**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS**

**PROVIDENCE, SC.** **SUPERIOR COURT**

**(Filed: April 9, 2012)**

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| **MICHAEL P. CHARETTE** | : | |
| | : | |
| **vs.** | : | **PM 2010-2195** |
| | : | |
| **STATE OF RHODE ISLAND** | : | |

## DECISION

**CARNES, J.** Before this Court is the application of Michael P. Charette ("Charette" or "Petitioner") for post-conviction relief. Charette was convicted and sentenced in P1-1992-1980A.[1] Charette now seeks post-conviction relief pursuant to G.L. 1956 § 10-9.1-1. The State of Rhode Island ("State") objects to and moves to dismiss Petitioner's application.

## I

## Facts and Travel

On May 27, 1993, a Superior Court jury convicted Charette of robbery, burglary, assault on a person sixty (60) years of age or older causing bodily injury, and assault with intent to commit robbery. The trial justice originally sentenced Charette to fifty (50) years to serve on each of the robbery and the burglary counts, five (5) years to serve on the assault on a person sixty (60) years of age or older causing bodily injury count, and twenty (20) years to serve on the assault with intent to commit robbery count. The trial justice further ruled that each of the sentences would run consecutively and not concurrently for a total of one hundred twenty-five (125) years.

[1] As the trial justice is no longer a member of the Rhode Island Superior Court, this Court considers the matter pursuant to Rhode Island Superior Court Rules of Practice 2.3(d)(4).

The defendant subsequently appealed, and his convictions were affirmed by the Rhode Island Supreme Court on January 21, 1997. State v. Charette, 688 A.2d 1286 (R.I. 1997). The Supreme Court initially declined to rule on Charette's appeal that his sentence was manifestly excessive on the grounds that it was premature.[2] On May 9, 1997, a different justice of the Superior Court heard Charette's motion to reduce his sentence and rendered a written decision which upheld the sentence of fifty (50) years imposed on the robbery conviction in Count I, but reduced the sentence imposed for the burglary conviction on Count III from the original imposition of fifty (50) years consecutive, to a reduced sentence of twenty (20) years to run concurrently and not consecutively to that imposed on Count I. The hearing justice further reduced the sentences imposed for the assault on a person sixty (60) years of age or older causing bodily injury in Count IV, and for assault with intent to commit robbery in Count VII by ruling that each sentence would run concurrent with and not consecutive to the sentences imposed on Counts I and III.

Petitioner gained release on parole at one time but after parole was revoked for an infraction. He filed a subsequent motion to further reduce his sentence that was denied and thereafter, on July 21, 2010, Petitioner filed a pro-se Application for Post-Conviction Relief. After receiving Petitioner's first motion to amend, counsel was appointed to represent Petitioner on February 28, 2011.

Petitioner and his counsel moved to amend the pending Application for Post-Conviction Relief in open court on November 18, 2011. Both counsel and Petitioner agreed that the amendment was embodied in the claims set forth in Petitioner's

[2] The original trial justice had since been appointed to the Rhode Island Supreme Court. The appellate decision indicates that he did not participate in same.

"Memorandum in Support of Michael Charette's Post Conviction Application" filed with the Court on October 31, 2011 ("Petitioner's Memo"). The State did not object to the amendment and the Court allowed the amendment.

Pursuant to his amended application, the Petitioner alleges that he was denied his right to effective assistance of counsel. Specifically, Petitioner alleges (1) that said ineffective assistance of trial counsel, in failing to move to dismiss that charge of assault with intent to rob at the close of the State's case, caused him to be unlawfully convicted of assault with intent to rob (Count VII) because said count was a lesser included offense of the robbery count, thus violating his right to be free from double jeopardy. (Petitioner's Memo at 2). Petitioner also alleges (2) that his trial counsel's failure to move for dismissal of the robbery and burglary counts (Counts I and III) at the close of the State's case caused him to be unlawfully convicted of each of those counts as well. Id. Petitioner argues that he should not have been convicted of the robbery because there was no evidence at trial that he took the victim's property from her person or her presence. Id. at 4. Petitioner further argues (3) that he should not have been convicted of the burglary count because the burglary count was "derivative of" the robbery count and there was no evidence that he broke into and entered the victim's home with the intent to commit a felony. Id. at 5.

Charette alleges that the convictions and sentences were imposed in violation of his right to effective assistance of counsel guaranteed by the Sixth Amendment of the United States Constitution and Article 1, Section 10 of the Rhode Island Constitution.

In its objection to Charette's claims, the State filed two different memorandums. The State filed a document simply entitled "Memorandum" on February 3, 2011. ("State

Memo Feb 3, 2011"). The State also filed an "Objection to Charette's Post Conviction Relief Application" on November 18, 2011. ("State Objection filed November 18, 2011").

The State initially responded that notwithstanding any of Charette's technical arguments, he would be unable to demonstrate that he was prejudiced as a result of his alleged lack of effective counsel as required by Strickland v. Washington, 466 U.S. 688, 104 S. Ct. 2052 (1984).[3] The State argues that since Charette subsequently received a reduced sentence where all counts would run concurrently instead of consecutively, he could not show the requisite prejudice. (State Memo Feb 3, 2011 at 3).

The State also maintained that Charette's argument that the assault with intent to rob charge was merged into the robbery charge had been raised on appeal by appellate counsel and the Rhode Island Supreme Court had ruled that the argument was required to be raised pretrial and therefore it was deemed waived. Id. at 5. The State further maintained that under the test described in Blockburger v. U.S., 284 U.S. 209, 304 (1932), the robbery statute contained elements not contained in statute related to the charge of assault with intent to rob and therefore the offenses were distinct. See State Objection filed November 18, 2011 at 1-2.

The State further maintained that Charette's argument that he did not commit robbery because the pocketbook taken from the victim was not taken from her person or her presence was "semantic" (sic) and actually allows Charette to benefit from his assault on the victim by knocking her to the ground on the first floor and then running upstairs to take her pocketbook from the second floor of her house. The State maintains that such an

[3] The State Memo of Feb. 3, 2011 appears to contain an incorrect citation. The State cites Strickland v. Washington, 467 U.S. 1267, 104 S. Ct. 3562. That citation is a one-page Memorandum Decision denying a petition for rehearing.

argument defies logic, and in a subsequent memo, the State provided several cases in support of its argument that the pocketbook was still taken from the presence of the victim. See State Objection filed November 18, 2011 at 3.

Finally, the State challenges Charette's argument that he should not be convicted of the burglary count because it is derivative of the robbery count, and the victim's property was not taken from her presence by maintaining that even if the Court were to agree to that premise, Charette was still found guilty of the felony count of assault on a person sixty (60) years of age or older causing bodily injury count and therefore the requisite elements of the burglary charge have been proven. Id. at 4.

**II**

**Standard of Review**

Under the Rhode Island Post-Conviction Relief Act, a person who has been convicted or sentenced for a crime and who claims 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 an action for post-conviction relief. R.I. Gen. Laws § 10-9.1-1(a)(1). The burden is on the Petitioner to prove, by a preponderance of the evidence, the alleged instance or instances of ineffective assistance of counsel. Page v. State, 995 A.2d 934, 942 (R.I. 2010); Hazard v. State, 968 A.2d 886, 891-92 (R.I. 2009); Bleau v. State, 968 A.2d 276, 278 (R.I.2009); Brown v. State, 964 A.2d 516, 526 (R.I.2009); Palmigiano v. Mullen, 119 R.I. 363, 374, 377 A.2d 242, 248 (1977). The Rhode Island Supreme Court has held that the appropriate procedure for asserting a Sixth Amendment challenge to the competency of counsel is not by direct appeal but rather by filing a petition for post-conviction relief under the Act. State v. Gibbons, 418 A. 2d 830, 839 ( R.I. 1980)**;** State

v. Freitas, 121 R.I. 412, 416-17, 399 A.2d 1217, 1219 (1979).

In reviewing a claim of ineffective assistance of counsel, our Supreme Court has stated that 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 having produced a just result.'" Bustamante v. Wall, 866 A.2d 516, 522 (R.I. 2005) (citing Toole v. State, 748 A.2d 806, 809 (R.I. 2000) (quoting Tarvis v. Moran, 551 A.2d 699, 700 (R.I.1988))). Indeed, the Court should reject a claim of ineffective assistance of counsel "unless the attorney's representation [was] so lacking that the trial became a farce and a mockery of justice. . . ." Pelletier v. State, 966 A.2d 1237, 1241 (R.I. 2009) (quoting State v. Dunn, 726 A.2d 1142, 1146 n.4 (R.I. 1999)).

In evaluating claims of ineffective assistance of counsel, our Supreme Court follows the standard articulated in the seminal United States Supreme Court decision of Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984). See Hazard, 968 A.2d at 891-92; Bustamante, 866 A.2d at 522. The Strickland two-part test requires that a defendant show: (1) that counsel's performance was so deficient and that counsel made errors so serious that he or she was not functioning at the level guaranteed by the Sixth Amendment; and (2) that "such deficient performance was so prejudicial to the defense and the errors were so serious as to amount to a deprivation of the applicant's right to a fair trial." Brennan v. Vose, 764 A.2d 168, 171 (R.I. 2001) (citing Strickland, 466 U.S. at 687). A defendant raising an ineffective assistance of counsel claim must satisfy both parts of the Strickland test to prevail; unless he or she does so, "it cannot be said that the conviction or . . . sentence resulted from a breakdown in the adversary process that renders the result unreliable." Simpson v. State, 769 A.2d 1257, 1266 (R.I.

2001) (quoting Strickland, 466 U.S. at 687).

In assessing the first part of the Strickland test, the performance of counsel is evaluated by determining whether that representation "fell below an objective standard of reasonableness." 466 U.S. at 688. "The performance proxy must be assessed in view of the totality of circumstances and in light of 'a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" Hazard, 968 A.2d at 892 (quoting Strickland, 466 U.S. at 689). "Mere tactical decisions, though ill-advised, do not by themselves constitute ineffective assistance of counsel." Bustamante, 866 A.2d at 523 (quoting Toole, 748 A.2d at 809). "A choice between trial tactics, which appears unwise only in hindsight, does not constitute constitutionally deficient representation under the reasonably competent assistance standard." 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)). In addition, "a single failure or omission on the part of privately retained counsel is unlikely to meet the Strickland threshold." Heath v. Vose, 747 A.2d 475, 479 (R.I. 2000).

When reviewing a claim of ineffective assistance of counsel, the Rhode Island Supreme Court has indicated that it is important to examine "the entire performance of counsel." Brown, 964 A.2d at 528; see also Heath, 747 A.2d at 478 (court analyzed ineffective assistance of counsel claim based on the "totality of omissions" committed by defense counsel).

Even if a defendant is able to satisfy the first part of the Strickland test by showing that counsel's performance was objectively unreasonable considering all of the circumstances, the defendant then must go on to establish that counsel's performance resulted in serious prejudice that undermined his or her right to a fair trial. Strickland,

466 U.S. at 694; Brown, 964 A.2d at 527. Under this second part of the Strickland analysis, "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694.

This second part of the test focuses on the reliability of the outcome of the proceeding. Thus, even if a defendant is successful in demonstrating that his or her counsel committed unreasonable errors, he or she still must be able to show that those errors "actually had an adverse effect on the defense," and not simply "some conceivable effect" since "virtually every act or omission of counsel would meet that test." Id. at 693. The United States Supreme Court has made clear that "an error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Id. at 691 (emphasis added); see also Brown, 964 A.2d at 528 (when counsel's performance is "deficient in a number of respects, then the possibility is greater that an accumulation of serious shortcomings prejudiced the defendant to a sufficient degree to meet the Strickland requirement") (internal citation omitted).

With these precepts in mind, "judicial scrutiny of counsel's performance must be highly deferential." Id. at 689. In Strickland, the Court cautioned a defendant against "second-guess[ing] counsel's assistance after conviction or adverse sentence." Id. Further, the Court added, "it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Id. A fair assessment of counsel's performance, therefore, "requires that

every effort be made 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." Id.

Recognizing the difficulties inherent in making such an evaluation, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id. In any given case, "[t]here are countless ways to provide effective assistance . . . [e]ven the best criminal defense attorneys would not defend a particular client in the same way." Id.; cf. Engle v. Isaac, 456 U.S. 107, 133-34, 102 S. Ct. 1558, 71 L. Ed. 2d 783 (1982) (holding that the Constitution only guarantees criminal defendants a fair trial and a competent attorney; it does not ensure that the defense will recognize and raise every possible claim). Thus, the task for a court is to determine if a defendant has met and carried his or her burden of showing that "the decision reached would reasonably likely have been different absent the errors." Strickland, 466 U.S. at 696.

## III

## Analysis

### A.

### Failing To Move To Dismiss The Charge Of Assault With Intent To Rob When the Stated Rested its Case

#### 1.

#### Double Jeopardy and Merger

Petitioner argues that by his counsel's failing to move to dismiss the

charge of assault with intent to rob at the end of the State's case, he was convicted of both the robbery count and the assault with intent to rob count. He therefore argues that because the assault with intent to rob is a lesser included offense of the robbery charge, the conviction on both counts violates the double jeopardy prohibition afforded by both the Fifth Amendment of our Federal Constitution and Art. I., Sec. 7 of our State's Constitution.[4] As indicated previously, the State counters by asserting that under the test described in Blockburger v. U.S., 284 U.S. 209, 304 (1932), the robbery statute contained elements not contained in the statute related to the charge of assault with intent to rob and therefore the offenses were distinct. See State Objection filed November 18, 2011 at 1-2.

This Court does not agree with the State's assertion that the offenses are distinct. The elements of an assault with intent to commit robbery are (1) that the defendant committed an assault or battery or both against the victim; and (2) that the defendant did so with the specific intent to commit the felony crime of robbery. An assault is defined as an "unlawful attempt or offer, with force or violence, to do a corporal hurt to another, whether from malice or wantonness." State v. Baker, 20 R.I. 275, 277, 38 A. 653, 654 (1897). A robbery, in the context of the charge against Charette, is defined in G.L. § 11-39-1. The State asserts that under that particular statute, "a first degree robbery charge can be sustained if the victim is (2) injured or (3) Elderly." See State Objection filed November 18, 2011 at 2. This Court disagrees as to the State's reference to the actual robbery statute that should be considered in this case. Charette went to his victim's home

[4] The United States Constitution, amendment V, states in pertinent part: . . . "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; . . ."; while the Rhode Island Constitution, art. I, sec. 7 states in pertinent part: . . . **"**No person shall be subject for the same offense to be twice put in jeopardy."

during the "early evening hours of December 15, 1990." See State v Charette, 688 A.2d at 1288. At that time, the robbery statute was different than what exists in the Rhode Island General Laws today. At that time, the statute provided:

> "Every person who shall commit robbery shall be imprisoned for life or for any term not less than five (5) years, provided however that every person who shall commit the crime of robbery by use of a dangerous weapon shall be imprisoned for life or for any term not less than ten (10) years."

1980 Public Laws, ch. 201, § 1.

The statute was not amended to include such terms as "where a victim is injured, or robbery where a victim is handicapped or elderly . . ." until passage of 1991 Public Laws, ch. 201, § 1, over six months after Charette committed his crimes.[5] On the day Charette acted, the common law and the 1980 version of the statute controlled the elements of robbery.

The common-law crime of robbery consists in the "felonious taking of money or goods of any value from the person of another, or in his presence, against his will, by violence, or putting him in fear." See State v. Domanski, 190 A. 854, 855 (R.I. 1937). Additionally, the State must prove that the defendant acted with the specific intent of wholly and permanently depriving the owner of said property, money or goods. State v. Robalewski, 418 A.2d 817, 821(1980).

In order to determine whether an accused is threatened by being punished twice for the same offense, the Rhode Island Supreme Court, in State ex rel. Scott v. Berberian, 109 R.I. 309, 284 A.2d 590 (1971), adopted the following standard as set forth in Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 182, 76 L. Ed. 306, 309

[5] The law became effective on June 17, 1991 after passage of Senate Bill 91-S-975A.

(1932); "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." Id. at 304. See also State v. Pope, 414 A.2d 781, 788 (R.I. 1980) (emphasis added). It is apparent that both an assault with intent to commit robbery and robbery each require proof of an assault. The robbery requires proof of the additional elements of actual taking with intent to permanently deprive. The assault with intent to commit robbery in the instant case involves the same proofs with regard to the assault and the intent. The only difference is that the robbery has not been completed in the context of the assault with intent to rob.

After comparing the elements of the two charges under consideration, this Court is not sufficiently satisfied that each offense "requires proof of a fact which the other does not." Blockburger, 284 U.S. at 304, 52 S. Ct. 180. Significantly, assault with intent to commit robbery specifically, and in so many words, equates that offense with robbery once factual testimony evidencing the accomplished robbery becomes manifest on the record. The offense of assault with intent to rob is subsumed into the offense of robbery.

This Court finds that the offense of assault with intent to commit robbery and the offense of robbery merged. The Rhode Island Supreme Court has previously indicated that a merger argument "is essentially a double jeopardy argument." State v. Grayhurst, 852 A.2d 491, 500 (R.I. 2004). The Supreme Court went on to articulate "As such, Rule 12(b)(2) [of the Superior Court Rules of Criminal Procedure] is applicable; that rule provides in pertinent part: 'The defense of double jeopardy . . . may be raised

only by motion before trial.'" See State v. Day, 925 A.2d 962, 977 (R.I. 2007). (Emphasis in original.) The Supreme Court added a footnote in that passage indicating:

> Footnote 22: We recognize that there will be situations where it will not be possible for a trial justice to rule on a Rule 12(b)(2) motion regarding a merger argument prior to trial. We emphasize, however, that failure to file such a motion prior to trial entails the grave risk of forfeiture of a legal argument. Id. (emphasis added).

The motion to dismiss may also be raised in the context of a defense motion for judgment of acquittal after the State rests its case, as advanced by Charette in the instant case. See State v Reis, 430 A.2d 749, 751-55 (R.I. 1981).

**2.**

**Ineffective Assistance Trial Counsel**

In this case, Petitioner claims that the failure of trial counsel to raise the issue either before trial, or once the State rested its case, resulted in his receiving ineffective assistance of counsel on this issue. It is important to note at this time that neither trial counsel nor appellate counsel testified at an evidentiary hearing in the context of Charette's post conviction relief application. Charette had filed an affidavit in the early stages of his case indicating that he was unable to locate his trial counsel.[6] This Court has distinct recollections of conversations with Petitioner, on the record,[7] regarding his intent to request funds for a private investigator to locate trial counsel. The Court also distinctly recalls assuring Petitioner that such a request would be seriously considered but that Petitioner would not be allowed to manage funds for an investigator during his

[6] The affidavit is dated December 17, 2010 and appears duly notarized. It is contained in the court file.
[7] The Court's own notes indicate that such conversations took place on January 14, 2010, February 3, 2010 and February 17, 2010. Although clerk notes appear in the file for those dates, the docket entries may not reflect all such dates on the "Criminal Docket Sheet Report" prepared by staff upon review of the clerk notes.

incarceration, due to his inability to promptly return calls and be otherwise accessible to manage said funds in a timely and expeditious manner. The record for those proceedings, and this Court's distinct recollection, is that the Court implored Petitioner to accept an appointment of counsel which is expressly provided for under the terms of the Post-Conviction Remedy chapter.[8] Notwithstanding the appointment of counsel, Petitioner elected to forego any hearing and submit the matter to this Court for decision based only upon the memos submitted. See Transcript of proceeding of November 18, 2011. The Court is therefore without any explanation from trial counsel regarding Petitioner's alleged ineffective assistance.

In order to prevail on his claim for post-conviction relief, Petitioner has the burden of proving by a preponderance of evidence that relief is warranted. Page and other cases cited in Part II, supra. Furthermore, in applying the standards in the Strickland analysis, Part II, supra, this Court is aware that a claim of ineffective assistance should be rejected unless counsel's performance was so deficient that the trial became a farce and a mockery of justice. See Pelletier v. State, 966 A.2d 1237, 1241 (R.I. 2009). In addition, "a single failure or omission on the part of privately retained counsel is unlikely to meet the Strickland threshold." Heath v. Vose, 747 A.2d 475, 479 (R.I. 2000). When reviewing a claim of ineffective assistance of counsel, the Rhode Island Supreme Court has indicated that it is important to examine "the entire performance of counsel." Brown, 964 A.2d at 528; see also Heath, 747 A.2d at 478 (court analyzed ineffective assistance of counsel claim based on the "totality of omissions" committed by defense counsel).

[8] R.I.G.L. § 10-9.1-5.

In the instant case, the case record amply demonstrates that trial counsel submitted a total of ten (10) motions before, during, and after trial, and successfully made a motion for judgment of acquittal during the trial on a charge of assault with intent to commit burglary. The State has also cited these components of trial counsel's performance in their State Objection filed November 18, 2011.

In regard to the double jeopardy argument, it is clear that some case law in our jurisdiction goes back to 1928. See State v. Pearson, 49 R.I. 386, 391, 143 A. 413, 415 (1928) ("This defense, if not waived by defendant, should have been made by a special plea . . . and tried before the general plea of not guilty.") (Cited in State v. McGuy, 841 A.2d 1109, 1115 (R.I. 2003)). However, the Rhode Island Supreme Court recently indicated that it's opinion in State v. Day, 925 A.2d 962 (R.I. 2007) "made the law explicitly clear." Id. at 977 (emphasis added). See State v. Shelton, 990 A.2d 191, 204-05 (R.I. 2010) (. . . "[O]ur opinion in Day focused with maximal explicitness on the necessity of bringing a merger argument to the attention of the trial court through a pretrial Rule 12(b)(2) motion" . . .). (emphasis added). In the instant case, Petitioner's crimes occurred on December 15, 1990, trial occurred in May of 1993, and the Supreme Court issued its Charette opinion on January 21, 1997, some ten years before its opinion in Day.

In light of the foregoing discussion, this Court declines to characterize trial counsel's performance as deficient.

**3.**

**Ineffective Assistance of Appellate Counsel as to this Claim**

It is clear that the merger issue was not raised in the trial court and the matter would ordinarily be deemed waived. It does appear from a reading of State v Charette, 688 A.2d 1286, 1289 (R.I. 1997) that appellate counsel raised the issue of error by reason of failure of the trial justice to give a lesser-included-offense instruction. The opinion goes on to note that this "overlooks the fact that no contemporaneous objection was lodged to the final charge." Id. Petitioner appears to concede this point in his Memo of November 18, 2011 at 2. Notwithstanding, there is some authority which would provide a basis for allowing appellate counsel to present such an argument in the first instance at the appellate level. See, e.g., State v. Scanlon, 982 A.2d 1268, 1277 (R.I. 2009). ("Although we also are satisfied that whether count 6 [felony assault-assault or battery resulting in serious bodily injury] merged with count 5 [felony assault-assault with a dangerous weapon], therefore implicating the Double Jeopardy Clauses of the United States and Rhode Island Constitutions was not preserved, we nonetheless address this argument."). Still, even though no motion was filed in Scanlon under Rule 12 prior to the trial, the trial justice did entertain argument on this issue when he heard defendant's motion for judgment of acquittal and he ruled on the issue. Id. at 1277. That is why the Supreme Court entertained the question.

In the instant case, appellate counsel did raise this issue. As such, this Court finds that appellate counsel's performance regarding this issue was not deficient.

**B.**

**Trial Counsel's Performance Relative to the Conviction on the Robbery Count**

**1.**

**The Precise Claim**

As Petitioner articulates his claim, he begins by reciting the factual scenario relative to the robbery count. The Rhode Island Supreme Court has depicted the factual background in its opinion.

> "The crime scene was a vestibule in Woonsocket, Rhode Island. Living alone in her home, eighty-eight year old Aldea DesPlaines (DesPlaines) had been watching television (the Lawrence Welk Show) during the early evening hours of Saturday, December 15, 1990. Expecting company, she heard a rap at her front door and opened it. To her dismay, she was immediately accosted by a hooded man who said, "Let's go upstairs." Terrified, DesPlaines tried desperately to push the intruder out, but he would not go gently into the night. Instead, he knocked her to the floor, dashed upstairs, snatched her pocketbook, and slunk away." State v. Charette, 688 A.2d 1286, 1288 (R.I. 1997).

Petitioner's point, relative to his claim on this issue, is that he could not lawfully be convicted of a robbery because the property taken, i.e., the pocketbook, was not taken from the victim's presence. It is unclear from a reading of the Charette opinion whether this precise claim was raised in the trial court. As already discussed herein, appellate counsel raised the issue of error by reason of failure of the trial justice to give a lesser-included-offense instruction. The opinion goes on to note that this "overlooks the fact that no contemporaneous objection was lodged to the final charge." Id. at 1289. There is nothing else in the opinion revealing the precise nature of the argument on the issue, including whether it related in any way to the robbery charge.

Notwithstanding Petitioner's need to carry the burden of proof relative to his requested relief, he has not provided any transcript of the trial or appellate proceedings demonstrating with any precision, the alleged failings of either trial or appellate counsel despite his apparent burden and responsibility to do so. See Bustamante v. Wall, 866 A.2d 516, 522-524 (R.I. 2005) (failure to provide transcripts or affidavits to support assertions results in failing to meet burden of proof in a post-conviction relief proceeding. . . . Without any evidence to support his allegations, [the Court is] unable to determine exactly what trial counsel said, in what context the alleged statements were made, and whether these statements were against [Petitioner's] wishes; consequently, we hold that [he] has failed to sustain his burden on this point. . . .").

Petitioner is somewhat ambiguous regarding the basis of his argument that trial, and/or appellate counsel performance(s), were deficient. In Petitioner's Memo he notes:

> "Because the handbag in this case was not in the physical presence or in the area of control of the victim, Michael Charette should not have been convicted of robbery. His trial attorney did not move for a judgment of acquittal on the robbery count, nor was any issue raised on appeal of this point." Id. at 5.

Petitioner does note in his Memo that "Trial counsel did move to dismiss the burglary count on the grounds that there was no breaking element with respect to his entry into his victim's residence," but noted that the Supreme Court rejected the argument holding that the fact that petitioner first opened the screen door to knock on the victim's door was sufficient to satisfy the breaking element of the crime. Id. The Court's reading of Petitioner's Memo leaves the impression that Petitioner alleges that his trial counsel's sole deficiency on this issue was in failing to move for a judgment of acquittal on the robbery count. Id. at 5. Petitioner further asserts:

> "Trial counsel's failure to raise this issue in the Superior Court was deficient performance, for which Mr. Charette has been prejudiced in that he was convicted of robbery and received a 50 year sentence. As indicated above, the fact that this issue was not raised on appeal means either one of two things: either trial counsel was deficient for not raising the issues below, or if he did raise the issue below and preserved it for appeal, then appellate counsel was deficient for not pressing the issue on appeal." Id. at 5.

Petitioner further suggests that if this Court finds that the facts of this case do not, as a matter of law, constitute robbery, then this Court should find that trial counsel, or appellate counsel was deficient and Petitioner was prejudiced by such deficiency. Id. at 5.

2.

**Robbery—Legal Analysis Under the Facts of the Case**

Petitioner directs this Court's attention to Commonwealth v. Weiner, 255 Mass. 506, 152 N.E. 359 (1926) and Commonwealth v. Homer, 235 Mass. 526, 127 N.E. 517 (1920). (Petitioner's Memo at 5). This Court is not convinced that the cases cited by Petitioner stand for the proposition that he asserts.

In Weiner, the facts indicate that on August 20, 1924, the defendant and three other men entered a jewelry store and thereafter, the store clerk was knocked down by one man. While others took and carried away the jewelry, the clerk was held covered by a pistol in the hand of the defendant. Weiner, 255 Mass. at 507. The sole issue before the Supreme Judicial Court of Massachusetts (SJC) was whether, in the absence of the presence of the owner of the jewelry store (Skinner), a case of robbery could be made out by taking the jewelry from the store clerk (Ives). Id. 255 Mass. at 508. The essence of Weiner's point was that the true owner of the property was Skinner (who was not present

at the time of the robbery) and not the store clerk, Ives, from whom the property was taken. Defendant Weiner was relying primarily upon the language of Massachusetts G. L., c. 277, §§ 39 and other cases (citations omitted) which defines "robbery," when used in an indictment, to mean "the taking and carrying away of personal property of another from his person and against his will, by force and violence, or by assault and putting in fear, with intent to steal." Weiner also directed the SJC's attention to a form of indictment for robbery contained in another section of the Massachusetts General Laws. Id. 255 Mass. at 508. The SJC responded and ruled that:

> "Even without the authority given by section 79 for the use of any form of indictment authorized by law, it is manifest that the section contemplates that there may be facts which constitute the offense to which the form given may not be appropriate, and that it does not establish the form as a definition of the offense.
>
> The grammatical construction of section 39 indicates that 'the personal property of another,' taken 'from his person,' shall belong to him; but it does not make clear the extent of his proprietary interest in it. We do not think the definition was intended to narrow the language of Commonwealth v. Clifford, 8 Cush. 215, which declared that the property taken away must be that of the person robbed or of some third person. . . ." Id. at 255 Mass. at 508-09.

The SJC goes on to authoritatively state that "[T]he essence of robbery is the exertion of force, actual or constructive, against another in order to take personal property of any value whatsoever, with the intention of stealing it, from the protection which the person of that other affords. Commonwealth v. Humphries, 7 Mass. 242**.** It is not affected by the state of the legal title to the goods taken. That the force is exerted within a store or building rather than on the highway or out of doors is immaterial. (Emphasis added). Id.

255 Mass. at 509. Ultimately, the exceptions of Weiner were overruled and the conviction upheld. Id. 255 Mass. at 506.

Homer, the other case cited by Charette for his legal proposition, was reversed on other grounds (including improper questions on cross examination) while the elements of robbery were upheld by the SJC. The voluminous and detailed background facts involve a robbery conviction on May 12, 1917, motivated by an alleged underlying debt between Homer and his alleged victim, Madge E. Wilbur. Homer, 235 Mass. at 529. The SJC's recitation of facts indicate that Ms. Wilbur's jewelry was in the care of the clerk at the Copley-Plaza Hotel in Boston, where Ms. Wilbur and her maid were guests. The factual recitation goes on to relate an incident that occurred between Ms. Wilbur and defendant at the Hotel Touraine, another hotel in that city. Id. 235 Mass. at 529-532. According to Ms. Wilbur's version of the events, defendant threatened her with a pistol and ordered her to send for her maid at the Copley-Plaza Hotel and bring her jewels to her location at the Hotel Touraine. Once the maid arrived at the Touraine with said jewelry, Ms. Wilbur, at the defendant's orders, went into the bathroom, and while there the maid delivered to the defendant the package of jewels, (list of contents omitted), which had been taken from a drawer in Ms. Wilbur's apartments at her direction. Further, when Ms. Wilbur came out of the bathroom, she found the defendant with the jewels in his hands and he made her take off her earrings and give them to him, and insisted that she write an order giving him permission to sell the jewels. . . . Id. 235 Mass. at 529-532.

The SJC noted that certain earrings of Ms. Wilbur were taken from her person but the defendant contended that, as to the jewels that were delivered to the defendant by the maid while Ms. Wilbur was in the bathroom, it could not be found that the property was

taken from her person. Id. 235 Mass. at 533. With regard to this argument, the SJC held:

> "As to the jewelry delivered by her maid, it was not necessary, in order to establish the crime of robbery, to prove that the property was taken from the person of the owner. It was enough if it was in her protection or control, and that by violence or putting in fear, she was compelled to surrender it. Moreover, there was evidence that after the jewels were delivered to the defendant, he brought them into the room, and in the presence of the owner, selected such parts as he desired and permitted her to keep one or two articles. **'**A thing is in the presence of a person, in respect to robbery, which is so within his reach, inspection, observation or control, that he could, if nor overcome by violence or prevented by fear, retain his possession of it.**'** The Report on Penal Code, Massachusetts, 1884, Robbery, paragraph 2, when the owner is kept in one room of a house and is forced to tell where his property may be found in another room and the assailant goes there and takes the property, it has been held that such a taking is robbery. . . . There was no error, therefore, in refusing the defendant's requests that the commonwealth had failed to prove the crime of robbery because there was no taking from the person." (emphasis added). (citations omitted). Id. 235 Mass. at 533-534.

While neither of Charette's citations support the proposition of law he asserts, the State directs this Court's attention to the more recent Maryland case of State v. Colvin, 314 Md. 1, 548 A.2d 506 (Md. 1988). The factual scenario and posture in Colvin is somewhat similar to the instant case. Colvin was found guilty of murder, robbery and daytime breaking and entering. Colvin's victim, however, was found deceased as a result of a stabbing that occurred at the foot of the staircase, while the property taken came from the master bedroom upstairs in the house. Furthermore, Colvin's victim, Lena Buchman, was an elderly Florida resident visiting her daughter and son-in-law at their home in the Pikesville section of Baltimore County. Colvin, 548 A.2d at 509. Both of

the owners were out of the house at work when the murder occurred. Id. Furthermore, the property (jewelry) taken during the robbery belonged to the homeowners, and not the victim. Id. 548 A.2d at 511.

Regarding the posture of Colvin's case, after Colvin's convictions were upheld on appeal, 299 Md. 88, 472 A.2d 953, Colvin filed a petition for post-conviction relief which was initially denied by the Circuit Court for Anne Arundel County, but the original death sentence was vacated by the Circuit Court. Id. 548 A.2d at 506. Both Colvin and the State of Maryland filed cross-appeals. Id. at 506. Colvin's principal contention in support of a new trial was a claimed ineffectiveness of trial counsel. Id. at 508.

Maryland's highest court analyzed Colvin's claim:

> "[Colvin] claims ineffectiveness with respect to the jury instruction on robbery. The claim is not that the instruction as given was incorrect, but that Payne should have obtained additional instructions which would have permitted the jury to find that there was no robbery. One of [Colvin's] robbery theories is that, because the jewelry and other property were taken from the master bedroom and because the stabbing occurred at the foot of the stairs, the taking did not occur in Mrs. Buchman's presence. **This is not the law**. Robbery convictions have been sustained where the victim was in one room of a house or place of business and the property was taken from another room. See State v. Campbell, 41 Del. 342, 22 A.2d 390 (Del. Ct. Gen. Sessions 1941); State v. Calhoun, 72 Iowa 432, 34 N.W. 194 (1887); Commonwealth v. Homer, 235 Mass. 526, 127 N.E. 517 (1920); State v. Williams, 183 S.W. 308 (Mo. 1916); State v. Culver, 109 N.J. Super. 108, 262 A.2d 422 (App. Div. 1970); State v. Cottone, 52 N.J. Super. 316, 145 A.2d 509 (App. Div. 1958); State v. Mosley, 102 Wis. 2d 636, 307 N.W.2d 200 (1981). Indeed, convictions have been sustained where the victim was in a building and personalty kept outside the building was taken. See Cobern v. State, 273 Ala. 547, 142 So.2d 869 (1962); State v. Hayes, 518 S.W.2d 40 (Mo. 1975). Further, and contrary to another of [Colvin's] arguments, [Colvin] can be convicted of robbery even though Mrs. Buchman was not

> the owner of the jewelry. We agree with State v. Cottone, 52 N.J. Super. at 323, 145 A.2d at 513 where the court said that a maid, who was the sole occupant of the home, "was in charge of everything contained therein against anyone except the [owners]." Payne was not deficient in failing to obtain instructions to which [Colvin] was not entitled." Colvin, 548 A.2d at 515. (emphasis added).

While there is a dearth of Rhode Island case law on point, this Court agrees with the SJC's rationale in Homer, as set forth above, to wit: "A thing is in the presence of a person, in respect to robbery, which is so within his reach, inspection, observation or control, that he could, if nor overcome by violence or prevented by fear, retain his possession of it." (emphasis added). This has been the law in the Commonwealth of Massachusetts since Homer was decided in 1920. As recently as 1988, Maryland's highest court cites Homer in its analysis of similar facts to the instant case. See Colvin, 548 A.2d at 515, supra.

**3.**

**Effectiveness of Trial Counsel on the Instant Claim**

As discussed above, Petitioner has provided no transcripts or affidavits indicating what trial counsel did or did not do relative to the robbery count at the end of trial. Petitioner alleges that trial counsel did not move to dismiss the robbery count when the State rested its case, although Petitioner does note that trial counsel did move to dismiss the burglary count on the ground that there was no breaking and entering. Petitioner's Memo at 5. There is no record on whether trial counsel's omission was strategic, or merely an oversight. Petitioner has the burden of proof on this issue. See Part II, supra, and cases cited therein. This Court is required to analyze the benchmark issue, namely "whether counsel's conduct so undermined the proper

functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Bustamante v. Wall, supra, in Part II. Keeping in mind that the Court is instructed that it should reject a claim of ineffective assistance of counsel "unless the attorney's representation [was] so lacking that the trial became a farce and a mockery of justice," Pelletier v. State, supra, the Court notes that the "performance proxy must be assessed in view of the totality of circumstances and in light of a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Hazard, 968 A.2d at 892 (quoting Strickland, 466 U.S. at 689). "Mere tactical decisions, though ill-advised, do not by themselves constitute ineffective assistance of counsel." Bustamante, supra.

In the instant case, trial counsel did move to dismiss the burglary count but not the robbery count. A close reading of the appellate opinion indicates that there were two major issues which were the focus of the Rhode Island Supreme Court. The first was the accuracy eyewitness identification issue. See Charette, supra, at 1288. The Supreme Court found the identification sufficiently reliable. Id. The second issue was the element of "breaking." Petitioner maintained that there was no breaking, (no use of force to accomplish the breaking), because the victim voluntarily opened her front door. Id. at 1289. The Supreme Court rejected this argument noting that Petitioner first had to open the screen door before he could knock on the victim's door or make contact with the victim herself. Id. Given these defenses, it is at least plausible[9] that trial counsel felt that he was undermining his two primary defenses, that there was an inaccurate identification, or no breaking by arguing a weaker defense by asserting that

[9] Plausible —1) apparently reasonable, valid, truthful, etc:, 2) apparently trustworthy or believable. Collins English Dictionary—Complete and Unabridged 10th Edition © William Collins Sons & Co. Ltd. 1979, 1986 © HarperCollins Publishers 1998, 2000, 2003, 2005, 2006, 2007, 2009. Dictionary.com.

the victim's pocketbook was not in her presence. The Rhode Island Supreme Court noted that an individual alleging ineffective assistance of trial counsel is "saddled with a heavy burden in that there exists a strong presumption that an attorney's performance falls within the range of reasonable professional assistance and sound strategy." See Rice v. State of Rhode Island, No. 2009-344-Appeal, slip op. at 10, 3/6/2012. (internal quotation marks omitted). Given the lack of testimony of trial counsel, the Petitioner's burden of proof, and the lens that this Court is required to analyze Petitioner's claim through, this Court cannot eliminate the contingency that trial counsel's failure to move to dismiss the robbery charge was strategic. The Court finds that Petitioner has failed to sustain his burden of proof on this particular theory.

On the other hand, if trial counsel's failure to move for above-discussed dismissal was a mere oversight, in light of the Court's duty to consider the totality of the circumstances, and the strong presumption to be afforded to trial counsel's conduct, the Court finds that this single failure or omission on the part of trial counsel does not meet the Strickland threshold. See Heath v. Vose, supra.

Lastly, even if this Court were inclined to find for Petitioner on the first Strickland prong, the Court finds that on the record before the Court, the Petitioner has failed to carry his burden of proof that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." See Strickland, 466 U.S. at 694. This Court is cognizant that a reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. Given the precise factual scenarios and holdings in both Homer and Colvin, supra, this

Court finds that it is unlikely that the trial justice would have granted such a motion.

**4.**

**Effectiveness of Appellate Counsel on the Instant Claim**

"In order to provide effective assistance under the Strickland test, an 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." Smith v. Robbins, 528 U.S. 259, 288, 120 S. Ct. 746, 145 L. Ed. 2d 756 (2000). 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. Chalk v. State, 949 A.2d 395, 399-400 (R.I. 2008)

While it is clear that Petitioner's appellate counsel raised both the identification and the "element of the break" issue, in order to prevail on his claim of ineffective assistance against his appellate counsel, it is necessary for Petitioner to demonstrate that the "presence of the property taken relative to the robbery charge" issue was not only meritorious, but clearly stronger than those issues actually raised on appeal.

In this context, this Court has quoted extensively from both the Homer case, cited by Petitioner, and the Colvin case cited by the State. This Court notes that eyewitness misidentification is the single greatest cause of wrongful convictions nationwide, playing a role in more than 75% of convictions overturned through DNA testing. See The Innocence Project Official Website, Understanding the Causes, Eyewitness Misidentification; http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php last visited March 26, 2012. Based on the facts set forth in the Charette opinion, the eyewitness identification was clearly the most important.

Furthermore, the issue involving the "element of force used in the break" was clearly stronger than the issue of whether the stolen property was in the presence of the victim given the holdings of Homer and Colvin. This Court finds that Petitioner has not met his burden of proof on the issue.

**C.**

**Petitioner Was Wrongfully Convicted of Burglary**

**1.**

**Petitioner's Argument**

Petitioner argues to the Court that the burglary charge is "derivative" of the robbery charge. Petitioner's Memo at 5. Burglary at common law is "the breaking and entering the dwelling-house of another in the nighttime with the intent to commit a felony therein, whether the felony is actually committed or not." State v. Contreras-Cruz, 765 A.2d 849, 852 (R.I. 2001). Petitioner argues that the jury "bootstrapped" the fact that Petitioner did commit robbery to infer that he intended to do so at the time he broke in. Petitioner's Memo at 6. Petitioner argues that if this Court finds that the elements of robbery are not satisfied, then the proper analysis for the Court is to determine, under that contingency, what crime the State proved that the Petitioner intended to commit at the time he broke into the victim's home. Id. at 6. Petitioner suggests that the "only logical answer" that is supported by the evidence is that Petitioner intended to commit larceny at the time of the breaking. Id.

**2.**

**Burglary—Legal Analysis Under the Facts of the Case**

Petitioner argues that the "only logical answer" he has suggested above is supported by the case law in this area, citing State v. Johnson, 116 R.I. 449, 358 A.2d 370 (R.I. 1976). The Court notes that an examination of exactly what occurred in Johnson is in order. Johnson was indicted for the common law offense of burglary. 358 A.2d at 371. The facts of the case presented at trial indicate that the property owner, a teacher, had fallen asleep on a dining room couch when she was awakened at approximately 1:30 a.m. Because the lights in the room were on, she observed a man, later identified as Johnson, coming through what was described as the driveway window, which was open. The teacher described that the man's head and shoulders were inside the apartment. The man retreated after the teacher screamed and charged at the intruder. Id. at 371-72.

The trial justice granted a motion for judgment of acquittal on the burglary charge but remarked that while there was evidence from which the jury could find that defendant intended to commit larceny once he landed inside the teacher's residence, there was no evidence as to the value of the property that he might have taken. Id. at 372. The trial justice next went on to analyze the difference between a felony and a misdemeanor under the statutory definitions of the law. Pursuant to R.I. Gen. Laws § 11-1-2, an offense punishable by a term of imprisonment for more than one year, or by a fine of more than one thousand ($1000) dollars is defined as a felony, while offense is punishable by either a term of imprisonment that does not exceed one year, or a fine exceeding one thousand ($1000) dollars or both is declared to be a misdemeanor. Thereafter, the trial justice discussed the difference between felony larceny and misdemeanor larceny. Under R.I.

Gen. Laws § 11-41-5, larceny of property valued over $500 is a felony while larceny of property whose value does not exceed $500 is a misdemeanor. Id. at 372 and Footnote 1 therein, where the Rhode Island Supreme Court additionally "point[s] out that [§] 11-41-7 provides that larceny from the person is a felony."

In Johnson, the trial justice charged the jury and instructed them that they could consider lesser included offenses of the so-called statutory breaking and entering proviso to which he had alluded when he granted the initial acquittal motion. This offense is found in R.I. Gen. Laws § 11-8-3. The statute makes it a crime for an individual to enter a dwelling at any time of the day or night with intent to commit murder, rape, robbery, arson, or larceny.[10] The statute does not require proof of the element of a break. It only requires proof of the element that a defendant "enters" said dwelling-house. Id. at 372-73. When the jury returned its verdict, the foreman announced that it had found defendant guilty of "(b)reaking and entering for the purpose of committing a felony." Id. at 373. Defense counsel suggested that the guilty verdict as returned by the foreman encompassed the burglary charge. The Rhode Island Supreme Court notes in its opinion that "an extended colloquy between counsel and the court ensued. The jury was polled and, although the poll evoked a series of different replies, it was clear that the jury's guilty verdict involved only the charge concerning an entry of the premises with the intent to commit larceny and that at no time did the jury consider the second charge, breaking and entering without the consent of the tenant." Id. at 373.

In denying Johnson's appeal, the Rhode Island Supreme Court noted,

> "There is a substantial body of law which holds that an unexplained, unlawful breaking and entering into a

[10] The trial justice also gave jurors an option to convict under R.I. Gen. Laws § 11-8-2. The jury did not return a verdict on that charge and it need not be discussed further in this Decision.

> dwelling or building containing personal property during the nighttime raises an inference that the illegal entry was made with the intent to commit larceny. . . . This inference is based upon the common experiences of man, which recognize that people usually do not engage in this type of behavior with an innocent intent and that ordinarily the intent in such instances is to steal. We believe, therefore, that defendant's aborted illicit nighttime breaking and entering into the teacher's apartment warrants the inference that he was there to steal something." Id. at 373-74. (Internal citations omitted).

While Johnson argued on appeal about the proper inferences to be drawn as to the value of the goods (below $500 or in excess of $500) that might be drawn from the precise context of the evidence, the Supreme Court disposed of the issue noting that the "quick response to this contention" was found in the language of § 11-8-3. The Supreme Court noted that when the Legislature used the word "larceny" in the statute, it was meant to be synonymous with the word "steal." The Court went on to elaborate, "in other words, all that is required under the entry with intent to commit larceny portion of [§] 11-8-3 is an intent to steal; the value of what is taken is immaterial." Id. at 374.

Importantly, the facts in Johnson are not identical to the facts before this Court. There was no contact between Johnson and his victim while, in the instant case, Petitioner knocked his victim to the ground and was ultimately convicted of assault on a person sixty (60) years of age or older causing bodily injury, a felony punishable by imprisonment for up to five years. Notwithstanding the existence of this additional felony, this Court has already declined to adopt Petitioner's arguments and dismiss the robbery charge.

**3.**

**Ineffective Assistance—Trial Counsel's Failure to Move to Dismiss the Burglary Count**

As discussed above in Part III A and Part III B of the instant Decision, Petitioner has provided no transcripts or affidavits indicating what trial counsel did or did not do relative to the burglary count at the end of trial. Petitioner alleges that trial counsel did not move to dismiss the burglary count on the grounds discussed in Part III C, herein, even though Petitioner admits that trial counsel did move to dismiss the burglary count on the ground that there was no breaking and entering. Petitioner's Memo at 5-6. There is no record on whether trial counsel's omission was strategic, or merely an oversight. Petitioner has the burden of proof on this issue. See Part II, supra, and cases cited therein. This Court is required to analyze the benchmark issue, namely "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Bustamante v. Wall, supra, in Part II. Keeping in mind that the Court is instructed that it should reject a claim of ineffective assistance of counsel "unless the attorney's representation [was] so lacking that the trial became a farce and a mockery of justice," Pelletier v. State, supra, the Court notes that the "performance proxy must be assessed in view of the totality of circumstances and in light of a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Hazard, 968 A.2d at 892 (quoting Strickland, 466 U.S. at 689). "Mere tactical decisions, though ill-advised, do not by themselves constitute ineffective assistance of counsel." Bustamante, supra.

In the instant case, trial counsel did move to dismiss the burglary count on the grounds that there was no break, but trial counsel did not move to dismiss the burglary on the ground that the taking of the purse was not a felony. A close reading of the appellate opinion indicates that there were two major issues which were the focus of the Rhode Island Supreme Court. The first was the accuracy eyewitness identification issue. See Charette, supra, at 1288. The Supreme Court found the identification sufficiently reliable. Id. The second issue was the element of "breaking." Petitioner maintained that there was no breaking, (no use of force to accomplish the breaking), because the victim voluntarily opened her front door. Id. at 1289. The Supreme Court rejected this argument noting that Petitioner first had to open the screen door before he could knock on the victim's door or make contact with the victim herself. Id. Given these defenses, it is at least plausible[11] that trial counsel felt that he was undermining his two primary defenses that there was an inaccurate identification or no breaking by arguing a weaker defense in asserting that since there was no robbery because the victim's pocketbook was not in her presence, the value of the pocketbook did not amount to a felony larceny. The Rhode Island Supreme Court noted that an individual alleging ineffective assistance of trial counsel is "saddled with a heavy burden in that there exists a strong presumption that an attorney's performance falls within the range of reasonable professional assistance and sound strategy." See Rice v. State of Rhode Island, No. 2009-344-Appeal, slip op. at 10, 3/6/2012. (internal quotation marks omitted). Given the lack of testimony of trial counsel, the Petitioner's burden of proof, and the lens that this Court is required to analyze Petitioner's claim through,

[11] Plausible – 1) apparently reasonable, valid, truthful, etc.; 2) apparently trustworthy or believable. See Footnote 9, supra.

this Court cannot eliminate the contingency that trial counsel's failure to move to dismiss the robbery charge was strategic. It is also at least plausible that defense counsel may not have wanted to advance competing theories. (Arguing no "break" versus the implicit acknowledgment that Petitioner actually stole the purse but, it was valued at less than $500). Given this Court's analysis and conclusion relative to the robbery charge, supra, the Court finds that Petitioner has failed to sustain his burden of proof on this particular theory.

On the other hand, if trial counsel's failure to move for above-discussed dismissal was a mere oversight, in light of the Court's duty to consider the totality of the circumstances, and the strong presumption to be afforded to trial counsel's conduct, the Court finds that this single failure or omission on the part of trial counsel does not meet the Strickland threshold. See Heath v. Vose, supra.

Lastly, even if this Court were inclined to find for Petitioner on the first Strickland prong, the Court finds that on the record before the Court, Petitioner has failed to carry his burden of proof that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." See Strickland, 466 U.S. at 694. This Court is cognizant that a reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. Given the precise factual scenario and the Rhode Island Supreme Court's holding in Johnson, this Court's analysis on the robbery charge, and the fact that even if Petitioner had persuaded this Court that there was no robbery as a matter of law, due to the additional felony of assault on a person sixty (60) years of age or older causing bodily injury, for which offense Petitioner was convicted in Count IV, this Court finds

that it is unlikely that the result would have been different. The Court denies Petitioner's claim on this issue.

**4.**

**Effectiveness of Appellate Counsel on the Instant Claim**

"In order to provide effective assistance under the Strickland test, an 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." Smith v. Robbins, 528 U.S. 259, 288, 120 S. Ct. 746, 145 L. Ed. 2d 756 (2000). 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. Chalk v. State, 949 A.2d 395, 399-400 (R.I. 2008).

While it is clear that Petitioner's appellate counsel raised both the identification and the "element of the break" issues, in order to prevail, it is necessary for Petitioner to demonstrate that the burglary element of "intent to commit a felony" issue was not only meritorious, but clearly stronger than those issues actually raised on appeal. This Court has quoted extensively from both facts and holdings in the Johnson case, cited by Petitioner. Furthermore, even if this Court had determined that there was no robbery as a matter of law, the state could still demonstrate the requisite element of "intent to commit a felony" with a reference to the felony charge of "assault on a person over 60 years of age resulting in bodily injury" for which Petitioner was convicted. Eyewitness misidentification is the single greatest cause of wrongful convictions nationwide, playing a role in more than 75% of convictions overturned through DNA testing. See The Innocence Project Official Website, Understanding the Causes, Eyewitness

Misidentification; http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php last visited March 26, 2012. Based on the facts set forth in the Charette opinion, the eyewitness identification was clearly the most important. Furthermore, the "element of force used in the break" issue was clearly stronger than the issue of whether the state had made out the burglary element of "intent to commit a felony." This Court finds that Petitioner has not met his burden of proof on the issue.

**IV**

**Conclusion**

For the reasons stated herein, the Court denies Petitioner's application on all grounds set forth.