STATE OF RHODE ISLAND

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: August 15, 2024)

EMANUEL BAPTISTA	:	
	:	
	:	
v.	:	**C.A. No. PM-2019-10375**
	:	
STATE OF RHODE ISLAND	:	

DECISION

M. DARIGAN, J. Before this Court is Petitioner Emanuel Baptista's amended application for postconviction relief. *See* Amended Application, Nov. 24, 2023.[1] Petitioner contends that his conviction should be vacated on the basis that his right to effective assistance of counsel under the Sixth Amendment to the United States Constitution and article I, section 10 of the Rhode Island Constitution was violated. *See id*. at 2; *see also* Petitioner's Memorandum in Support of Amended Application, Nov. 24, 2023. (Pet'r's Mem.) at 2-3. Jurisdiction is pursuant to G.L. 1956 chapter 9.1 of title 10.

[1] Petitioner initially filed a *pro se* application for postconviction relief on October 23, 2019. He filed a second *pro se* application for postconviction relief on February 20, 2023. No memoranda were filed in relation to these applications, nor was any postconviction relief hearing conducted. Petitioner filed an amended application on November 24, 2023, with the assistance of counsel. All references herein to the petition or application are to the November 2023 Amended Application which is the operative application for postconviction relief. *See* Appl.

I

Facts and Travel

The facts concerning Petitioner's conviction are set forth in *State v. Baptista*, 79 A.3d 24 (R.I. 2013).[2] Suffice to say, in 2011, Petitioner was found guilty after a trial by jury of two counts of first-degree child molestation and two counts of first-degree child abuse. *Id*. at 29. Thereafter, Petitioner moved for a new trial. *Id*. After the trial justice denied such request, the trial justice sentenced Petitioner to "concurrent life sentences on each count of child molestation" and, as to the counts for first-degree child abuse, to "concurrent sentences of twenty years, ten to serve, with eight and one-half years to serve prior to eligibility for parole, to run consecutively to the sentences [for child molestation.]" *Id*. Petitioner then appealed to the Supreme Court. *Id*. at 30. Our Supreme Court affirmed the judgment of conviction. *Id*. at 32. Petitioner was represented at trial by Attorney Mark Dana.[3] Additional facts are supplemented below as needed.

In his Amended Application, Petitioner asserts that his right to effective assistance of counsel as set forth in the Sixth Amendment to the United States Constitution and article I, section 10 of the Rhode Island Constitution was violated. *See* Appl. at 2. He claims that trial counsel was ineffective for the following reasons: (1) failing to attend Petitioner's presentence report interview with probation; (2) failing to advocate for additional DNA testing; and (3) failing to "file memorandums" at Petitioner's request. *See id*. In his memorandum filed with the

[2] This Court spares the reader the disturbing details which involve the abuse and molestation of Petitioner's four-month-old daughter. *See State v. Baptista*, 79 A.3d 24, 24-28 (R.I. 2013).

[3] Hereinafter, this Court refers to Attorney Dana as "trial counsel" when referencing the 2011 trial and "Attorney Dana" when referring to his testimony during the postconviction relief hearing held on March 21, 2024.

Amended Application, Petitioner additionally asserts that trial counsel was ineffective because he failed to provide Petitioner with a translator at trial. *See* Pet'r's Mem. at 6.

This Court conducted an evidentiary hearing on March 21, 2024 (2024 Hearing) at which both Petitioner and Attorney Dana testified. *See* Hr'g Tr., Mar. 21, 2024 (2024 Hr'g Tr.). Their testimony addressed the above-noted four grounds cited by Petitioner as support for his claim of ineffective assistance of counsel. Testimony was also elicited concerning a fifth argument for ineffective assistance of counsel: that trial counsel prejudiced Petitioner's defense by not informing him that trial counsel was contacted by and communicated with a juror after the 2011 verdict. Thereafter, the State filed a post-hearing memorandum on April 30, 2024 and Petitioner filed same on May 6, 2024. *See* State's Post-Hearing Mem. (State's Mem.); Petitioner's Post-Hearing Mem. (Pet'r's Post-Hr'g Mem.).

II

Standard of Review

Postconviction relief is a statutory remedy, pursuant to § 10-9.1-1(a), and provides:

> "Any person who has been convicted of, or sentenced for, a crime . . . 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 . . . may institute, without paying a filing fee, a proceeding under this chapter to secure relief." Section 10-9.1-1(a).

"'[T]he remedy of postconviction relief is available to any person who has been convicted of a crime and who thereafter alleges . . . that the conviction violated the applicant's constitutional rights[.]'" *DeCiantis v. State*, 24 A.3d 557, 569 (R.I. 2011) (quoting *Page v. State*, 995 A.2d 934, 942 (R.I. 2010)). The applicant "bears the burden of proving, by a preponderance of the evidence, that such relief is warranted in his or her case." *Id*. "The court shall make specific

findings of fact, and state expressly its conclusions of law, relating to each issue presented." Section 10-9.1-7.

III

Analysis

This Court is guided by the standard for reviewing a claim of ineffective assistance of counsel as prescribed in *Strickland v. Washington*, 466 U.S. 668, 688 (1984) and adopted by our Supreme Court in *Brown v. Moran*, 534 A.2d 180, 182 (R.I. 1987). *Strickland* sets forth the following test to determine whether counsel's assistance was ineffective:

> "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." *Strickland*, 466 U.S. at 687; *see also Brown*, 534 A.2d at 182.

The first prong requires an applicant to show that "counsel's advice was not within the range of competence demanded of attorneys in criminal cases." *Neufville v. State*, 13 A.3d 607, 610 (R.I. 2011) (internal quotation omitted). The Court makes this assessment "in view of the totality of the circumstances with a strong presumption that counsel's conduct falls within the permissible range of assistance." *Id.* (internal citations omitted). And, in evaluating counsel's performance, the Court must make "every effort . . . to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Lynch v. State*, 13 A.3d 603, 606 (R.I. 2011). If a petitioner fails to show that counsel's representation was constitutionally deficient, then the

Court need not address the second prong of *Strickland* concerning prejudice. *See Page,* 995 A.2d at 945 (explaining that the Court "need not consider the second *Strickland* prong (prejudice)" because "counsel's performance was reasonable and, as such, did not run afoul of even the first prong (deficiency) under the *Strickland* test").

As noted above, before this Court, Petitioner makes five allegations of ineffective assistance of counsel. *See generally* Pet'r's Mem; Pet'r's Post-Hr'g Mem. Each allegation will be addressed in turn.

A

Failure to Attend Presentence Interview

Pursuant to G.L. 1956 § 12-19-6, after an accused is found guilty, "the court shall, before imposing sentence, have presented to it by the administrator of probation and parole a presentence report." Section 12-19-6. Rule 32(c) of the Superior Court Rules of Criminal Procedure outlines the presentence investigation and report requirements. Before imposing sentence, the Court is to make the presentence report available to the Attorney General and to counsel for the defendant. Super. R. Crim. P. 32(c)(3).

In his claim of ineffective assistance of counsel, Petitioner relies upon Federal Rule of Criminal Procedure 32(c)(2) which provides that "[t]he probation officer who interviews a defendant as part of a presentence investigation *must,* on request, give the defendant's attorney notice and a reasonable opportunity to attend the interview." Fed. R. Crim. P. 32(c)(2) (emphasis added). He argues that trial counsel failed to attend the presentence report meeting between Petitioner and the probation department which resulted in a presentence report that was "highly prejudicial" to Petitioner. (Pet'r's Mem. at 4-5.)

Unlike its federal counterpart, Rhode Island's Rule 32 is silent as to whether defense counsel may or should participate in the presentence investigation by the administrator of probation and parole. Rule 32 simply provides that "[t]he court shall . . . make the report available for inspection to the attorney for the defendant, or to the defendant if the defendant is not represented by an attorney, and afford an opportunity to the defense to comment thereon." Super. R. Crim. P. 32(c)(3). Although the Rhode Island Rules do not require that defense counsel be given notice and opportunity to attend a defendant's meeting with probation, this Court understands that it is generally the practice in this State to invite such participation.

Here, Petitioner was interviewed as part of the presentence investigation; however, trial counsel was not given notice of the interview and, as a result, was not present for the interview. *See generally* State's 2024 Hr'g, Ex. C: Hr'g Tr., Apr. 27, 2011 (2011 Hr'g Tr.).[4] Soon after, trial counsel learned about the interview and immediately contacted the trial justice to ensure she would not read the report. *See id*. at 1:14-16. The trial justice held a hearing the following day and confirmed that she had not opened the report. *See id*. at 1:16; *see also id*. at 4:1-3. The parties arranged for Petitioner's presentence interview to be redone within the following week. *See id*. at 5:11-21. Parts of the original report were redacted to avoid prejudicial effect to Petitioner. *See* 2024 Hr'g Tr. at 9:5-8.

Before this Court, Petitioner asserts that the presentence report was "highly prejudicial" to him because he did not have his trial counsel present at his first presentence interview. (Pet'r's Mem. at 5.) The State concedes that trial counsel was not present at this interview, but for the reason that probation did not contact him to inform him of the date and time of the interview.

[4] At the 2024 Hearing, three exhibits were admitted, including Exhibit C which features a transcript from the April 27, 2011 hearing where trial counsel raised this presentence issue with the trial justice.

State's Mem. at 7; *see also* 2011 Hr'g Tr. at 3:12-20. At the 2024 Hearing, Attorney Dana again explained that probation did not contact him prior to Petitioner's first presentence interview. State's Mem. at 7; *see also* 2024 Hr'g Tr. at 36:10-14. Notably, as soon as he learned of the interview, trial counsel attempted to remedy the issue by contacting the court, organizing a second interview, and ensuring the first report would be appropriately redacted. State's Mem. at 7; *see also* 2024 Hr'g Tr. at 36:23-37:13.

In view of the totality of the circumstances, trial counsel's conduct was reasonable. Indeed, without proper notification of the presentence interview, trial counsel cannot be criticized for his failure to appear. This Court is satisfied that trial counsel corrected any prejudice to Petitioner as completely and timely as he could have—he had the interview redone and ensured redaction of the first report.[5] Moreover, not attending the initial interview was not trial counsel's error; rather, it was probation's failure to inform trial counsel of the interview. As a result, trial counsel protected his client's rights to the best of his ability given the circumstances. Accordingly, this Court concludes that trial counsel was not ineffective in failing to attend the first presentence interview.

B

Failure to Conduct Additional DNA Testing

At the 2011 trial, several items were tested for Petitioner's DNA, such as wipes, cloths, and diapers. (Pet'r's Mem. at 6.) Petitioner's DNA was not found on any of those items. *Id.*

[5] The issue of the redaction of the first report remains unclear as Petitioner has not provided a copy of the first or second report to this Court. Petitioner testified that "some of the [first] report was still used in [his] sentencing" and that "the Judge . . . made reference to the [first] sentencing report during [Petitioner's] sentencing[.]" (2024 Hr'g Tr. at 9:9, 9:12-14.) However, Attorney Dana testified that the operative presentence report included information from the first interview, but that those parts were ultimately redacted. *See id.* at 37:17-23. Nevertheless, this Court remains satisfied that trial counsel's actions, taken promptly after learning of the issue, were not ineffective.

Trial counsel chose not to compel the State to perform additional DNA testing. As a result, several other items from the residence, including Petitioner's clothing and the victim's clothing, were *not* tested for Petitioner's DNA. *Id*.

Before this Court, Petitioner asserts that "trial counsel was deficient in failing to ensure additional items . . . were tested for the Petitioner's DNA." *Id*. at 5. At the 2024 Hearing, Petitioner stated that "[n]ot everything" was tested. (2024 Hr'g Tr. at 5:21.) Regarding his claim for ineffective assistance of counsel, Petitioner asserted that he would have liked trial counsel to "test everything else, you know, everything that was collected." *Id*. at 6:13-14.

The State, however, insists that trial counsel's decision to not test additional DNA was a strategic one. *See* State's Mem. at 6-7. At the 2024 Hearing, Attorney Dana explained that the DNA results of the tested items were "extremely helpful" because "[Petitioner's] DNA was *not* there[.]" (2024 Hr'g Tr. at 31:10-11 (emphasis added).) Attorney Dana reasoned, "I had no reason from a strategic point of view to go any further with that, for the same reason no one has done it to date, probably, because, again, be careful what you wish for." *Id*. at 31:14-17. As to the items that Petitioner claims trial counsel should have tested, Attorney Dana explained,

> "Those items were *intentionally not tested* because the results I had were enough to create doubt. Again, our job is not to prove innocence, it's to create doubt. And when you are in that type of a situation with all of the evidence that was presented, yet, *no evidence of DNA as it relates to [Petitioner]*, that's a win as far as I'm concerned. I wouldn't have gone any further with that in any case." *Id*. at 31:25-32:6 (emphases added).

This Court concludes that trial counsel's decision was a savvy, strategic decision that ultimately benefitted Petitioner. After all, the initial DNA reports did not link to Petitioner's DNA. Had trial counsel sought DNA testing for additional materials, it is possible those results would hurt Petitioner's case. Instead, trial counsel avoided the discovery of potentially

incriminating evidence and chose for the jury to see that the DNA results did not link Petitioner to the crime. While the jury nevertheless found Petitioner guilty, that outcome cannot be said to be because trial counsel did not request additional DNA testing. Accordingly, this Court concludes that trial counsel was not ineffective in failing to test additional items for Petitioner's DNA.

C

Failure to File Motion to Suppress

During the initial investigation of Petitioner, he confessed to the abuse of his infant daughter. *See Baptista*, 79 A.3d at 28-29. On February 14, 2011, trial counsel filed a motion with the Superior Court seeking suppression of said confession and other evidence seized from Petitioner's residence. *See* State's 2024 Hr'g, Ex. B: Motion to Suppress, Feb. 4, 2011; *see also Baptista*, 79 A.3d at 29, n.7 ("The record reflects that a motion to suppress the items seized and defendant's statements to police was filed with the Superior Court."). At the trial, it appears that the motion to suppress the confession was not addressed, whereas a hearing on the motion to suppress the items was held. *See Baptista*, 79 A.3d at 29, n.7 ("although a suppression hearing concerning the seized items was held, there is no indication that the motion to suppress the statements made to police was addressed").

Before this Court, Petitioner asserts that trial counsel "refused to file the motions and memorandums." (Pet'r's Mem. at 6.)[6] Petitioner claims that had such been filed, he "would have had a greater opportunity to attain a more favorable verdict from the jury." *Id*. At the 2024 Hearing, Petitioner testified that he wanted trial counsel to suppress Petitioner's confession made

[6] This Court notes the lack of specificity with which Petitioner makes this claim; however, given the context of the Hearing and the State's Memorandum, this Court understands this argument to refer to alleged failure to file motions to suppress.

to the detectives during his interrogation. *See* 2024 Hr'g Tr. at 10:24-11:5. Trial counsel, however, told Petitioner "this is a good matter for appeal[.]" *Id*. at 11:8.

Although the trial record is not clear as to the disposition of the motion to suppress filed on February 4, 2011, the State argues that trial counsel's decisions regarding the motion to suppress were strategic. *See* State's Mem. 8-9. At the 2024 Hearing, Attorney Dana testified as to his recollection: he filed a motion to suppress and the trial justice denied it. *See* 2024 Hr'g Tr. at 43:16-17. Thereafter, Attorney Dana explained that he "felt that was a good issue on appeal." *Id*. at 43:22. He recalls discussing this strategy with Petitioner. *See id*. at 44:18-19.

This Court lacks the benefit of a hearing transcript for the motion to suppress from 2011. *See* State's Mem. at 8. Whether the motion to suppress the confession was heard and denied or not pressed by trial counsel is not clear. Petitioner's filings and hearing testimony did not elucidate the disposition of the motion. Absent a more specific argument and evidence as to the alleged failure to "file memorandums" at Petitioner's request, the only evidence before this Court is Attorney Dana's testimony that the motion to suppress was denied and that suppression of the confession was a good issue for appeal. *See* 2024 Hr'g Tr. at 43:22. This was a strategic decision that must be viewed from trial counsel's perspective at the time, without regard to hindsight. *See Lynch*, 13 A.3d at 606. Petitioner has not therefore met his burden of demonstrating that trial counsel failed to file motions and memorandums. On the evidence presented, this Court is satisfied that, at the time of trial, trial counsel sufficiently defended Petitioner and his conduct was reasonable. Accordingly, this Court concludes that trial counsel was not ineffective for failing to "file memorandums" at Petitioner's request.

D

Failure to Provide a Translator

At the 2011 trial, Petitioner did not have a translator. Petitioner now asserts that he should have been provided a translator because he "did not speak good English." (Pet'r's Mem. at 6.) Petitioner testified that at the time of the trial, his English was "all right." (2024 Hr'g Tr. at 6:20.) He admitted that he did not request a translator, but explained that he "didn't even know . . . [he] could have one." *Id*. at 7:4. Moreover, Petitioner agreed that he did not have a "problem with English[,]" did not have a "problem understanding or communicating with the detective[,]" nor did he have "any problem understanding the questions that were asked of [him.]" *Id*. at 15:18-19, 24-25, 16:14-15. Nevertheless, Petitioner insists that a translator would have been beneficial because having someone speak to you "in a native tongue" allows one to better understand "what's going on." *Id*. at 16:20-21.

The State insists that this issue has no merit because Petitioner never requested a translator, nor did he express that "he had any problems communicating with his attorney or the police." (State's Mem. at 8.) At the 2024 Hearing, Attorney Dana testified,

> "As it relates to English, I would have never hindered him in speaking to me if I did not feel he could speak English, or even thought there was any issue of that, and I did not. And I don't think the issue ever came up. I think it was fine. My memory is that he worked at Patriot Place, he was able to communicate there. I didn't see any issues relative to a language barrier." (2024 Hr'g Tr. at 33:2-9.)

Petitioner's claim that he needed a translator is weak. This Court notes that Petitioner never asked for a translator, nor was there any evidence that he required a translator in his 2011 trial. Without any indication that Petitioner needed the assistance of a translator, the fact that

trial counsel did not secure a translator was reasonable. Accordingly, this Court concludes that trial counsel was not ineffective in failing to get a translator for Petitioner.

E

Post-Trial Juror Issue

Following the 2011 verdict, a juror contacted trial counsel and requested to meet with him. *See* State's Mem., Ex. D. Trial counsel met with the juror for about twenty minutes; the juror appeared emotional and wanted to "apologize for the verdict." *Id*. Immediately thereafter, trial counsel contacted the trial judge and opposing counsel to summarize the interaction he had with the juror. *Id*. In his e-mail, trial counsel explained:

> "nothing that [the juror] said to me could ever overturn the verdict or create an issue on appeal or post conviction relief. The other jurors did not in any way coerce or intimidate her. No extraneous material was brought into the jury room. There was pressure which I told [the juror] is part of the process." *Id*.

Petitioner did not learn of the interaction between trial counsel and the juror for years, until after his initial Application was filed. *See* Pet'r's Post-Hr'g Mem. at 1. Petitioner asserts that trial counsel was ineffective and, thus, prejudiced him because he "was unable to proceed with this information for a motion for new trial or on his appeal" since he did not know about it. *Id*. at 2.

The State asserts that trial counsel's conduct was not ineffective because he confirmed that there was no juror misconduct. *See* State's Mem. at 9. At the 2024 Hearing, Attorney Dana testified, explaining that the juror contacted him and discussed the breakdown of the juror's votes over the course of the days. *See* 2024 Hr'g Tr. at 38:7-13. When the jurors first entered the jury room, the votes breakdown was six to six; eventually it was ten to two, with the juror being one of the two remaining not guilty votes. *See id*. at 38:13-15. On the last day of deliberation,

the juror explained that one of the other jurors made a comment, "I've just got to get back to my life." *Id*. at 38:16-17. The juror subsequently "felt terrible and felt she had to vote guilty." *Id*. at 38:17-18. Notably, Attorney Dana confirmed the jurors did not coerce or threaten her, nor did the jurors bring any extraneous materials into the jury room. *See id*. at 38:19-23. As a result, he confirmed that there was no basis for a new trial. *See id*. Additionally, Attorney Dana explained that he "[i]mmediately" contacted both the trial judge and opposing counsel to discuss the juror's concerns. *Id*. at 39:4.

This Court concludes that trial counsel took the appropriate action when contacted by the juror. He determined that there were no grounds to claim that the jury was tainted or the juror was inappropriately pressured. Additionally, he timely informed the trial justice and opposing counsel. Because trial counsel determined there were no grounds for improper conduct, there was nothing left for him to do. While trial counsel should have informed Petitioner of this interaction at the time it occurred, the sole fact that he did not does not make his conduct rise to the level of ineffective assistance of counsel. Therefore, in light of the totality of the circumstances, trial counsel's conduct was reasonable. Accordingly, this Court concludes that trial counsel was not ineffective for failing to inform Petitioner about the jury member that he spoke to after the verdict.

IV

Conclusion

In light of the foregoing, this Court concludes that Petitioner has not satisfied his burden of proving by a preponderance of the evidence that postconviction relief is warranted. Furthermore, this Court is satisfied that trial counsel provided competent and professional

services to Petitioner in his 2011 trial. As such, Petitioner's Application for postconviction relief is denied and dismissed.

Counsel shall submit the appropriate order for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**Emanuel Baptista v. State of Rhode Island**
CASE NO:	**PM-2019-10375**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**August 15, 2024**
JUSTICE/MAGISTRATE:	**M. Darigan, J.**
ATTORNEYS:	
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For Defendant:	**Judy Davis, Esq.**