical analysis, he concluded that Bodden was most likely the shooter.[8] *See id.* at 255:10-21, 262:17-263:1, 271:2-10. On cross-examination, Hall acknowledged that four items of Bodden's clothing were tested as opposed to only one item of Barros's clothing, which may have skewed the data. *See id.* at 277:19-278:4.

2. Alison Gingell

Alison Gingell was called by the State as an expert witness. She is employed by the State of Connecticut Forensics Laboratory. *Id.* at 306. She testified that GSR analysis requires more

[8] According to Hall, GSR typically consists of three elements: lead, barium, and antimony. *See* PCR Hr'g Tr. at 256:4-6. GSR data can be represented by single-component particles, two-component particles, or three-component particles. *See id.* at 256:6-11. Importantly, three-component particles are associated with higher statistical confidence levels than single- and two-component particles. *See id.* at 259:12-23. Moreover, while single-component particles are not entirely insignificant, they are associated with lower statistical confidence levels because barium, antimony, and, particularly, lead are fairly prevalent within the environment. *See id.* at 259:24-260:8.

than just a cursory review of instrument-generated data. *See id.* at 323:1-5. Instead, according to Ms. Gingell, GSR analysis also requires an analyst to conduct a manual examination to confirm or reject potential particles identified by the instrument. *See id.* Ms. Gingell also testified that, in her work at the state laboratory, she would not be allowed to make a determination as to who might be a likely shooter. *Id.* at 339. However, she did not disagree with Mr. Hall's quantifications. *Id.*

II

Standard of Review

Postconviction relief is a statutory remedy '"available to any person who has been convicted of a crime and who thereafter alleges . . . that the conviction violated the applicant's constitutional rights[.]"' *Higham v. State*, 45 A.3d 1180, 1183 (R.I. 2012) (quoting *DeCiantis v. State*, 24 A.3d 557, 569 (R.I. 2011)); *see* § 10-9.1-1(a)(1). Section 10-9.1-1(a) states:

> "Any 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:
> "(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;
> "may institute, without paying a filing fee, a proceeding under this chapter to secure relief." Section 10-9.1-1(a).

"In this jurisdiction an application for postconviction relief is civil in nature." *Ouimette v. Moran*, 541 A.2d 855, 856 (R.I. 1988); *see also* § 10-9.1-7 ("All rules and statutes applicable in civil proceedings shall apply . . . ."). Therefore, "an applicant for postconviction relief must bear 'the burden of proving, by a preponderance of the evidence, that [such] relief is warranted' in his or her case." *Hazard v. State*, 64 A.3d 749, 756 (R.I. 2013) (quoting *Anderson v. State*, 45 A.3d 594, 601 (R.I. 2012)); *see also Mattatall v. State*, 947 A.2d 896, 901 n.7 (R.I. 2008).

III

Analysis

A

Barros's Ineffective Assistance of Counsel Claim—The Suppression Hearing

Barros argues that he was provided with ineffective assistance of counsel because his attorney failed to appeal the trial judge's denial of the motion to suppress. *See* Memorandum in Support of Post-Conviction Relief Petition (PCR Mem.) at 37. Barros's argument that the trial judge erred is two-fold, that the court improperly admitted the statements under Rule 803 of the R.I. Rules of Evidence and that the admission of the statements violated the Confrontation Clause.[9]

1. The Confrontation Clause

The Sixth Amendment's Confrontation Clause provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." *Crawford v. Washington*, 541 U.S. 36, 42 (2004) (internal quotation omitted). "The Fourteenth Amendment

[9] The State argues that Barros's challenge to the admission of Cruz's statements to officers at the scene is barred because the issue could have been brought up on direct appeal and, hence, are barred by the doctrine of *res judicata*. State's Post-Hearing Memorandum Opposing Petitioner's Application for Post-Conviction Relief (State's Post-Hr'g Mem.) at 7, citing *Taylor v. Wall*, 821 A.2d 685 (R.I. 2003). The issue before the court, however, as discussed *infra*, is whether Defense Counsel was ineffective because the issue was not raised on direct appeal.

renders the Clause binding on the States." *Michigan v. Bryant*, 562 U.S. 344, 352 (2011) (citing *Pointer v. Texas*, 380 U.S. 400, 403 (1965)); *see generally State v. Feliciano*, 901 A.2d 631 (R.I. 2006). The primary concern undergirding the Confrontation Clause is the "use of *ex parte* examinations as evidence against the accused." *See Crawford*, 541 U.S. at 50. Thus, the Confrontation Clause generally bars the "admission of testimonial statements of a witness who" does not appear at trial. *Davis v. Washington*, 547 U.S. 813, 821 (2006) (internal quotation omitted).

In *Crawford*, the Supreme Court declared that a testimonial statement is only admissible at trial if: (1) the witness is unavailable, and (2) the defendant had a prior opportunity to cross-examine the witness. *See Crawford*, 541 U.S. at 68. Critical to the holdings in *Crawford* and its progeny is the notion of a "testimonial" statement. *See Davis*, 547 U.S. at 821.

Generally, a statement is testimonial if it is "created primarily or 'solely for an 'evidentiary purpose,' . . . made in aid of a police investigation[.]'" *State v. Lopez*, 45 A.3d 1, 12 (R.I. 2012) (quoting *Bullcoming v. New Mexico* 564 U.S. 647, 664 (2011); quoting *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 311 (2009)).

In *Bryant*, the Court addressed testimonial statements in the context of an emergency situation similar to that presented in this case. *See Bryant*, 562 U.S. at 354-67. The *Bryant* Court stated:

> "'Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.'" *Id.* at 356 (quoting *Davis*, 547 U.S. at 822).

Whether statements elicited from police interrogations are testimonial or not requires an inquiry into the primary purpose of the interrogation. *See id.* More specifically, discerning the primary purpose of an interrogation requires an objective evaluation of the "circumstances in which the encounter occurs and the statements and actions of the parties." *Id.* at 359. The "relevant inquiry is not the subjective or actual purpose of the individuals involved in a particular encounter, but rather the purpose that reasonable participants [the officers and the declarant] would have had[.]" *Id.* at 360.

According to the Court:

> "The existence of an ongoing emergency is relevant to determining the primary purpose of the interrogation because an emergency focuses the participants on something other than "prov[ing] past events potentially relevant to later criminal prosecution." *Davis*, 547 U.S. at 822 . . . Rather, it focuses them on '"end[ing] a threatening situation."' *Id.* at 832. . . Implicit in *Davis* is the idea that because the prospect of fabrication in statements given for the primary purpose of resolving that emergency is presumably significantly diminished, the Confrontation Clause does not require such statements to be subject to the crucible of cross-examination." *Id.* at 361.

In other words, statements are testimonial where the police questioning "was not seeking to determine . . . what is happening, but rather what happened." *Id.* (quoting *Davis*, 547 U.S. at 830) (internal quotations omitted).

i. Cruz's Verbal Statement to Detective Maxwell Was Testimonial

The admission of Cruz's statements faced a few evidentiary and constitutional hurdles pretrial. The trial judge first addressed whether the statements were admissible under three hearsay exceptions: (1) excited utterance; (2) dying declaration; and (3) declaration of a decedent made in good faith. R.I. R. Evid. 803(2), 804(b)(2), and 804(c). The trial judge extensively analyzed the law and hearing testimony and found that Barros's head nods and/or statements fit within all three

exceptions. Hr'g Tr. at 404-13. Having ruled on the evidentiary matters, the court turned to the issue of whether the statements were, nonetheless, barred under *Crawford* and its progeny.[10]

The trial judge found that Cruz's statements were not testimonial because they were elicited for the primary purpose of resolving an ongoing emergency. *See id.* at 418:9-12. Specifically, the trial judge found that while the scene was under control, a general threat remained. *See id.* at 415:25-416:15. Additionally, the trial judge found that the *potential* presence of additional firearms or shooters on the scene gave credence to an ongoing emergency theory. *See id.* at 418:9-12 (emphasis added).

It appears to this court that the nature of the interrogations by Detectives Maxwell and Matracia were distinct and distinguishable from each other. While, objectively, the head nod interaction between Detective Matracia and Cruz could arguably be viewed in the context of an on-going emergency, the same does not apply to the verbal statement to Detective Maxwell.

The Supreme Court in *Bryant* recognized that a situation may evolve from what is originally an emergency situation to a less threatening event.

> "[N]one of this suggests that an emergency is ongoing in every place or even just surrounding the victim for the entire time that the

[10] The court relied upon the *Feliciano* Court's instruction in the context of applying the Rule 804(c) exception and its relationship to the Confrontation Clause in light of the Supreme Court's decisions in *Crawford v. Washington,* 541 U.S. 36 (2004) and *Davis v. Washington,* 547 U.S. 813 (2006). Specifically, *Feliciano* instructed when a trial justice is called upon to evaluate an out-of-court statement under Rule 804(c), he or she must undertake a multistep analysis to determine whether the statement was '"made *in good faith* before the commencement of the action and upon the personal knowledge of the declarant."' *Norton v. Courtemanche,* 798 A.2d 925, 930 (R.I. 2002) (quoting *Waldman v. Shipyard Marina, Inc.*, 102 R.I. 366, 368, 230 A.2d 841, 843 (1967)). Additionally, the trial justice must discern, under an objective standard, whether "the attendant circumstances display the earmarks of a 'testimonial' statement." *Feliciano,* 901 A.2d 631, 641 (R.I. 2006). If the statement is found to be testimonial, the inquiry ends and the evidence must be excluded. *Id.* On the other hand, if the statement is found to be non-testimonial, it also must manifest an '"indicia of reliability."' *State v. Ramirez,* 936 A.2d 1254, 1266 (R.I. 2007) (quoting *Feliciano,* 901 A.2d at 641).

> perpetrator of a violent crime is on the loose. As we recognized in *Davis*, "a conversation which begins as an interrogation to determine the need for emergency assistance" can "evolve into testimonial statements." 547 U.S. at 828 (internal quotation marks omitted). This evolution may occur if, for example, a declarant provides police with information that makes clear that what appeared to be an emergency is not or is no longer an emergency or that what appeared to be a public threat is actually a private dispute. It could also occur if a perpetrator is disarmed, surrenders, is apprehended, or, as in *Davis*, flees with little prospect of posing a threat to the public. Trial courts can determine in the first instance when any transition from nontestimonial to testimonial occurs,[10] and exclude 'the portions of any statement that have become testimonial, as they do, for example, with unduly prejudicial portions of otherwise admissible evidence.' *Id.* at 829." *Bryant*, 562 U.S. at 365–66.

Detective Matracia's interaction with Cruz occurred at the outset of events. Both Cruz and Henley were still on the ground by the car. Officers were attempting to get control of the scene and the show-up appears to have taken place in that context. The same cannot be said for the statement to Detective Maxwell.

Captain Hawkins and Firefighter Lopez both testified that the standard operating procedure when responding to a shooting scene is to stay away from the scene until it has been secured. *See* Hr'g Tr. at 281:15-16, 328:16-329:2. Also, both men testified that dispatch confirmed to them that the scene had been secured. *See id.* at 329:3-5, 281:14-15. Moreover, Captain Hawkins described the scene as having a heavy police presence upon the rescue vehicle's arrival at the Monet Lounge. *See id.* at 281:11-14. In fact, Patrolman Sirignano testified that there may have been as many as thirty police officers on scene. *See id.* at 35:10-15.

By the time Detective Maxwell arrived at the Monet Lounge, between at least five and ten minutes had passed from Patrolman Pattie's initial radio transmission declaring that shots had been fired. *Compare id.* at 244:18-22 (Detective Maxwell stated that he arrived on scene approximately

five minutes after hearing Patrolman Pattie's radio transmission), *with id.* at 281:7-10 (Captain Hawkins stated that the rescue vehicle arrived on scene in approximately less than ten minutes after being dispatched). Additionally, prior to Detective Maxwell's arrival on scene, police officers had already secured a handgun and detained Barros and Bodden. *See id.* at 30:20-31:2.

Of greater significance is that before Detective Maxwell spoke to Cruz, Detective Matracia conducted a show-up with Cruz which, according to Detective Matracia, resulted in a positive identification of Barros as the shooter. *See id.* at 182-83.

The show-up took place after Detective Matracia encountered Cruz and Henley on the ground by a car. In fact, both Detectives Matracia and Maxwell testified that each of them found the victims on the ground by a car when they arrived at the scene. *Id.* at 158, 246, 258. Yet, curiously, neither Detective testified that they interacted at that time in regard to the show-up. Detective Maxwell denied having any knowledge of the show-up, even though he claimed that he, like Detective Matracia, first encountered the victims on the ground, and Detective Matracia stated that he had not seen Detective Maxwell until after the show-up. *Id.* at 195, 196, 252.

According to Detective Matracia, he saw Detective Maxwell's car pull up to Harris Avenue at some point and then saw him standing over at the doorway on the side of the rescue. *Id.* at 194. He did not speak to him at all on scene about what happened but did so back at the police station. *Id.* at 195, 196.

Conversely, Detective Maxwell, in addition to testifying that he saw the men on the ground and denying knowledge of the intervening show-up with Detective Matracia, testified that he went over to the ambulance where Cruz was receiving attention "[p]robably a minute or two" after arriving on scene and asked him, "Who shot you?" *Id.* at 250:3-7, 252:4-11. Therefore, he made

it to the ambulance where Cruz had been taken within two minutes of seeing him on the ground. In the interim, somehow, a show-up took place of which Maxwell was not aware.

Detective Maxwell testified that he asked Cruz who shot him—as he always asks at a shooting scene—because he wanted to apprehend the shooter. *See id.* at 252:4-11. According to him, he was "looking solely for who shot him." *Id.* at 266. After questioning Cruz, he walked over to Detective Matracia and told him "something to the effect of, 'This guy is saying something about a second guy.'" *Id.* at 253:16-20. He also clarified that he spoke to Detective Matracia briefly at the scene and then more in depth back at the police station. *Id.* at 253.

He did testify on redirect examination that time was of the essence because Cruz didn't look good and he "wanted to get a broadcast out" and "get [him] to the hospital." *Id.* at 273:7-8. He explained that he wanted to get the information out because he didn't know if there were other weapons and he was concerned for public safety. *Id.* at 275. However, he made no attempt to apprehend or cause anyone to apprehend any suspects. *Id.* at 276.

Detective Maxwell may have testified to wanting to get a broadcast out and about his concern for public safety, but an objective review of his testimony, as a whole, and the circumstances at the time of the questioning reveal that the primary purpose of Detective Maxwell's questioning appears to have been for the purpose of determining "what happened," instead of what was happening in the moment. *See Bryant,* 562 U.S. at 356-57.

The question on its own is a "what happened" question—"who shot you?"—and, appropriately, it's what Detective Maxwell quite naturally always asks. Cruz was in the ambulance being tended to and had, according to Detective Matracia, already identified Cruz as the shooter.[11]

[11] The questions posed by Detective Matracia can certainly also be characterized as "what happened" questions, but the circumstances and timing of his questions certainly lend more support to the trial judge's reasoning.

It was not until they were back at the station and the emergency was clearly over that it appears that Detectives Matracia and Maxwell actually shared any information. Hence, as best can be discerned, Detective Maxwell arrived at the scene, saw Cruz and Henley on the ground, did not see the show-up, walked over to the ambulance, asked a question, got an answer, and went back to the station.

A comparison to *Bryant* highlights the issue. In *Bryant*, police arrived at a gas station parking lot in response to a report that a man had been shot. *Id.* at 349. Upon arrival, they found the victim who told them he had been shot by Bryant outside of Bryant's house, through a door, and had driven himself to the gas station. The victim spoke to several officers at the scene about the matter until rescue arrived within five to ten minutes. *Id.*

The Court found that the statements were not testimonial because the officers did not know the location of the shooter and there remained an ongoing emergency; it was an informal, fluid, and somewhat confused situation, and potential threat to the public remained. *See id.* at 373-77. In addition, at no point during the questioning did the victim or the police know the location of the shooter. *Id.* at 374. The questioning all occurred well within the first few minutes of the police officer's arrival and well before they secured the scene of the shooting. *Id.* [12]

[12] Of note is Justice Scalia's dissent (with which Justice Ginsburg concurred) in *Bryant*. *Bryant*, 562 U.S. at 380-96. Justice Scalia took issue with the majority's approach which he felt improperly considered the reliability of the statements. Instead, Justice Scalia would focus on the intent of declarant. *Id.* at 385. However, Justice Scalia noted that even under the majority's test, at least certain statements should have been suppressed because:

> "At the very least, the officers' intentions *turned* investigative during their 10–minute encounter with Covington, and the conversation 'evolve[d] into testimonial statements.' *Davis*, 547 U.S., at 828 (internal quotation marks omitted). The fifth officer to arrive at the scene did not need to run straight to Covington and ask a battery of questions 'to determine the need for emergency assistance.' *Ibid*. He could have asked his fellow officers, who presumably had a better sense of that than Covington—and a better

In this case, at minimum, the situation had transitioned from emergency to investigatory by the time Detective Maxwell asked what happened. The suspects had been apprehended, the gun was located, Detective Matracia had obtained an identification, rescue had been given the "all clear," and Cruz was in the ambulance. In fact, Cruz made the statement when safely ensconced in the ambulance and gave a response that was "accusatory" in nature. *See Bryant* at 367 *("Davis* requires a combined inquiry that accounts for both the declarant and the interrogator.").

An objective inquiry into primary purpose of the questioning leads to the conclusion that Detective Maxwell was attempting to "prove past events potentially relevant to [a] later criminal prosecution." *Id.* at 356. Thus, Cruz's verbal statement to Detective Maxwell was a testimonial statement subject to the Sixth Amendment's Confrontation Clause. *See Crawford*, 541 U.S. at 68.

ii. The Ineffective Assistance of Counsel-Legal Framework

Pursuant to the Sixth Amendment of the United States Constitution, criminal defendants have the right to effective assistance of counsel. *See Reyes v. State*, 141 A.3d 644, 654 (R.I. 2016). The law is well settled in Rhode Island that ineffective assistance of counsel claims are evaluated under the requirements of *Strickland v. Washington*, 466 U.S. 668 (1984). *See Whitaker v. State*, 199 A.3d 1021, 1027 (R.I. 2019). The benchmark issue is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as

> sense of what he could do to assist. No, the value of asking the same battery of questions a fifth time was to ensure that Covington told a consistent story and to see if any new details helpful to the investigation and eventual prosecution would emerge. Having the testimony of five officers to recount Covingtons consistent story undoubtedly helped obtain Bryant's conviction. (Which came, I may note, after the first jury could not reach a verdict. See 483 Mich., at 137, 768 N.W.2d, at 67.)" *Bryant*, 562 U.S. at 387.

having produced a just result." *Id.* Under the *Strickland* standard, the court utilizes a two-prong test to determine whether trial counsel's assistance was ineffective. *See id.* (citing *Strickland*, 466 U.S. at 687). Both of the *Strickland* requirements must be satisfied to demonstrate a successful ineffective assistance of counsel claim. *See Hazard v. State*, 968 A.2d 886, 892 (R.I. 2009). Therefore, "[a] defendant's failure to satisfy one prong of the *Strickland* analysis obviates the need for a court to consider the remaining prong." *Knight v. Spencer*, 447 F.3d 6, 15 (1st Cir. 2006).

First, a petitioner must show that counsel's performance was deficient to the point that "counsel was not functioning as the 'counsel' guaranteed [to] the [petitioner] by the Sixth Amendment." *Strickland*, 466 U.S. at 687. This prong can be satisfied only by a showing that counsel's representation fell below "an objective standard of reasonableness." *Whitaker*, 199 A.3d at 1027 (internal quotation omitted). In evaluating counsel's performance, courts are mindful that there is "a strong presumption . . . that an attorney's performance falls within the range of reasonable professional assistance and sound strategy." *Id.* (internal quotation omitted). "'[E]ffective representation is not the same as errorless representation.'" *State v. D'Alo*, 477 A.2d 89, 92 (R.I. 1984) (quoting *United States v. Bosch*, 584 F.2d 1113, 1121 (1st Cir. 1978)). '"Thus, a choice between trial tactics, which appears unwise only in hindsight, does not constitute constitutionally-deficient representation"' and will not satisfy this first prong. *Id.* Further, '"[e]ven the most skillful criminal attorneys make errors during a trial. The myriad of decisions which must be made by defense counsel quickly and in the pressure cooker of the courtroom makes errorless representation improbable, if not impossible."' *Id.*

Second, "the [petitioner] must show that the deficient performance prejudiced the defense" such that a reasonable probability exists that a different outcome would have resulted in the absence of counsel's unprofessional errors. *See Strickland*, 466 U.S. at 687; *see also Whitaker*,

199 A.3d at 1027. In other words, a petitioner must show that '"there is a reasonable probability that, *but for* counsel's unprofessional errors, the result of the proceeding would have been different."' *Whitaker*, 199 A.3d at 1027 (quoting *Page v. State*, 995 A.2d 934, 943 (R.I. 2010)). The Rhode Island Supreme Court has stated that this is a "'highly demanding and heavy burden."' *Id.* (quoting *Knight*, 447 F.3d at 15).

Furthermore, the standard for ineffective assistance of counsel claims discussed in *Strickland* applies to appellate counsel. *See Page*, 995 A.2d at 943. The Rhode Island Supreme Court has clarified that "to provide effective assistance under the *Strickland* test, appellate counsel . . . need not (and should not) raise every nonfrivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal." *Chalk v. State*, 949 A.2d 395, 399 (R.I. 2008) (internal quotation omitted). "Therefore, to meet both *Strickland* prongs, an applicant must demonstrate that the omitted issue was not only meritorious, but 'clearly stronger' than those issues that actually were raised on appeal." *See id.*

a. Defense Counsel's Failure to Appeal the Adverse Suppression Hearing Ruling Constitutes Ineffective Assistance of Counsel

At the postconviction-relief evidentiary hearing, Defense Counsel stated that he chose not to appeal the trial judge's ruling on the motion to suppress because he thought that the trial judge "made a sound ruling." *See* PCR Hr'g Tr. at 156. However, Defense Counsel stated that in response to a question about the trial court's ruling on the hearsay exceptions. *Id.*[13] It is likely

[13] The testimony was as follows:

> "Q: Why didn't you -- why didn't you appeal the denial of the suppression motion to the Supreme Court?
> "THE WITNESS: The . . . ruling to allow the declaration?
> "[COUNSEL]: Yes. He allowed under three reasons: Excited utterance, dying declaration, and declaration of a decedent in good faith.

that had the trial judge's ruling on the hearsay exceptions been appealed, it would not have been successful because trial judges are traditionally afforded significant deference in regard to evidentiary rulings. *See Barros*, 148 A.3d at 175. Defense Counsel, however, was not specifically asked why he did not appeal the *Crawford* issue, and it is unclear whether he made any strategic decision in regard to the *Crawford* issue. If he did, he overlooked a significant constitutional issue.

The argument that Barros was denied his Sixth Amendment right to confront the witnesses against him was "not only meritorious, but 'clearly stronger' than" the issue that was raised on appeal. *See Chalk*, 949 A.2d at 399. Defense Counsel unsuccessfully raised a single issue on appeal: whether the trial justice erred by ruling that Bodden properly invoked his Fifth Amendment right against self-incrimination. *See Barros*, 148 A.3d at 171. The Supreme Court denied the appeal for two reasons. *See id.* at 172, 175-76. First, the Court stated that the issue on appeal had been waived because it was never objected to at trial. *See id.* at 172. Second, although Defense Counsel framed the appeal as a constitutional issue, the Court clarified that Barros did not have standing to contest Bodden's Fifth Amendment rights. *See id.* at 171-72. Consequently, the Court stated that even if the issue had been preserved, "the decision to exclude Bodden's live testimony was an evidentiary ruling, and thus [fell] within the trial justice's sound discretion." *See id.* at 175.

Conversely, Defense Counsel failed to appeal a potential violation of Barros's Confrontation Clause right. *See Crawford*, 541 U.S. at 42. Unlike the standard of review for evidentiary questions, the Supreme Court applies a *de novo* standard for mixed questions of law

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> "A: As disappointing as it was, I think he made a sound ruling, that he had the bases covered. I thought the other issues that we brought up on appeal had more -- you know, had merit." PCR Hr'g Tr. at 156.

and fact that implicate a constitutional question. *See, e.g.*, *State v. Lopez*, 45 A.3d at 11; *State v. Imbruglia*, 913 A.2d 1022, 1031 (R.I. 2007); *State v. Wiggins*, 919 A.2d 987, 990 (R.I. 2007).

Indeed, the Confrontation Clause is a "bedrock procedural guarantee." *Crawford*, 541 U.S. at 42. In light of both the significance of the Confrontation Clause issue and the importance that Cruz's verbal statement necessarily played at trial, the issue of Barros's right to confront the witnesses against him was clearly stronger than the issue Defense Counsel actually raised on appeal. Not only had it been preserved as a result of the suppression hearing, but it was also viable, at least in regard to the statement to Detective Maxwell. Therefore, Defense Counsel's failure to appeal the trial judge's ruling regarding Cruz's verbal statement was deficient performance such that "counsel was not functioning as the 'counsel' guaranteed [to] the [petitioner] by the Sixth Amendment." *Strickland*, 466 U.S. at 687.

Moving onto the second *Strickland* prong, Defense Counsel's failure to appeal the trial judge's ruling regarding Cruz's verbal statement prejudiced Barros such that a reasonable probability exists that a different outcome would have resulted in the absence of counsel's error. *See id.*

Barros's trial effectively came down to three groups of evidence against Barros: (1) DNA evidence; (2) Cruz's head nod gestures to Detective Matracia and verbal statement to Detective Maxwell; and, (3) conflicting evidence as to whether two witnesses saw the gun in Barros or Bodden's hand. *See generally Barros*, 148 A.3d at 170-71. As is to be discussed *infra*, the DNA evidence in this case excluded Barros as a contributor to the DNA found on the gun, although the testimony and closing argument attempted to use the DNA evidence against Barros nonetheless. In addition, the witness testimony was, at best, contradictory. A police officer placed the gun in Bodden's hand. Conversely, Henley testified that he did not see a gun in Bodden's hand and the

parking lot attendant, Zorabedian, a lay witness, with a criminal record, who initially denied any knowledge of the events, placed the gun in Barros's hand after the shooting. *See* Trial Tr. at 1311-1314, 1357. Additionally, when Patrolman Pattie removed Bodden from the vehicle, Bodden stated, "It's me. It's all me. It's all mine." *See* Hr'g Tr. at 112:24-113:3. Hence, the most damning evidence for conviction would have been Cruz's statements, and one of those statements is much more ambiguous than the other.

The testimony regarding the head nods that identified Barros as the shooter is premised on Detective Matracia's testimony and interpretation of the head nods in relation to both Bodden and Barros. However, Cruz's head nod gestures lose some of their impact in the absence of Cruz's verbal statement to Detective Maxwell. The statement to Detective Maxwell was actually a verbal statement which, in essence, confirmed Detective Matracia's interpretation.

At Barros's trial, a reasonable person would be hard-pressed to dismiss Cruz's head nod gestures in light of Cruz's alleged statement to Detective Maxwell. But, in the absence of Cruz's verbal statement, the head nod gestures would be viewed and weighed on its own. Without the statement to Detective Maxwell, the State's case is premised on the contradictory statements of who possessed the gun, the head nods, and is undercut by Bodden's statement that the gun was his. Thus, there is certainly a reasonable probability that the outcome of Barros's trial would have been different if Defense Counsel appealed the trial judge's adverse ruling regarding Cruz's verbal statement.

In short, the admission of Cruz's verbal statement to Detective Maxwell violated the Confrontation Clause of the Sixth Amendment pursuant to *Crawford* and its progeny. Moreover, Defense Counsel's failure to appeal such a decision amounts to ineffective assistance of counsel because failure to appeal this issue was objectively unreasonable, the issue was clearly stronger

than the issue raised on appeal, and the failure to appeal the trial judge's ruling prejudiced Barros, especially in light of the remainder of the conflicting evidence at trial.

B

Newly Discovered Evidence

Barros argues that he is entitled to postconviction relief due to newly discovered evidence. Specifically, Barros alleges that the witnesses who testified at the hearing to their knowledge of events or to Bodden's confessions constitute newly discovered evidence.

When analyzing a postconviction-relief application based on newly discovered evidence, "the hearing justice utilizes the same standard used for considering a motion for a new trial due to newly discovered evidence." *See Graham v. State*, 229 A.3d 63, 69 (R.I. 2020). In such an application, a trial justice must determine "whether the previously undisclosed [or newly discovered] favorable evidence puts the case in such a different light as to undermine confidence in the verdict." *See Bleau v. Wall*, 808 A.2d 637, 643 (R.I. 2002) (internal quotation omitted).

The newly discovered evidence standard is a two-pronged test by which the trial court determines whether to grant relief. *See Graham*, 229 A.3d at 69. This standard requires a postconviction-relief applicant to first establish all four factors under the first prong before the court moves on to the second prong. *See id.*

The first prong of the newly discovered evidence test requires an applicant to establish that the evidence: (1) is newly discovered or newly available since trial; (2) was not discoverable prior to trial despite a defendant's exercise of due diligence during trial; (3) is not merely cumulative or impeaching but material to the issue upon which it is admissible; and (4) is of a kind that would probably change the verdict at a new trial. *Id.* Once the threshold prong is satisfied, the trial justice may move on to the second prong. *See id.*

The second prong of the newly discovered evidence test requires the trial justice to decide whether to accept or reject conflicting testimony by exercising independent judgment. The trial justice "must use its experience with people and events in weighing the [evidence]." *State v. Collazo*, 446 A.2d 1006, 1011-12 n.4 (R.I. 1982). Importantly, the new evidence must satisfy both the threshold prong and the credibility prong for the trial justice to grant an applicant's requested postconviction relief. *See id.*

1. The Witnesses to the Event: Gonsalves, Dias, and Delgado

The primary argument that runs through most of Barros's newly discovered evidence claim is that many of the witnesses, except for Gloria Parajon, did not come forward prior to trial because of their fear of retribution from Bodden. The argument is heavily reliant upon the Rhode Island Supreme Court's holding in *State v. Tavares*, 461 A.2d 390, 392 (R.I. 1983).

The *Tavares* Court considered whether evidence was newly discovered even though it was discovered before trial. *See Tavares*, 461 A.2d at 392. The Court found that a witness who was discoverable to the defendant—but who could not be located before or during the trial—constituted newly discovered evidence. *See id.* at 392-93. The Court explained that "a distinction between newly discovered evidence and newly available evidence is a matter of semantics, which should play no part in determining a defendant's right to a new trial, particularly when the evidence is unavailable through no fault of the defendant." *Id.* at 392. But the Court specified that the remaining prerequisites of the newly discovered evidence test must be met. *See id.* In other words, *Tavares* extended the concept of newly discovered evidence to include newly available evidence, but it did not dispose of the other necessary elements of the newly discovered evidence test. *See id.*

i. Austin Gonsalves

Gonsalves claims to have seen Bodden shoot Cruz. He met with Defense Counsel prior to trial and even agreed to testify until he backed out due to his professed fear of Bodden. Even under an overly expansive reading of *Tavares*, Gonsalves's testimony does not constitute newly available or newly discovered evidence. Gonsalves met with Defense Counsel "at least five times," where Gonsalves disclosed that he saw Bodden holding the gun and shooting Cruz. *See* PCR Hr'g Tr. at 145:6-24. Unlike the witness in *Tavares*, who could not be located before or during trial, Defense Counsel knew exactly where Gonsalves was, met with him several times, was even planning to present Gonsalves as a witness at trial. *See id.* at 159:1-16. Accordingly, Gonsalves is not newly discovered or newly available evidence because the first prong of the newly discovered evidence test has not been satisfied. *See Graham*, 229 A.3d at 69.

None of the witnesses actually testified to any threats by Bodden, only to their perceived fear. Hence, the claims are speculative, at best. To find that such evidence constitutes newly discovered evidence would undermine the integrity of the process. One could arguably lie in wait hoping for a desired verdict—i.e., not guilty for his purported friend Barros, and hence, have both absolved—or only come forward at a more personally convenient time.

Gonsalves was available. He had a choice of whether or not to testify. He chose not to. Absent compelling evidence, which is not present here, he cannot choose when, or when not, to participate.

As stated by the Supreme Court of Massachusetts,

> "The basis for the defendant's decision, a coercion or fear exception to the standards governing newly discovered evidence, has no support in the law. It is surely regrettable that parties or witnesses in criminal prosecutions may be subject to threats and intimidation to the point where they may not come forward or cooperate. However, recognizing a new exception of the sort argued for by the

> defendant—an exception of almost limitless definition and application that insulates those who acquiesce to pressure—impermissibly evades the issue of witness intimidation and threatens the integrity of the trial process. . . . 'A hard choice is not the same as no choice.'" *Commonwealth v. Weichell*, 847 N.E.2d 1080, 1091(Mass. 2006) (quoting *United States v. Martinez–Salazar*, 528 U.S. 304, 315 (2000)).

ii. Jorge Dias

Jorge Dias also claims to have seen Bodden shoot Cruz. He never met with Defense Counsel but was obviously known to Barros and was in contact with Barros's mother up until and into his trial. After a defendant has his day in court, there is a heavy burden when alleging newly discovered evidence. *See State v. Quaweay*, 89 A.3d 823, 828 (R.I. 2014). "For a defendant to satisfy his burden of showing that information could not have previously been discovered through a diligent search, [courts] have ordinarily required the defendant to show that he made a reasonable investigation of evidence which was available to him prior to trial." *See id.*

For example, in *State v. Hazard*, 797 A.2d 448 (R.I. 2002), the defendant, Hazard, argued that a New Jersey State Trooper's patrol log was newly discovered alibi evidence. *See Hazard*, 797 A.2d at 463. But the Court concluded that the patrol log was not newly discovered evidence because, among other things, Hazard "failed to demonstrate that he exercised the requisite degree of diligence to obtain the evidence." *See id.* at 465. Specifically, the Court reiterated testimony that Hazard could have obtained the evidence by placing a simple phone call to any New Jersey police barracks. *See id.* Thus, the Court made clear that the onus is on a defendant to demonstrate that evidence was "not discoverable prior to trial with the exercise of due diligence[.]" *See id.* at 463.

Dias's testimony demonstrates, at the very least, that he was discoverable prior to trial through the exercise of due diligence. Dias was present on the night of the shooting as part of

Barros's friend group. *See* PCR Hr'g Tr. at 101:8-12. Therefore, Barros should have been able to discover Dias as a witness. Moreover, Dias was in contact with Barros's mother regarding his unwillingness to testify. *See id.* at 137:23-138:5.

Accordingly, Dias's testimony does not constitute newly discovered evidence because Dias was discoverable through the exercise of due diligence. He never came forward, purportedly because of his fear of Bodden, but also because he assumed Barros "should be all right" once the police conducted its investigation. *Id.* at 109, 128. As with Gonsalves, the fact that he may have been afraid of Bodden does not create an exception to allow his testimony, even under *Tavares*, and he shouldn't be able to undermine the process when he found out that his friend was not "all right" after all.

iii. Amos Delgado

Amos Delgado was also part of the friend group at the Monet Lounge on the night of the shooting. *See id.* at 62:18-22. However, according to his own testimony, he was not an eyewitness to the shooting. Once in his car, he claims that Gonsalves told him, "Terrel's all right, Terrel's all right" and that Bodden had been the shooter. *Id.* at 76. He also claimed that he would not be testifying if Bodden was still alive. *Id.* at 75. His only contribution is the hearsay statement that Gonsalves told him Bodden was the shooter. *Id.* at 76. Additionally, Delgado was clearly known to Defense Counsel because he testified that he met with Defense Counsel before Barros's trial. *See id.* at 145:12-13. Hence, even if he had admissible evidence, it would not be newly discovered.

2. The Witnesses to the "Confession"

i. Gloria Parajon

As outlined, *supra*, Gloria Parajon was Bodden's first cousin to whom he allegedly confessed to the murder the day after his release from the ACI. *Id.* at 346, 351-53. According to

Parajon, Bodden told her that he was the shooter and that Barros was at the "wrong place at the wrong time." *See id.* at 353:8-9. She also claimed to have had between five and ten conversations with Bodden over the course of a five-year period when Bodden admitted to being the shooter at the Monet Lounge. *See id.* at 357-58.

The State does not dispute that Parajon satisfies the criteria for the threshold prong of the newly discovered evidence test. Importantly, Parajon testified that she was unknown to Barros until she contacted Barros's mother through Facebook in July of 2020. *See id.* at 370:7-17. Also, Parajon testified that she had not met Barros or his mother before the postconviction-relief hearing. *See id.* at 353:16-20. Parajon was also not discoverable prior to trial through the exercise of due diligence because there is no reason to believe that Defense Counsel, Barros, or anyone else associated with Barros's defense team would have known about Parajon's existence.

Parajon's testimony is not merely cumulative or impeaching, and her testimony is of a kind that could change the verdict at a new trial since it offers new and exculpatory evidence. '"Evidence is cumulative which . . . adds other circumstances of the same general character. But that evidence which brings to light some new and independent truth of a different character, although it tend [sic] to prove the same proposition or ground of claim before insisted on, is not cumulative within the true meaning of the rule on this subject."' *Tavares,* 401 A.2d at 392 (quoting *Zoglio v. T.W. Waterman Co.,* 39 R.I. 396, 404, 98 A. 280, 283 (1916)). Parajon would testify that Bodden admitted to being the shooter, the issue in this case, which would obviously be significant in light of the competing evidence that was presented at trial. The testimony would add to and give context to Bodden's statement that, "It's me. It's all me. It's all mine." Hr'g Tr. at 112-13.

The next step in the newly discovered evidence analysis requires the court to assess Parajon's credibility. However, first the court must also address the admissibility of Parajon's hearsay testimony that Bodden admitted to being the shooter at the Monet Lounge under Rule 804(b)(3) of the R.I. Rules of Evidence.

Rule 804(b)(3), the statement against interest exception, provides, in pertinent part:

> "A statement which was at the time of its making . . . so far tended to subject the declarant to civil or criminal liability . . . that a reasonable person in the declarant's position would not have made the statement unless the declarant believed it to be true. *A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement*." *State v. Firth*, 708 A.2d 526, 531 (R.I. 1998) (emphasis added).

Under the statement against interest exception, "three considerations must be taken into account to determine the trustworthiness of declarations made against one's penal interest: first, the timing of the declaration and the party to whom the declaration was made; second, the existence of corroborating evidence; and third, the extent to which the statement is truly against the declarant's penal interest." *Id.* (citing *State v. Rivera*, 602 A.2d 571, 577 (Conn. 1992)). The State equivocates in its opposition to Barros's petition by stating that the statement "might qualify" as a statement against penal interest. *See* State's Post-Hr'g Mem. at 28.[14]

It is clear that the statement, if true, was against Bodden's penal interest. *See Firth* at 531. He had just been released on bail after the shooting and the issue all along was whether Bodden or Barros was the shooter. Moreover, the corroborating circumstances are favorable to admission.

[14] The State argues that although the statement made immediately after Barros's release might qualify as a statement against interest, the subsequent statements over time, and after Barros's conviction, are too remote. State's Post-Hr'g Mem. at 28. Clearly, that statement allegedly made upon his release is of greater significance given the timing and the greater clarity to which Parajon testified to that statement as contrasted with the others and is the primary focus of the court's analysis.

The First Circuit has stated that Rule 804(b)(3) requires "meaningful corroboration," and establishing meaningful corroboration does not require "independent evidence supporting the truth of the matter asserted by the hearsay statements." *See United States v. Taylor*, 848 F.3d 476, 486 (1st Cir. 2017) (internal quotation omitted). But there must be "evidence that clearly indicates that the statements were worthy of belief, based upon the circumstances in which the statements were made." *Id.* at 486-87 (internal quotation omitted). A statement may be corroborated by the circumstances if the statement was made to a family member. *Id.* at 487.

A court may consider the following factors when making this determination: '"the timing of the declaration and the relationship between the declarant and the witness, ... the reliability and character of the declarant, ... whether the statement was made spontaneously, ... whether other people heard the out-of-court statement, ... whether there is any apparent motive for the declarant to misrepresent the matter, ... and whether and in what circumstances the statement was repeated."' *Commonwealth v. Galloway*, 534 N.E.2d 778, 781 (Mass. 1989) (quoting *Commonwealth v. Drew*, 489 N.E.2d 1233, 1241 (Mass. 1986)). A "judge should assess the credibility of the declarant ... and ... admit a statement if there is some reasonable likelihood that the statement could be true." *Weichell*, 847 N.E.2d at 1093 (quotations omitted).

According to Parajon, Bodden confessed to her upon his release from the ACI. Not only was the confession immediate, but it was not surprising to her in light of her knowledge of his character and reputation. *See* PCR Hr'g Tr. at 351-53. Moreover, the statement was made within days of his statement to Patrolman Pattie that, "It's me. It's all me. It's all mine." Hr'g Tr. at 112:24-113:3. *See, e.g., Rivera*, 602 A.2d at 577 (court considered, but eventually rejected as speculative, corroborating evidence of the crime in assessing 804(b)(3) evidence).

It is clearly concerning that Parajon did not come forward for years, until her cousin was killed. However, it is noteworthy that she independently reached out to Barros's mother through Facebook in July of 2020 to share her story. *See* PCR Hr'g Tr. at 370. Hence, both the circumstances of her disclosure and the trial evidence are noteworthy and provide corroboration.

For many of the same reasons, the statement is also credible. The fact that Parajon was unknown to Barros, coupled with her familial relation to Bodden, and the fact that she reached out to Barros's mother without any prompt, weighs in favor of finding Parajon's testimony reliable and credible. *See id.* at 370:7-17, 346:18-24. Accordingly, Parajon's testimony constitutes newly discovered evidence.

ii. Marcus DePina

The analysis of Marcus DePina's testimony is somewhat similar to that of Gloria Parajon's, to a point.

First, the DePina testimony constitutes newly discovered evidence, which the State does not appear to contest. State's Post-Hr'g Mem. at 26. Although Barros and Bodden were friends, there is no evidence that Barros or anybody involved in his legal defense had reason to know about the alleged conversation between DePina and Bodden. Instead, DePina only opted to share his story after Bodden's death. *See* PCR Hr'g Tr. at 219:12-15. Additionally, as with Parajon, DePina's testimony is not merely cumulative or impeaching, and it is of a kind that could change the verdict at a new trial since it offers new and exculpatory evidence.

In addition, the statement would likely be admissible as a statement against penal interest pursuant Rule 804(b)(3). However, the court has serious concerns about the credibility of Mr. DePina.

At the outset, unlike Ms. Parajon, DePina did not volunteer his information unprompted. His testimony is less than clear on the issue, but he testified that he originally told "some . . . ladies" who came to him and asked him if he "had known anything" because he and "Terrel was pretty cool." *Id.* at 223, 224. He later signed an affidavit that was prepared for him about his knowledge. *Id.* at 224. However, he also agreed that he had talked about the matter on a podcast, although it is unclear if he did so before or after being approached by the "ladies." *See id.* at 225.

In addition, the circumstances of his retelling of his story are unusual, at best. He claims that he was staying at a female friend's house and Bodden just happened to appear at the same house without any prior knowledge that he would be there. *Id.* at 213.[15] Once faced with this circumstantial meeting, Bodden then proceeded to unburden himself about the events while the two of them huddled in a bathroom in the house. *Id.* at 214.

However, he claimed that they spent an hour discussing the matter but that Bodden never provided him with any details of what actually happened. *Id.* at 214-15. He also claimed that Bodden told him that he had shot someone but wasn't sure that the person was dead. *Id.* at 205. It is unlikely that Bodden did say that to DePina. Bodden had been interviewed on the night of the murder. He did not admit to the shooting but was told that Cruz was dead. *See id.* at 399, 400, PCR Hr'g Exs. G, H. Hence, Bodden knew Cruz was dead and would have surely known that his friend Barros had been charged with the crime.

In addition, he claimed to have had subsequent conversations about doing the "right thing" prior to Barros's trial. *Id.* at 210. However, his testimony in that regard became more equivocal on cross-examination when confronted with the fact that Bodden was incarcerated on September

[15] More specifically, DePina agreed that he was at a "flop house" and explained that Bodden "didn't know [he] was there. It isn't like he went there to look for [him]. The house is like a house that, like, you could probably walk into if you wanted to. *Id.*

1, 2012, shortly after his release from the ACI and remained incarcerated up and through the time of Bodden's trial. *Id.* at 215-17.[16] Although DePina's testimony is intriguing, it does not pass the second prong of the newly discovered evidence test—it is not "credible enough" to warrant a new trial. *Firth*, 708 A.2d at 532.

iii. Defense Counsel's Failure to Subpoena Gonsalves to Secure Testimony at Trial

Although the court has found that Gonsalves's testimony does not constitute newly discovered evidence, it is certainly significant evidence that would have been highly relevant at trial—he claims that he saw Bodden shoot Cruz and he had made the same statement to Defense Counsel. Hence, Barros argues that he received ineffective assistance of counsel when Defense Counsel decided not to subpoena Gonsalves for trial.

Again, to establish an ineffective assistance of counsel claim, a petitioner must show that counsel's representation fell below an "objective standard of reasonableness." *See Whitaker*, 199 A.3d at 1027 (internal quotation omitted). Moreover, the standard for effective assistance of counsel is "very forgiving." *See United States v. Theodore*, 468 F.3d 52, 57 (1st Cir. 2006). Due to this forgiving standard, "a defendant must overcome a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance and sound trial strategy." *See Hughes v. State*, 656 A.2d 971, 972 (R.I. 1995).

[16] For instance:

> "Q: And, you know, you kept telling him he should come forward; right?
> "A: A bunch of times.
> "Q: Okay. And that was before Terrel's trial; right?
> "A: I don't think so. Honestly, I'm not a hundred percent sure. I just know I spoke to him about literally the day before he passed away and then a short time, like, a little bit before that, like, I want to say maybe six to three months before he passed away." *Id*. at 216.

Defense Counsel testified that he planned to call Gonsalves as a witness at Barros's trial. *See* PCR Hr'g Tr. at 158:12. In fact, Defense Counsel had arranged for the courtroom to be cleared so that Gonsalves would not have to testify in front of the public. *See id.* at 158:25-159:3. Additionally, Defense Counsel testified that Gonsalves repeatedly told him that he would testify. *See id.* at 159:8-9. When asked why he did not subpoena Gonsalves, Defense Counsel stated that Gonsalves "made it unequivocally clear to me on more than one occasion, he said 'If you give me a subpoena, I'll never show up, I'll never show up.'" *See id.* at 159:9-11.

It was a perfectly reasonable and measured calculation for Defense Counsel to refrain from subpoenaing Gonsalves since Gonsalves made it clear that he would not comply with a subpoena. *See id.* Simply put, Defense Counsel's conduct amounts to sound trial strategy.

Defense Counsel is a highly seasoned attorney with extensive experience. He had two options: (1) subpoena Gonsalves despite Gonsalves's insistence that he would not appear; or (2) attempt to convince him to appear and rely on his promise that he would. In the end, his efforts were for naught, but it is also just as likely that the subpoena would have been equally unsuccessful due to Gonsalves's declaration that he would not appear if served. Accordingly, Defense Counsel's conduct did not fall below an "objective standard of reasonableness," and Barros's ineffective assistance of counsel claim fails on this issue. *See Whitaker*, 199 A.3d at 1027 (internal quotation omitted).

C

DNA Evidence

1. The False DNA Testimony

Barros argues that his Fourteenth Amendment due process rights have been violated because the State presented false or misleading DNA evidence at trial. Specifically, Barros asserts

that the State's DNA expert witness, Cara Lupino, falsely stated that the presence of DNA on an item proves that a person touched the item. Additionally, Barros takes issue with Ms. Lupino's statement that the presence of a three-person mixture on an item proves that three people touched the item and to the line of questioning that inferred that Barros's DNA was consistent with that found on the gun.

It is essentially admitted that certain portions of Ms. Lupino's testimony were, at best, incorrect. Ms. Lupino did testify that Barros was excluded as a contributor to DNA found on the murder weapon, a handgun. *See* PCR Hr'g Tr. at 436:2-5, 437:16-20, Trial Tr. at 1004-1005. However, Ms. Lupino incorrectly testified that "[a] mixture [found on an item] would tell you that more than one person *touched* an item." *See* PCR Hr'g Tr. at 435:12-436:5 (emphasis added). At the evidentiary hearing, Ms. Lupino admitted that, at the time of trial, she knew that secondary transfer occurred between materials, hence, she couldn't testify to that. *See* PCR Hr'g Tr. at 431:14-15. Yet she testified at trial that, based on the number of alleles on the handgun, "at least three different people handled that [handgun.]" *See* Trial Tr. at 999:25. More problematic was that Ms. Lupino testified that a mixture of alleles was found on the handgun, including a number of alleles consistent with Barros's DNA profile. *See id.* at 1000-1004.

In *Napue v. Illinois*, 360 U.S. 264 (1959), the Supreme Court declared that a conviction procured by false or misleading testimony "must fall under the Fourteenth Amendment." *Napue*, 360 U.S. at 269; *see also State v. Towns*, 432 A.2d 688 (R.I. 1981). Specifically, a *Napue* violation occurs when the government introduces or fails to correct false or misleading testimony, "even though the government knew or should have known that the testimony was false[.]" *U.S. v. Straker*, 800 F.3d 570, 603-04 (D.C. Cir. 2015) (citing *U.S. v. Agurs*, 427 U.S. 97, 103 (1976)). But a new trial is not automatically warranted if false or misleading testimony is introduced. *See*

Giglio v. U.S., 405 U.S. 150, 154 (1972). Instead, the false or misleading evidence must also be material such that there is a reasonable likelihood that the false evidence could have affected the judgment of the jury. *See id.*

Although Ms. Lupino testified that Barros was excluded as a contributor to the handgun, her testimony can be viewed as falsely implying that Barros's DNA was on the handgun. Again, her testimony about the exclusion was as follows:

> "Q: And did you come -- did you come to a conclusion with respect to the profile of Terrel Barros?
>
> "A: We reported that as an exclusion.
>
> "Q: And why – I'm sorry, go ahead.
>
> "A: Because Mr. Barros's DNA profile was not represented at all the locations. It's lab policy to report that as an exclusion.
>
> "Q: So that's part of your policy; correct?
>
> "A: Yes, it is.
>
> "Q: And you're not saying to this jury that Terrel Barros didn't handle that gun, are you?
>
> "A: I can't say that." Trial Tr. at 1004 -1005.

Rather than explain what it means to be excluded, the exclusion was explained away, in an apologetic manner, as "policy" because his DNA was not represented at all locations. In fact, Ms. Lupino could not testify to Barros's DNA having been found at all.

More problematic is that it appears that the prosecution specifically elicited the testimony to create a false impression that Barros's DNA was on the gun. *See id.* at 982-83. Ms. Lupino was asked, at length, to confirm that a number of Barros's alleles were consistent with those found on the gun. The State used two exhibits to compare Barros's alleles to those found in the mixture of DNA from the gun in order, one would think, to show the consistency between the two. *See id.*

at 1000-1004. In all, there appear to be close to thirty questions related to Barros's alleles and possible connection to those found on the gun. *See id.* [17] She admitted at the hearing that the correlation was "meaningless" in "this context." PCR Hr'g Tr. at 477.[18] They were just random matches. *Id.* at 477, 482.

Not only did the prosecution fail to correct the evidence, but the prosecutor reinforced the testimony that insinuated that Barros's DNA was on the gun during the State's closing argument.

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[17] Examples of the questioning are as follows:

> "Q: Okay. And, for instance, let's look at the first allele that we have here at D8S1179. Can you tell me what you find there.
> "A: Yes. In that mixture there is an 11, 12 which is consistent with the DNA profile of Mr. Barros.
> "Q: And with respect to the second allele?
> "A: The D21, there is a 30, which is consistent. However, the 31.2 is not present in the DNA mixture.
> "Q: And our third allele, it's represented at 10, 11, which is also located on item 4; is that correct?
> "A: Yes. That's correct.
> "Q: And on our fourth allele, Terrel Barros is an 11, 12, but the 11 is not represented on item 4; is that correct?
> "A: That's correct.
> "Q: And you have in the 5th location a OL and 17. Could you explain what an OL means? It says 'off ladder allele'?
> "A: Yes. Off ladder alleles are alleles that are rare and not in our normal standards. So we just call them off ladder, instead of assigning them a particular number.
> "Q: And you have a 17 there, that's represented by Mr. Barros, on both the front grip and on his unique profile; correct?
> "A: Yes.
> "Q: And at the next location, which is the 6th location, we have a 9.3 located there; is that correct?
> "A: Yes." *Id.* at 1001-1002.

[18] The court is cognizant that at the hearing, Barros's DNA expert, Mr. Carita agreed that the testing conducted in 2013 was correct. *Id.* at 574. However, while "technically" correct and while Ms. Lupino testified to Barros's exclusion, the thrust of the questioning was clearly intended to undercut the "correct" finding that Barros was excluded.

"When you look at the defendant's DNA and you look at the numbers, compare them. Compare the defendant's DNA to the mixture of DNA that's found on that gun." *See id.* at 1350.

In *Towns*, the R.I. Supreme Court found that there was a due process violation when a prosecutor failed to correct testimony that became apparently false during trial. *See Towns*, 432 A.2d at 690-91. In that case, a Providence Detective testified that he had performed a benzidine test on the defendant which was "positive" for the presence of blood. *Id.* at 689. Later, during trial, an expert witness contradicted the detective by testifying that the detective did not conduct the test properly because he had used a contaminated cotton swab and that the result was actually an absence of blood on the defendant's hand. *Id.* at 690. Nonetheless, the prosecutor failed to correct that matter and actually reinforced the false testimony during closing. *Id.* The Court noted that although it was a case where the prosecutor did not initially knowingly present false testimony, the Court was nonetheless concerned that the prosecutor failed to correct the false evidence, objected to a curative instruction on the matter, and "emphasiz[ed the] spurious testimony during his closing . . . [which] amounted to a denial of defendant's right to due process." *Id.* at 691.

Here, while it is unclear, the State likewise may have been unaware that the principle of secondary transfer undermined Ms. Lupino's testimony. However, the State was clearly aware that Barros was excluded as a contributor to the mixture of DNA found on the gun. In light of the fact that Ms. Lupino knew about secondary transfer, and the fact that Ms. Lupino and the State knew that Barros was excluded, the State should have known that the implication that Barros's DNA was on the gun was false and misleading. The State failed to correct false and misleading evidence. *See Straker*, 800 F.3d at 603-04. Instead, as in *Towns*, it highlighted it in its closing.

The State argues that even if there was error, it was not material because there was a "plethora of evidence" incriminating Barros. *See* State's Post-Hr'g Mem. at 37-38. The argument

blatantly overstates the nature of the evidence. The State had to convince the jury that Barros handled the murder weapon and, without Ms. Lupino's testimony, the only evidence connecting Barros to the handgun was Cruz's statement identifying Barros as the shooter and Gregory Zorabedian's testimony. *See, e.g.*, Trial Tr. at 1326:12-14. The court has already addressed the potential problems with Cruz's statements, *supra.* In regard to Zorabedian's testimony, the State admitted in its closing that Zorabedian had lied under oath at a previous hearing before changing his story to include seeing Barros holding a handgun. *See* Trial Tr. at 1345:11-15.

In addition, the fact that the State highlighted the false and misleading DNA evidence during closing argument signifies the importance of the evidence. *See id.* at 1350:1-14. In fact, it was so convincing that, in considering Barros's appeal, the R.I. Supreme Court noted the following:

> "It is worth noting that the expert witness who testified at trial said that DNA from multiple people was on the gun and that some of the DNA found on the gun matched defendant's DNA, but he added that there was not enough of defendant's DNA to positively identify him." *Barros*, 148 A.3d at 176, n.2.

If one excludes the DNA testimony or, rather, if the testimony is simply that Barros was excluded and that the principles of transfer DNA *preclude* one from ascribing any correlation between the mixture from the gun and Barros's alleles, the false DNA evidence is clearly material. That is because the jury is then left to weigh Cruz's identification against the fact that it was Bodden's, and not Barros's, DNA that was found on the gun and that Bodden claimed at the time of the incident, "It's me. It's all me. It's all mine." Hr'g Tr. at 112-13.

The presentation of false and misleading evidence by the State was material because a reasonable likelihood exists that the evidence could have affected the judgment of the jury. *See*

Giglio, 405 U.S. at 154; *Towns*, 432 A.2d at 691. Thus, Barros's conviction "must fall under the Fourteenth Amendment." *Napue*, 360 U.S. at 269.

2. Statistical Probability Evidence Claim

Barros also claims that the State was required to introduce statistical probability evidence to accompany the evidence that Barros was excluded as a contributor of the subject DNA. The State counters that statistical probability evidence was not required at trial because Barros was specifically excluded as a possible contributor to the DNA found on the gun.

Barros's argument relies exclusively on Massachusetts caselaw which requires that "nonexclusion" DNA testimony be accompanied by a "statistical explanation of the meaning of nonexclusion." *See Commonwealth v. Mattei*, 920 N.E.2d 845, 856 (Mass. 2010); *Commonwealth v. Cameron*, 39 N.E.3d 723, 728 (Mass. 2015). "Nonexclusion" DNA testimony is "[e]vidence that a defendant is not excluded." *See id.* at 106. Massachusetts courts reason that "nonexclusion" DNA testimony requires accompanying statistical probability evidence because "nonexclusion" DNA testimony may "suggest to the jury that a 'link would be more firmly established if only more [sample] were available for testing.'" *Id.* (quoting *Commonwealth v. Nesbitt*, 892 N.E.2d 299 (Mass. 2008)). This principle has not been addressed in Rhode Island, and this is not the appropriate case to expound on the principle.

The issue was not raised at trial and Barros does not even attempt to make an argument that it was ineffective assistance of counsel to fail to raise the issue. In addition, even if the principle were adopted in Rhode Island, it isn't even applicable to the facts at hand. *See, e.g.*, *Cameron*, 39 N.E.3d at 728 (stating that "nonexclusion" testimony should be accompanied by statistical probability evidence). Ms. Lupino testified that Barros was specifically excluded as a contributor to the gun. *See* Trial Tr. at 1004-1005. Thus, it is unclear how one would prove a

statistical probability of an exclusion. Defendant did not provide any such evidence, even by way of his own expert, Mr. Carita. Hence, there is no support for his claim.

D

Actual Innocence Claim

The postconviction-relief statute does not explicitly provide for an actual innocence claim. However, § 10-9.1-1(a)(4) permits relief for claims where "there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice[.]" *See* § 10-9.1-1(a)(4). Barros pleads actual innocence based principally on his expert's review of the gunshot residue evidence, the newly discovered evidence, and the evidence pointing to Bodden.

Dr. Hall testified that Bodden was most likely the shooter because the data showed that Bodden's clothing contained more than two and a half times as many two-component particles as Barros's clothing. *See* PCR Hr'g Tr. at 255:10-21, 262:17-263:1, 271:2-10. However, four items of Bodden's clothing were tested as opposed to only one item of Barros's clothing, which may have skewed the data. *See id.* at 277:19-278:4. The State's GSR expert, Ms. Gingell, did not dispute Dr. Hall's quantifications but explained that GSR analysis also requires an analyst to conduct a manual examination to confirm or reject potential particles identified by the instrument. *Id.* at 323.

Basically, Dr. Hall calculated that more particles were obtained from more items of clothing that were obtained from Bodden than the single item obtained from Barros. It is unclear what Dr. Hall's calculations add to the analysis in this matter. Dr. Hall relies on math to conclude only that Bodden was more "likely" the shooter. His opinion, even if valid, is not conclusive.

Barros claims that Dr. Hall's opinion, along with his newly discovered evidence, and the issues with DNA prove his innocence. As discussed *supra,* not all the evidence presented at his hearing is "newly discovered." More importantly, there remains evidence pointing to Barros as the shooter, such as Cruz's head nod "statements" to Detective Matracia as well as the late inning testimony of Gregory Zorabedian, even with its challenges. That evidence may possibly be overcome by Bodden's own statements to the police on the night of the incident, as well as to his cousin, and by the DNA evidence. However, the present state of the evidence does not support an actual innocence claim.

IV

Conclusion

For the reasons set forth above, Barros's Sixth Amendment right to effective assistance of counsel was violated when Defense Counsel failed to appeal the trial judge's ruling regarding Cruz's verbal statement to Detective Maxwell. Additionally, Gloria Parajon's testimony constitutes newly discovered evidence. Moreover, Barros's Fourteenth Amendment due process rights were violated due to the State's use of false and misleading DNA evidence. Accordingly, Barros's petition for postconviction relief is granted on those grounds. The remainder of Barros's claims are denied. The conviction is vacated and Petitioner is entitled to a new trial.

Counsel is instructed to prepare an appropriate order and judgment to enter.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**Terrel Barros v. State of Rhode Island**
CASE NO:	**PM-2017-4915**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**August 4, 2023**
JUSTICE/MAGISTRATE:	**Matos, J.**

ATTORNEYS:

For Plaintiff:	**Robert Kando, Esq.**
For Defendant:	**Judy Davis, Esq.**