STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: June 20, 2013)

ANTHONY LIPSCOMB	**:**	
Petitioner	**:**	
	:	
V.	**:**	**C.A. NO. PM 2010-3377**
	:	
STATE OF RHODE ISLAND	**:**	
Respondent	**:**	

DECISION

CLIFTON, J. This matter is before the Court on Anthony Lipscomb's (Petitioner) Petition for Post-Conviction Relief pursuant to chapter 9.1 of title 10 of the Rhode Island General Laws. In his original filing, Petitioner claimed errors only in his convictions in P2/00-1178A and P2/01-1539A. Subsequently, Petitioner amended his original petition adding the following two other cases: P2/02-2748A and P2/02-2748B.

After consideration of the Amended Petition for Post-Conviction Relief, the records from the evidentiary hearing on the amended petition, the plea transcripts, the exhibits, and the parties' memoranda and arguments, this Court denies Anthony Lipscomb's Petition for Post-Conviction Relief.

I

Facts and Travel

On December 28, 2009, Petitioner filed, pro se, an Omnibus Motion to Withdraw the Nolo Contendere Pleas in P2/00-1178A and P2/01-1539A, based upon "the ineffective assistance of counsel and constitutionally effective pleas" . . . (hereinafter, Omnibus Motion). In his Omnibus Motion, Petitioner expressly invoked "Rhode Island Rules of Criminal Procedure, 10-

9.1. . . ."[1] Additionally, within this Omnibus Motion, Petitioner requested appointment of counsel.

Founded upon his claims of ineffective assistance of counsel, the relief Petitioner sought in his Omnibus Motion was that each of the above cases "be dismissed, withdrawn or corrected on the record or in the alternative to vacate the convictions and order that new trials be held." Petitioner claimed that the advice that two separate attorneys were required to provide him in these matters was ineffective, thus resulting in his pleas of nolo contendere, and thereby prejudicing him.

The State of Rhode Island (State or Respondent) submitted its Answer to the Omnibus Motion on June 16, 2010. In its response, the State offered not only a general denial to Petitioner's claim, but also raised the affirmative defense of laches as to the claims in both P2/2000-1178A and P2/2001-1539A. The Respondent treated the Omnibus Motion as an Application for Post-Conviction Relief.

Later, on August 26, 2010, Petitioner filed an affidavit seeking to correct any procedural deficiencies in his Omnibus Motion.[2] Petitioner renewed his request for assistance of counsel.

This matter was assigned to this Court on October 29, 2010. Next, on December 14, 2010, Respondent filed a Motion to Dismiss pursuant to Super. R. Civ. P. 12(b)-(6), Rule 56 and alternatively under the doctrine of laches (hereinafter, Motion to Dismiss).

In addition to the above grounds for dismissal, Respondent argued Petitioner failed to procedurally comply with §10-9.1-1, in that he did not identify any alleged facts to support his

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[1] Although Petitioner relied on Super. R. Crim. P. § 10-9.1 in his Omnibus Motion as the basis for this Court's jurisdiction, it was apparently accepted by Respondent and was accepted by this Court that Petitioner was seeking post-conviction remedy pursuant to § 10-9.1.

[2] Within the Affidavit, Petitioner referenced receipt of an Order dated July 30, 2010 from Judge Lanphear "instructing me to file a sworn and verified complaint."

application for post-conviction relief and substantively was not otherwise entitled to the relief sought.[3]

In the section entitled collateral consequences of its Motion to Dismiss, Respondent refers to two additional cases that it was aware of and that it believed affected Respondent. Those two cases are: P2/2002-2748B and District Court Case Number 62-2004-23675 which, according to Respondent, was later "adopted federally."

On January 5, 2011, Petitioner, acting pro se, renewed his objection to this Court's granting Respondent's Motion to Dismiss.[4] In his response, Petitioner offered facts which he contended satisfied the requirements of Strickland v. Washington, 466 U.S. 668 (1984), while also claiming that his prior pleas were "unintelligible and involuntary" under Padilla v. Kentucky, 559 U.S. 356 (2010).

On January 7, 2011, counsel was appointed for Petitioner. Counsel then, on behalf of Petitioner, requested and was granted the right to obtain transcripts from the sentencing proceedings in P2/01-1539A and P2/02-2748B. Sometime later, counsel for Petitioner filed a similar motion seeking transcripts from the proceeding in P2/2000-1178A.

On March 1, 2012, counsel for Petitioner, having previously obtained transcripts from the sentencing in these cases, filed a Motion for Transcripts from the Plea Colloquies in P2/2001-1539A and P2/ 2000-1178A.

On March 7, 2012, Respondent filed its second Motion to Dismiss pursuant to Super R. Civ. P. 12(b)-(6), a Motion for Summary Judgment pursuant to Super R. Civ. P. 56 and under the doctrine of laches, which was virtually identical to the earlier motion. In addition, Respondent

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[3] Respondent in this motion also raised Petitioner's failure to comply with the requirements of §§ 10-9.1-3 and 10-9.1-4.

[4] The file reflects this filing was done in Providence County Superior Court. At the time, this Court was assigned to Kent County Superior Court.

supplemented its arguments by attaching Petitioner's earlier November 2008 Federal Court Petition filed pursuant to 28 U.S.C. § 2255 (habeas corpus-federal custody), the federal government's July 2009 response to that filing (United States v. Lipscomb, Cr. No. 05-011S), and a judgment from the United States First Circuit Court of Appeals, in United States v. Lipscomb, (09-1716, Nov. 25, 2009), wherein the First Circuit Court granted the prosecution's Motion for Summary Disposition from Defendant's (Petitioner) appeal from his resentence following an earlier, successful appeal to the First Circuit Court of Appeals.

Afterwards, on May 8, 2012, through appointed counsel, Petitioner presented a Motion to Amend his Post-Conviction Application. In that Motion, paragraphs 5 and 6, counsel informs this Court that Petitioner had previously filed his "second 'Omnibus Pro Se Motion' in P2-98-2369A" and his '"Third Omnibus Pro Se Motion' in P2-02-2748B." Petitioner through counsel requested that the amendment allow the second and third Omnibus Motions to be joined, along with the two cases originally complained of, into one post-conviction proceeding. Respondent did not object. That Motion was granted on June 13, 2012.

On June 13, 2012, this Court issued an Order of Conditional Dismissal pursuant to § 10-9.1-6 requiring Petitioner to comply with the requirements of §§ 10-9.1-3 and 10-9.1-4 before August 8, 2012.

Thereafter, on July 20, 2012, Petitioner filed his Amended Post-Conviction Application (hereinafter, Amended PCR). In his Amended PCR, he claims he did not have effective assistance of counsel in connection with his decision to plead nolo contendere in each of the cases. Later, the Respondent filed an Amended Motion to Dismiss, the Amended PCR. The Amended Motion to Dismiss raised both procedural and substantive grounds supporting the request.

Next, the State filed its Amended Answer to the Amended PCR. In its Amended Answer the State responded to each matter, admitting some of the allegations raised by Petitioner and denying others. The State repeated its affirmative defense of laches for each matter.

On September 7, 2012, after hearing arguments from the parties, this Court denied Respondent's Motion to Dismiss pursuant to Super R. Civ. P. 12(b)-(6) as it applies to P2/98-2369A, P2/00-1178A, P2/01-1539A and P2/02-2748B. On September 7, 2012, the matter was scheduled for hearing with witnesses on December 7, 2012.

At the time Petitioner filed this matter he was then serving a total sentence of fifteen years imposed upon him by the United States District Court, District of Rhode Island, for two counts of possession with intent to distribute more than five grams of cocaine base, and possession of a firearm in furtherance of a drug trafficking crime. Petitioner testified that the sentences imposed for the drug offenses in federal court were enhanced based upon the State convictions he now challenges. Petitioner admits challenging these convictions after having received knowledge that the federal prosecutors were seeking to enhance his sentences in federal court based upon these prior sentences.

Commencing February 6, 2013, this Court conducted an evidentiary hearing. During that hearing, Petitioner did not testify live before this Court.[5] As a substitute for live testimony a deposition of Petitioner's testimony taken January 17, 2013 (testimony) was introduced as a full exhibit (Pet'r's Ex. 1, Full.) In addition, Petitioner's three former attorneys were called as witnesses. Other exhibits were also introduced as full exhibits during the hearing.

[5] The initial pleading dated December 22, 2009 filed by Petitioner, as did every other document submitted directly by Petitioner, gives his mailing address as "F.C.I., Otisville, New York. F.C.I. is the abbreviation for Federal Correctional Institution, Otisville, New York, (http://www.bop.gov/locations/institutions/otv/). It was represented by counsel for Petitioner and Respondent that Petitioner remained at that facility, and therefore was beyond the subpoena power of this Court.

A

As to P2/98-2369A[6]

In P2/1998-2369A, Petitioner was originally charged with possession with intent to deliver a controlled substance. That original charge was amended to "possession of marijuana." Petitioner pled nolo contendere to the amended charge and received a one-year suspended sentence with probation on February 23, 1999. (Resp't's Ex. A., Full.) In Count 1 of his Amended PCR, Petitioner alleged that he pleaded guilty to the amended charge in this matter because his attorney "negligently and [in] derogation of his duties as an attorney, failed to advise (Petitioner) that he could move to suppress the essential evidence . . . because it was obtained by means of an illegal search and seizure . . ." and the Motion, "probably would have been successful [and] he would not have pleaded to an amended charge." (Amended PCR, para. 3.) Because of such negligence on the part of his attorney, he was prejudiced in pleading nolo contendere. As such, the judgment and conviction in this matter should be vacated.

Following the evidentiary hearing on February 25, 2013, counsel for Petitioner withdrew Petitioner's claim of ineffective assistance of counsel as it related to Count 1 (P2/98-2369A) of the Amended PCR. Petitioner's counsel acknowledged that Petitioner was unable to satisfy his burden of proof as to this matter.

B

As to P2/00-1178A

In P2/2000-1178A, Petitioner was originally charged on May 11, 2000 in Count 1 with possession of cocaine, and in Count 2 with possession of marijuana (Pet'r's Ex. 3, Full.)[7]

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[6] The records submitted by the parties show that Attorney Scott Lutes represented Petitioner in this matter.

According to the police narrative of March 1, 2000, Providence Police had been informed that a passenger in a white Mercury Sable was observed holding a shotgun. That vehicle was known by law enforcement to be owned by the Petitioner. Later, the vehicle was observed parked, and Petitioner was later seen getting into the car. When police made their way to the vehicle, they observed what they claim was a black leather case in the passenger seat area of the car and shotgun shells.

In his Amended PCR, Petitioner restated the circumstances surrounding his arrest, in large part, based upon the charging documents within this Criminal Information. In his Amended PCR, he alleged that he and the other person were "placed into custody" for further investigation, but not charged with any crimes. He alleged that he was later taken to the police station. In the course of a "custodial search" during the process of removing his pants, both cocaine and marijuana were found.

In his Amended PCR he maintained the police:

> ". . . lacked probable cause to charge Petitioner with any crime at the time of his arrest, they likewise lacked probable cause to perform the comprehensive custodial search at the police station. A protective pat down in accordance with Terry v. Ohio is the must (sic) police could legally do under the circumstances. In removing [Petitioner's] pants to search for contraband the police clearly exceeded the limits of the law. Had [Petitioner's] attorney been diligently performing his services he should have determined that there were grounds to suppress the evidence in this case, and should have advised [Petitioner] that a motion to suppress would have been possible. Had this been done [Petitioner] would not have pleaded nolo to these charges."

[7] Another person was charged in Count 1 together with Petitioner in this Information. That person pled nolo contendere on May 17, 2000 to possession of cocaine and received a two-year term of probation.

He concluded in alleging "the prejudice suffered by [Petitioner] is that he pleaded nolo based upon negligence (sic) performance of counsel therefore both elements of Strickland, deficient performance and prejudice, have been satisfied."[8]

Petitioner testified he was the driver of a car stopped by members of the Providence Police. In addition, he testified there was one passenger also in the car. Petitioner testified that at the scene he was subjected to a pat-down search which did not reveal the presence of any contraband. Petitioner claims he was not arrested. He was not informed of any charges being brought against him.

Petitioner testified that other members of law enforcement wanted to talk to him and he was taken "downtown to the police station." While at the police station, he was brought to the cell block before he was questioned. Petitioner testified that before being placed in a cell he was again subjected to a pat down search after his shoes and belt were removed, where he was subjected to a "strip search" by two officers. During that search his pants were removed where both cocaine and marijuana were found, "between my legs . . . and the pocket of my drawers. . . ."

Petitioner was charged with two drug offenses. He testified that had he been told that he was "able to raise a serious legal challenge in regards to illegal search and seizure, I would have done so." Had his lawyer told him there might have been grounds to file a motion to suppress, he would have done so.

During the hearing, Petitioner testified that he recalled hiring Scott Lutes as his attorney in this matter. He further recalled having "general conversations" with Mr. Lutes, and discussing just the facts of the case. He did not recall discussing any legal strategy. Petitioner did not recall

[8] See Count II, Amended PCR, para. 4-6.

that prior to disposing of this case that it was "passed for trial." However, he did not dispute that the records reflect that entry.

Petitioner recalled that after a "lengthy process" on October 2, 2000, Petitioner pled nolo contendere to these charges, possession of a controlled substance, cocaine and possession of marijuana second offense. Petitioner received concurrent sentences of two years suspended with probation.[9] Petitioner testified that although the plea deal resolved two cases with a "favorable . . . good" disposition, Petitioner testified that he again pled "out of ignorance." He further testified that he never really sat down with his attorney to discuss the facts surrounding his arrest. Petitioner admits not having introduced the subject of the search with his lawyer. He recalled that his conversations with his lawyer did not take place outside the courthouse, only within the courthouse.

Attorney Scott Lutes testified during this hearing. Prior to his testimony, Mr. Lutes reviewed the amended petition that had been filed. According to his testimony, Mr. Lutes had practiced law for approximately twenty-six years, and that during those years, his practice had been exclusively in criminal matters, where he has handled approximately one hundred suppression motions on behalf of his clients. He recalled prevailing in some suppression hearings which resulted in charges being dismissed against his client(s), but not so in other cases.

Mr. Lutes testified that, prior to his representation of Petitioner in P2/2000-1178A, he also previously represented Petitioner in the separate matter of P2/1998-2369A. In P2/1998-2369A, Petitioner was originally charged with possession with intent to deliver a controlled substance. That original charge was amended to possession of marijuana. Petitioner pled nolo

[9] Petitioner acknowledged that on the same day that he disposed of P2/2000-1178A, he also disposed of unrelated case P2/2000-1176, with Mr. Lutes acting as his attorney, wherein he received the same sentence: two years suspended. Petitioner is not challenging the advice given by Mr. Lutes in that unrelated matter.

contendere to the amended charge and received a one-year suspended sentence with probation on February 23, 1999. (Resp't's Ex. A, Full.)

Mr. Lutes agreed with the basic factual scenario contained in the Information package leading up to the charge as alleged by Petitioner in P2/2000-1178A. Mr. Lutes vaguely recalled that, based upon facts in the Information package, he considered filing a motion to suppress the evidence that was seized but did not. On cross-examination, Mr. Lutes testified that it is part of his practice to discuss with his client the "strength of the case," and Mr. Lutes was unwilling to speculate if to suppress a motion would have been successful.

Mr. Lutes recalled that charges in P2/2000-1178A, as well as other felony drug charges against Petitioner in P2/2000-1176A, were all disposed of by Petitioner's pleas after the cases had been "passed for trial." On direct examination, Mr. Lutes recalled Petitioner being happy that the original charge had been reduced to felony possession of marijuana, rather than a more serious drug charge.

C

P2/2001-1539A

On May 16, 2001 in P2/2001-1539A, Petitioner was originally charged by a Criminal Information with possession of marijuana, after a previous conviction of marijuana. The Criminal Information contained a "police narrative" presumably signed by arresting officer, Rhode Island State Trooper Dandeneau.

The police narrative recited that while he was in an unmarked vehicle on Route 10 southbound in Providence, he [Trooper Dandeneau] observed a vehicle traveling 70 mph in a 50 mph speed zone. Trooper Dandeneau then activated his emergency lights. The vehicle continued until taking the Union Avenue ramp and stopped, initially blocking traffic. When

instructed by Trooper Dandeneau to proceed slightly further, the driver complied. While doing so, Trooper Dandeneau observed the driver making some "furtive movements with his right hand."

Trooper Dandeneau approached the vehicle and noticed "heavy tint on all the side windows." Trooper Dandeneau requested and received license and registration information from the sole occupant [Petitioner]. According to Trooper Dandeneau, Petitioner told him that "he had just bought the car today . . ." producing a handwritten Bill of Sale dated April 13, 2001.

While checking the information provided by the driver, Trooper Dandeneau wrote ". . . the subject looked familiar." Trooper Dandeneau wrote that he recalled stopping the same subject in the same vehicle the week prior. Trooper Dandeneau wrote he "found the old ticket [previously] issued," and "last week . . . subject had also produced a hand written bill of sale with a date of 4/7/01." During the April 7, 2001 stop, Trooper Dandeneau issued violations for tinted windows and proof of insurance only. Trooper Dandeneau recalled that on April 7, 2001, [Petitioner] had a large sum of small bills in his pocket and [based upon information available to him] had been in the ACI for numerous charges, including drug charges.

According to the police narrative, after running a check for outstanding warrants and re-approaching Petitioner's vehicle, Trooper Dandeneau asked Petitioner if "he had just bought the car. Petitioner responded, "yeah today." Further, Petitioner denied having been arrested before April 13, 2001.

After requesting Petitioner to get out of his car and asking if Petitioner had any weapons on him, Trooper Dandeneau had the Petitioner assume a position and performed a Terry pat-down. Trooper Dandeneau wrote "in doing so he removed . . . a large sum of money (in small bills) from the front pocket area . . . " When asked the source of that money, Petitioner replied "it

was his tax return . . .” but could not state the amount. According to Trooper Dandeneau, while checking [Petitioner’s] leg area, “the subject began to move nervously.” Trooper Dandeneau’s report notes when searching the “outside of the pants . . . felt several bulges similar to golf balls in his [Petitioner’s] groin.” When asked what was in the pants, [Petitioner] didn’t answer and began to struggle slightly.

Trooper Dandeneau and another trooper leaned [Petitioner] against the trunk of the car where he was handcuffed by Trooper Dandeneau. Trooper Dandeneau unzipped [Petitioner’s] pants and removed four clear plastic bags believed to be marijuana.

In the Amended PCR, Petitioner alleged he “. . . pleaded nolo to this charge because he did not believe he had a meritorious defense to the case. This belief was based upon information provided to him by his attorney, and in particular was based upon his attorney’s failure to advise him that he could have filed a meritorious motion to suppress the evidence in this case. Had [Petitioner] been so advised he would not have agreed to plead nolo, but rather, would have proceeded with a motion to suppress with probably successful results.”[10]

Petitioner testified that in P2/2001-1539A, he was originally charged with felony possession of marijuana on April 13, 2001.[11] (Pet’r’s Ex. 4, Full.) Petitioner recalled privately retaining Attorney Matthew Smith to represent him. Petitioner testified he recalled being stopped by a Rhode Island State Trooper in an unmarked car.

During his testimony he recalled being asked for his license and the registration for the car he was operating. Petitioner recalled the trooper stating that the reason for the stop was for

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[10] See Count III, Amended PCR, para. 2, 4-5.

[11] Petitioner acknowledged at the time of this arrest and charge in P2/2001-1539A, he was also on probation for the charges of both P2/2000-1176 and P2/2000-1178A and was served with notice pursuant to Super. R. Crim. P. 32(f) alleging him to be in violation of his previous sentence.

speeding. Petitioner recalled not having the registration for the car, claiming it had just been privately purchased that day. He recalled the state trooper returning to his unmarked cruiser, coming back, and then asking Petitioner to step out of his car. Shortly thereafter, a search of Petitioner ensued. Petitioner recalled being searched twice. Petitioner's testimony indicated that the first search did not reveal any illegal contraband, only money. It was during the second search, near Petitioner's groin area, when the marijuana was found.

Similar to the location of the drugs found in P2/2000-1178A, Petitioner testified that after his outer pants were removed, the drugs were found in a pocket of his underwear "the brief pocket, the brief underwear . . . like Superman underwear with a double pocket in the brief."

Petitioner testified that similar to the circumstances of his prior cases, there were no discussions regarding legal strategy between him and his attorney. The only discussion he claims to have occurred with his attorney was about the type of deal Petitioner would be willing to go along with, and denied any discussions about filing a motion to suppress the evidence or any strategy. Petitioner did not recall telling his lawyer about concerns he had over the legality of the search, even though he suspected it was "a profiling type of thing going on" resulting in his being pulled over.

Petitioner testified that this case (P2/2001-1539A) was transferred to the Adult Drug Court on both the new charges, as well as the probation violation. Petitioner testified he did not successfully complete the Drug Court and was sentenced as a result.

Petitioner's attorney in this matter, Matthew Smith, testified at the hearing. At the time he represented Petitioner, he had been practicing law for over ten years. Mr. Smith testified that he began practicing law as a Special Assistant Attorney General, first in District Court, then later in Superior Court where he handled trials. He testified that over the course of his approximately

seven years with the Department of the Attorney General, he handled "thousands of cases," including cases where search and seizure issues, as well as confessions, were involved. In addition, he testified that he has had between thirty to forty jury trials, including eight jury trials in federal court.

Mr. Smith further testified that as a criminal defense attorney, he has a dual role; that is, to identify relevant issues and evaluate the merits of proceeding with a particular course of action. He acknowledged that as a criminal defense attorney he is required to discuss all relevant issues with his client, whether an issue is raised by his client or recognized by him. He testified that in his experience, not all issues raised by his clients are worthy of pursuing by way of a motion. He also testified that, as a criminal defense attorney, he is required to discuss plea offers with his client(s). And if a client rejects an offer, his obligation is to proceed to trial. Mr. Smith agreed that, had he been successful in suppressing the evidence, the State would have been unable to proceed in obtaining a conviction.

He also testified recalling a discussion with Petitioner about the options of allowing his probation violation hearing to go forward with the new charges in the normal course of proceedings, or alternatively asking that all proceedings, violations and new charges be referred to the Adult Drug Court.

After discussing those options with Petitioner, Mr. Smith was convinced that Petitioner was a bright, articulate person, and agreed that Petitioner could benefit from the rehabilitative philosophy then employed by the Drug Court. According to Mr. Smith, Petitioner fully understood the "pre-plea conditions" for admission to Drug Court. Mr. Smith agreed there was no motion to suppress filed by him on behalf of Petitioner in this matter. Mr. Smith testified that while it was his practice to discuss potential issues with his client, such as a motion to suppress,

he did not have an independent recollection of discussing the filing of a motion to suppress with Petitioner.

In response to questions from Respondent, Mr. Smith testified that after having examined the police report in this case, he recognized the police officer's unzipping of Petitioner's pants during the Terry search as a potential suppression issue. However, he was also aware that the trooper wrote in his police report that Petitioner had "lied" to him about allegedly purchasing the vehicle that day, based upon a recent encounter between Petitioner and the same trooper. Further, Mr. Smith testified that according to the trooper's police report, when conducting the pat-down of Petitioner's outer clothing, he detected "bulges" in Petitioner's groin area. Mr. Smith testified that in his opinion, those facts, under then existing case law, while a "close call," could have provided the trooper with probable cause to justify the more intrusive search of Petitioner. Mr. Smith testified he was certain he had discussed this issue with Petitioner before the plea of nolo contendere was entered.[12]

D

P2/2002-2748B

In the last matter of P2/2002-2748B, Petitioner was originally charged with three felony offenses: Count 1—Conspiracy, with Garci Thezan, to Violate Uniform Controlled Substance Act by Agreeing to Possess with Intent to Deliver Marijuana; Count 2—Possession with Intent to Deliver Controlled Substance Marijuana; and Count 3—Possession with Intent to Deliver Cocaine. (Pet'r's Ex. 5, Full.)

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[12] As to P2/2001-1539A, in Petitioner's Amended PCR he stated, "This belief was based upon information provided to him by his attorney." This "admission" tends to corroborate Smith's recollection that before the plea was entered, he discussed the facts with Petitioner.

The police narrative filed in this Information provided that members of the Providence Police Department's "Special Services Division," for two months prior to July 9, 2002, were investigating illegal narcotics trafficking at 912 Chalkstone Avenue, Providence, Rhode Island. Information revealed two subjects, residing in two separate apartments, were selling and storing marijuana at this location.

In addition, the police narrative stated that "a confidential and reliable informant (provided information) that both subjects were using the basement to store their drugs. Another Providence police officer assigned to the A.T.F. task force "assisted in cultivating information that the two subjects involved (Petitioner and another subject identified as "G") were also selling marijuana in exchange for guns." Based upon this information, a search warrant was signed by a District Court judge.

On July 9, 2002, after police surveilled the premises, they saw another person pull up in a vehicle, go to the back door and knock, where he was greeted by "G" (later identified as Garci Thezan). After the vehicle left 912 Chalkstone Ave., the vehicle was stopped by a police officer and marijuana was seized. After this seizure, both floors of 912 Chalkstone Ave. were searched pursuant to the search warrant.

During the search of the second floor no occupants were present; however, both cocaine and marijuana, along with other evidence consistent with selling drugs, were found in the ceiling of the bathroom. In addition, personal documents belonging to [Petitioner] were also found during the search of the second floor. An arrest warrant was then obtained for [Petitioner's] arrest.

In his Amended PCR, Petitioner agreed with the facts as stated above. He further alleged that his attorney filed several motions, including a Motion to Disclose the Confidential Informant

and a Motion to Suppress. Petitioner alleged both motions were heard and denied.[13] Additionally, in his Amended PCR, Petitioner claimed to have "information within [Petitioner's] personal knowledge that the State could not produce any witness who could say that [Petitioner] had engaged in any drug transactions," nor could the State provide the identity of the confidential informant who provided the basis for the search warrant.[14]

Petitioner alleged his defense attorney knew that the State lacked witnesses to connect him with drug dealing, but did not share this information with him; and that defense counsel "misled" [Petitioner] to think said witnesses were available. And that, because this Petitioner pled to the reduced charge of one count of possession of marijuana, he would not have done so had the true information been provided.[15]

During his testimony Petitioner recalled that his attorney in this matter was Richard Corley, Esq. Unlike the two other matters, where previous counsel were privately retained, Petitioner's recollection is that Mr. Corley was "court appointed."

Petitioner testified that originally he, along with another person, was initially charged with felony conspiracy to possess cocaine and possession of marijuana. Petitioner recalls that on the day of trial, Oct. 20, 2003, he pled to one amended count of misdemeanor possession of marijuana and dismissal of the other charges in exchange for a sentence of one-year probation. (Resp't's Ex. E, Full.)

In his testimony, Petitioner recalled Mr. Corley discussing the facts of the case with him. Petitioner also recalled that Mr. Corley filed not only a Motion to Dismiss the charges, but in addition, also filed a Motion to Suppress the evidence. In his petition he claims that Attorney

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[13] See Count IV, ¶ 5.
[14] See Count IV, ¶ 6.
[15] See Count IV, ¶ 6, 7.

Corley knew that the necessary confidential informant was not available to testify at Petitioner's trial, failed to disclose such information to Petitioner, that being that the State did not have the confidential informant as they had represented.[16] Petitioner testified that he became aware of this information years after his plea while examining the court file, and had he known at the time of his plea of the non-existence of this informant, he would not have pled; rather, he would have proceeded to trial.

Mr. Corley testified during the hearing. He testified that he has been admitted to practice law in the State of Rhode Island for thirty years, and that the majority of this time was spent in the private practice of law, with some years as a public defender. Mr. Corley testified that he reviewed the papers filed in P2/2002-2748B, as well as Petitioner's testimony, prior to his testimony during this hearing.

Mr. Corley testified that it was his practice, when commencing representation of a client, to obtain all information available and for strategic reasons, he does so before formal charges are brought. He further stated that unless there are tactical reasons for not doing so, he follows up with formal discovery only after formal charges have been brought.

Mr. Corley testified that he was well aware and he informed Petitioner that law enforcement, in the Affidavit for the Search Warrant, claimed to have information from one or more "confidential informant(s)." He also testified it was for this reason that he pursued a "Motion to Disclose the Confidential Informant." That Motion was denied by the Court after a hearing.

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[16] The file reflects that on Oct. 20, 2003 in P2/02-2748B, the State filed a Dismissal under Super. R. Crim. P. 48(a) ". . . for the following reason(s): Counts 3 & 4 in exchange for Defendant's plea to Count 2. Unable to disclose C.I., and search warrant did not include 2nd floor apt.-marijuana + scales showing intent to deliver was found in 2nd floor."

According to Mr. Corley, Petitioner was originally charged with possession with intent to deliver marijuana and possession with intent to deliver cocaine. Mr. Corley did not recall having any discussions with Petitioner about the unavailability of the "confidential informant" at the time the matter was ready to proceed to trial. Mr. Corley agreed with Petitioner that the original charges were later amended to one misdemeanor count of possession of marijuana.

Mr. Corley testified that during his years of practicing law he had been involved with numerous pre-trial conferences. In an attempt to resolve cases in his client's best interest, he conveyed all pre-trial offers to Petitioner. Although he may have said to Petitioner, "It is in your best interest to plea," Mr. Corley testified that he recognized it was his client's decision whether to plead or not. In his view, the resolution, from the original charges in this matter, was the best outcome he could have realistically achieved.

II

Standard of Review

The Rhode Island Supreme Court has recognized that the statutory remedy of post-conviction relief found in § 10-9.1 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. . . . " Hazard v. State (Hazard II), 64 A.3d 749, 756 (R.I. 2013) (citation omitted), Hall v. State, 60 A.3d 928, 931 (R.I. 2013) (citation omitted).

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) (quoting Toole v. State, 748 A.2d 806, 809 (R.I. 2000)). 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 Moniz v. State, 933 A.2d 691, 696 (R.I. 2007)).

In evaluating claims of ineffective assistance of counsel, our Supreme Court follows the standard enunciated in the seminal United States Supreme Court decision of Strickland v. Washington, 466 U.S. 668. See Hazard v. State (Hazard I), 968 A.2d at 886, 891-892 (R.I. 2009); Bustamante, 866 A.2d at 522. The Strickland two-part test requires that a petitioner 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 State v. Brennan, 627 A.2d 842, 845 (R.I. 1993)). A petitioner 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." Strickland, 466 U.S. at 688. "The performance prong 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 I, 968 A.2d at 892 (quoting Heath v. Vose, 747 A.2d 475, 478 (R.I. 2008)). '"[M]ere 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, 747 A.2d at 479. When reviewing a claim of ineffective assistance of counsel, this Court thus should examine "the entire performance of counsel." Brown v. State, 964 A.2d 516, 528 (R.I. 2009); see also Heath, 747 A.2d at 478 (analyzing ineffective assistance of counsel claim based on the "totality of omissions" committed by defense counsel).

Even if a petitioner 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 petitioner then must go on to establish that counsel's performance resulted in serious prejudice that undermined his or her right to a fair trial. See Strickland, 466 U.S. at 694; Brown, 964 A.2d at 527. Under this second part of the Strickland analysis, "[t]he 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 petitioner 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 "[v]irtually 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 (explaining that 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" (citation omitted).

With these precepts in mind, "[j]udicial scrutiny of counsel's performance must be highly deferential." Strickland, 466 U.S. at 689. In Strickland, the court cautioned a defendant against "second-guess[ing] counsel's assistance after conviction or adverse sentence." Id. (citation omitted). 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. (citation omitted). "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 the 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 (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 petitioner 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

In Rhode Island all rules of civil proceeding apply in post-conviction matters. Sec. 10-9.1-7. To succeed on a claim under the Post-Conviction Statute, a petitioner must establish entitlement to relief by a preponderance of the evidence. Torres v. State, 19 A.3d 71, 77 (R.I. 2011) (citing Page v. State, 995 A.2d 934, 942 (R.I. 2010)).

When acting as the fact-finder in any non-jury matter, it is the obligation of the court to weigh and evaluate all of the evidence presented, and to assess the credibility of all of the witnesses who testified. State v. Duggan, 414 A.2d 788, 792 (R.I. 1980). Further, a court "may reject testimony containing '"inherent improbabilities or contradictions which, alone or in conjunction with other circumstances in evidence . . .' satisfy [the trial justice] that the testimony is false." Id., (quoting Correia v. Norberg, 391 A.2d 94, 98 (R.I. 1978)). While not controlling the outcome of the decisions in this matter this Court must factor into its "credibility calculus" that Petitioner decided to challenge these prior convictions upon gaining knowledge that the federal government was seeking to enhance his federal sentence.

When a petitioner seeking post-conviction relief is represented by counsel during the plea process and enters a plea upon the advice of counsel, "the voluntariness of the plea depends on whether counsel's advice 'was within the range of competence demanded of attorneys' in

criminal cases.'" Hill v. Lockhart, 474 U.S. 52, 56 (1985) (quoting McMann v. Richardson, 397 U.S. 759, 771 (1970)).

When the circumstances giving rise to post-conviction proceedings were as they are presented in each of these matters, Petitioner entering a plea of nolo contendere rather than proceeding to trial to force the State to satisfy its burdens of proof, '"[t]he sole focus of an application for post-conviction relief is 'the nature of counsel's advice concerning the plea and the voluntariness of the plea. If the plea is validly entered, we do not consider any alleged prior constitutional infirmity." Torres, 19 A.3d at 79 (quoting Gonder v. State, 935 A.2d 82, 87 (R.I. 2007) (internal quotation marks omitted).

In two of the matters, P2/2000-1178 and P2/2001-1539, Petitioner challenges he was represented by the counsel he privately retained. As earlier noted, "a single failure or omission on the part of privately retained counsel is unlikely to meet the Strickland threshold." Heath 747 A.2d at 479. In the last matter, P2/2002-2748B, he was represented by court appointed counsel. However, any suggestion that a different or higher standard of competence should apply to court appointed versus privately retained counsel was rejected by the Supreme Court in Mickens v. Taylor, 535 U.S. 162, 168 n.2 (2002).

Only if Petitioner shows the performance of those attorneys "[was] so lacking that the trial [had] become a farce and a mockery of justice . . ." is he able to satisfy the first prong of Strickland. Brown 964 A.2d at 527 n.15 (alterations in original) (quoting Larngar v. Wall, 918 A.2d 850, 856 (R.I. 2007)).

In two of the matters, (P2/2000-1178A and P2/2001-1539A), the claims raised by Petitioner focused on his assertion that the advice objectively demanded from his attorneys "was not 'within the range of competence demanded of attorneys in criminal cases.'" See Strickland,

466 U.S. at 688 (citation omitted); see also Miguel v. State, 774 A.2d 19, 22 (R.I. 2001) (saying that to prevail on appeal, a petitioner must show that attorney's representation '"was not within the range of competence demanded of attorneys in criminal cases.'" (quoting State v. Dufresne, 463 A.2d 720, 723 (R.I. 1981))). Specifically, he avows that his attorneys in those matters failed to properly advise him of the potential merits of challenging the legality of the seizure of the drugs found on him resulting in his pleas of nolo contendere. In the other matter, Petitioner claims either (1) the failure of his attorney to tell him of the non-existence of a confidential informant, or by (2) "mislead[ing]" Petitioner about the existence of a confidential informant, or both, caused him to plea nolo contendere.

As the moving party in this Petition, it is compulsory upon Petitioner to prove that his former attorneys did not advise him of the potential merits of challenging the seizure of the drugs in two of the cases. It is also compulsory upon Petitioner to prove that his former attorney did not inform of the non-existence, or did mislead Petitioner, about the existence of a confidential informant.

B

As to P2/2000-1178A

On October 2, 2002, Petitioner, with counsel, pled nolo contendere before Magistrate Keough (Ret.), receiving concurrent two-year suspended sentences for possession of cocaine and felony possession of marijuana. During his testimony Petitioner admitted that before he pled, he was advised that he had the right to proceed to trial or he could waive his constitutional rights and enter a plea.

The main thrust of Petitioner's argument in this matter is that law enforcement officers, in removing [Petitioner's] pants to search for contraband, clearly exceeded the limits of the law.

In his Amended PCR, Petitioner, to support his argument, wrote that the police ". . . lacked probable cause to charge Petitioner with any crime at the time of his arrest, [and] they likewise lacked probable cause to perform the comprehensive custodial search at the police station. Petitioner begins this legal syllogism on the major premise that under the facts contained in the Criminal Information Package the police " . . . *lacked probable cause to charge [him] with any crime* [therefore] they likewise lacked probable cause to perform the comprehensive custodial search at the police station." Petitioner concluded his argument that "A protective pat down in accordance with Terry v. Ohio is the must (sic) police could legally do under the circumstances."

What Petitioner failed to say in his Amended PCR was the Police Narrative filed in P2/2000-1178 also contained the following: "[I]t should be noted that on 2/27/00, a complainant responded to Central Station and reported that a white Mercury Sable with tinted windows with several black males in the vehicle shot into his vehicle. The subject stated that the owner of the vehicle he knows as Anthony Lipscomb."

According to the police narrative on March 1, 2000, Providence Police were informed that the passenger in a white Mercury Sable was observed holding a shotgun. That vehicle was known to be owned by Petitioner. The same vehicle was later observed parked and Petitioner was later seen getting into the car. When police made their way to the vehicle, they observed what they claim was a black leather case [of the approximate size of a shotgun] in the passenger seat area of the car along with shotgun shells. It was with all of these alleged facts that Mr. Lutes commenced his representation of Petitioner in this matter.

The longstanding test for probable cause justifying an arrest without a warrant has been when facts and circumstances within the arresting officer's knowledge are sufficient to warrant a

prudent person, or one of reasonable caution, believing under the circumstances that the suspect has committed, or is committing, or is about to commit an offense. Beck v. Ohio, 379 U.S. 89 (1964). The facts known to law enforcement, as reflected in the police narrative, supra, would appear to support a finding that Petitioner was lawfully arrested.

Recently, the majority of the Supreme Court addressed the permissible scope of an intrusive warrantless search of a person in lawful police custody:

> "[A]lso uncontested is the 'right on the part of the Government, always recognized under English and American law to search the person of the accused when legally arrested." Weeks v United States, 232 U.S. 383, 392 (1914), overturned on other grounds, Mapp v. Ohio, 367 U.S. 643 (1961). "The validity of the search of a person incident to a lawful arrest has been regarded as settled from its first enunciation, and has remained virtually unchallenged." United States v. Robinson, 414 U.S. 218, 224 (1973). "Even in that context, the Court has been clear that individual suspicion is not necessary, because '[t]he constitutionality of a search incident to an arrest does not depend on whether there is any indication that the person arrested possesses weapons or evidence. The fact of a lawful arrest, standing alone, authorizes a search.'" Maryland v. King ____U.S._____(2013) No. 12-207, slip op. at 11 (filed June 3, 2013) (citing Michigan v. DiFillippo, 443 U.S. 31, 35 (1979)).

During his testimony, Petitioner was vague about precisely what he told his attorney. Petitioner testified that he only recalled having general discussions with Mr. Lutes. Although Petitioner testified "that he never really sat down with his attorney," he did not provide any reasons as to why this did not occur. It is noteworthy to state that from examining the criminal docket sheet report in this matter (Pet'r's Ex. 5, Full) that during the six months elapsing from the date of the offense [March 1, 2000], when Petitioner was initially held without bail for fourteen days, until the date of the plea, he was released on bail. If Petitioner did not visit his lawyer's office to discuss the facts and other legal issues with his attorney during that time, the fault cannot be solely attributable to his attorney.

Petitioner testified at the hearing on this application, had he "been told I was able to raise a ***serious*** legal challenge, in regards to search and seizure, I would have done so." (Emphasis supplied). As he testified at the hearing during that time, he had a number of general discussions with his attorney about the facts. Importantly, Petitioner did not testify specifically saying Mr. Lutes did not discuss filing a motion to suppress. Only that he did not recall discussing legal strategy with Mr. Lutes.

Petitioner, however, was inconsistent in his testimony. During direct examination he testified that he did not discuss the fact that something may have been wrong with the search. On cross-examination, he recalled discussing the facts of the case [with his attorney] but did not recall discussing legal strategy. He agreed he pled to this charge "at the edge of trial." Petitioner admitted he understood there was a risk in proceeding with, but losing, a motion to suppress evidence. The risk being, that he would not have received the "good deal" he did receive.

Mr. Lutes, when he was representing Petitioner in this matter, was a seasoned attorney with over twenty years of practice in criminal defense law. Mr. Lutes testified that he considered filing a motion to suppress based upon the facts he was informed of at that time. Mr. Lutes did not say that he did not discuss filing a motion to suppress the evidence with Petitioner. Mr. Lutes, at the hearing on cross-examination, testified that it is part of his practice to discuss with his client the "strength of the case." Mr. Lutes was unwilling to speculate if such a motion would have been successful. Under all of the circumstances presented, it is reasonable to infer that Mr. Lutes did not believe that he could make a "***serious***" legal challenge to the search for the following reasons.

The police report in this matter indicated that days earlier, occupants in the vehicle known to belong to Petitioner fired shots at another vehicle. The police report in this matter indicated on the day of the Petitioner's arrest, one of the occupants of the vehicle was observed with a shotgun. The police report further noted shells were observed in the vehicle near the case suspected of holding the shotgun. Arguably, based upon these facts, the evidence seized could have been suppressed. However, any seasoned criminal defense attorney such as Mr. Lutes would have realized that the burden of proof on the prosecution at a motion to suppress tangible evidence hearing is only by a preponderance of the evidence to prove probable cause to search.

Clearly an experienced attorney, based upon the facts and the law, could objectively conclude a court would find the search to be a legal search incident to an arrest and deny a motion to suppress. Having made such a conclusion would be reasonable. Making such a conclusion would preclude an attorney from making a serious legal challenge to suppress the evidence.

'"[M]ere 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."' D'alo, 477 A.2d at 92 (quoting Bosch, 584 F.2d at 1121).

When reviewing a claim of ineffective assistance of counsel, this Court thus should examine "the entire performance of counsel." Brown, 964 A.2d at 528; see also Heath, 747 A.2d at 478 (analyzing ineffective assistance of counsel claim based on the "totality of omissions" committed by defense counsel). In examining the entire performance of Mr. Lutes, this Court notes that not only was he able to dispose of the charges in P2/2000-1178A, he was

also able to dispose of a charge in a separate matter in P2/2000-1176, receiving the same sentence, two years suspended, two years' probation.[17]

In evaluating the testimony offered by the parties in this matter, this Court finds the testimony from Mr. Lutes to be credible. Further, this Court finds the testimony from Petitioner to be lacking in credibility. Based upon the above reasons, it is this Court's judgment that counsel's performance in this matter was not constitutionally deficient. Petitioner has failed to establish the first prong of Strickland.

Lacking proof of the likelihood of success, Petitioner cannot succeed on the prejudice prong of Strickland.

C

As to P2/2001-1539A

In his Amended PCR, Petitioner alleged he ". . . pleaded nolo to this charge because he did not believe he had a meritorious defense to the case. This belief was based upon information provided to him by his attorney, and in particular was based upon his attorney's failure to advise him that he could have filed a meritorious motion to suppress the evidence in this case. Had [Petitioner] been so advised he would not have agreed to plead nolo but rather, would have proceeded with a motion to suppress with probably successful results."[18]

The criminal docket sheet in P2/ 2001-1539A reflects that Petitioner was arraigned on April 13, 2001. Bail was set in the amount of $500 cash bail, which he posted. His case was scheduled for "pre-arraignment conference" on June 15, 2001. Petitioner did not appear at that

[17] In examining all of the evidence, this Court also takes into consideration the fact that Mr. Lutes had represented Petitioner in the earlier matter P2/1998-2369A, wherein Petitioner received a disposition of one-year suspended sentence, one-year probation on an amended charge of possession of marijuana, and Petitioner made similar allegations of ineffective assistance of counsel against Mr. Lutes. which he admitted through counsel he could not prove.

[18] See Count III, Amended PCR, para. 2, 4-5.

scheduled conference. Thereafter, a warrant was issued on June 20, 2001 based upon his failure to appear on June 15, 2001.

The bench warrant issued on June 20, 2001 was "cancelled on October 9, 2001"; however, his bail was increased to $750 cash. Privately retained counsel entered his appearance on behalf of Petitioner on October 16, 2001. Although the handwritten "remarks" section of the "clerk's note" written on October 9, 2001 indicated ". . . def [defendant] to be pres [presented] as viol [violator] on 10/16" from the records it does not look as though that occurred.

After a series of court dates from October 16, 2001, it appears from examining the clerk's note that on March 1, 2002, the Petitioner and the State mutually agreed to have the new charge continued one week, but have the matter scheduled on the Drug [Court's] Calendar. It was not until April 12, 2002 that this Court first addressed any procedural or substantive matters concerning Petitioner.

On April 23, 2002, Petitioner with private counsel entered his conditional plea of nolo contendere to the charge of "possession of marijuana second or subsequent offense."[19] In exchange for his plea, Petitioner received the following: "sentence-referred to drug court program/capped plea two years ACI, six months to serve, 18 months' probation."

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[19] **RHODE ISLAND ADULT DRUG COURT SUPERIOR COURT CONTRACT PARAGRAPHS**

> 15. I understand that while in the Drug Court Program, the prosecution of the pending charge(s) and/or violation(s) will be stayed or placed on hold and, if I successfully complete the Drug Court Program, the pending charge(s) and/or violation(s) will be dismissed.
>
> 16. I understand that if I am terminated from the Drug Court Program, I will be sentenced on the pending charge(s) and/or violation(s) against me, in accordance with the minimum and maximum caps that I have agreed to.

Petitioner's matter was, according to the documents within the court's file, reviewed fourteen times between April 23, 2002 and November 8, 2002, without the sentence previously envisaged being executed. On November 15 2002, the State filed a Bail Violation Notice and requested that a warrant be issued for Petitioner.[20] Petitioner appeared on December 13, 2002 and was ordered "held without bail" based upon the State's claim that he was not only a violator of the terms of his bail, but he was also a probation violator.

More than a month later, January 29, 2003, the sentence that Petitioner originally negotiated and agreed to in his conditional plea on April 23, 2002 was imposed. Shortly thereafter, Petitioner, through new counsel, successfully petitioned to correct the sentence recently imposed.[21]

Petitioner testified that similar to the situations in his prior case, there were no discussions about strategy between him and his attorney. He denied there were any discussions about filing a motion to suppress the evidence or any tactic. Petitioner did not recall telling his lawyer about concerns he had over the legality of the search, even though he suspected it was "a profiling type of thing going on" resulting in his being pulled over. The only discussion he claimed occurred between him and his attorney was about the type of deal Petitioner would be willing to go along with.

At the hearing on this application, Petitioner during his testimony denied having any discussions with his attorney about the possibility that the search was not legal. His testimony was that there were no discussions about filing a motion to suppress. He did, however,

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[20] The notice required under S. Ct. Rule 46(g) contained the allegations which ultimately culminated with the original charge against Petitioner in P2/02-2748B.

[21] Attorney Richard Corley entered his Appearance on behalf of Petitioner on April 8, 2003.

acknowledge that because the car he was driving was unregistered, this could possibly have raised suspicion for the trooper.

Petitioner agreed when the new charge was brought against him, he was on probation for the earlier matters and a violation of probation notice was filed against him. Petitioner testified that when he was originally charged on April 13, 2001 with the offense, he was also on probation imposed from P2/2000-1176 and P2/2000-1178.

Petitioner, during his testimony, agreed that in electing to have the matters [new case and violation case] proceed into Drug Court, that had he successfully completed his treatment obligations, the new case would have been dismissed, and that he would avoid being adjudged a violator.

When Mr. Smith was retained by Petitioner, Mr. Smith was far from being a novice attorney in criminal law. Before Mr. Smith represented Petitioner, he had worked for approximately seven years in the Department of the Attorney General. There, according to his testimony, he handled "thousands of cases" including cases where search and seizure issues and confessions where involved. He represented clients in approximately thirty jury trials, including eight jury trials in federal court.

Mr. Smith testified that he understood, as counsel for Petitioner, he had a dual responsibility to Petitioner. One responsibility was to identify possible issues and communicate such issues to his client, but at the same time refrain from pursuing frivolous motions.[22]

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[22]Rules of Professional Conduct, Art. V, Rule 3.1,

> "Meritorious Claims and Contentions. A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in fact and law for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or a respondent in a

Mr. Smith testified that according to the trooper's Police Report, when conducting the pat-down of Petitioner's outer clothing, he detected "bulges" in Petitioner's groin area. Mr. Smith testified that in his opinion, those facts under the case law then existing—while, a "close call"—could have provided the trooper with probable cause justifying the more intrusive search of Petitioner.

The State argues the evidence offered at hearing established that Petitioner was aware of, and actively involved in, the strategy pursued in this matter. The State's argument on this point is convincing. When charged with the offense, Petitioner was on probation. Petitioner had been served with probation violation notices. Petitioner had at least two viable options: (1) proceeding in the traditional course of a violation hearing with the lower standard of proof; and (2) entering the "Drug Court," successfully completing the requirements and having the case dismissed.

Here again, there were conflicts between the testimony from Petitioner and his attorney on the critical claim that "my attorney did not advise me about filing a motion to suppress." In evaluating the testimony offered, this Court finds that Petitioner failed to sustain his burden of proof. Both Petitioner and Mr. Smith testified under oath. Mr. Smith testified that he did discuss the possibility of filing and succeeding with a motion to suppress; Petitioner said he did not.

Clearly, had Mr. Smith testified he did not consider or discuss the issue with Petitioner, this Court would be compelled to rule Petitioner satisfied the performance prong of Strickland.

> proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established." Art. V, Rule 3.1

This Court is not attempting to decide if Mr. Smiths' conduct in this matter was or was not appropriate under Rules of Professional Conduct, Art V, Rule 3.1.

After considering all of this information, Mr. Smith testified he was certain he had discussed this issue with Petitioner before the plea of nolo contendere was entered.[23] This Court finds Mr. Smith's testimony credible.

This Court, after reviewing the facts and circumstances presented "to evaluate the conduct from counsel's perspective at the time,"' Hazard II, 64 A.3d at 761 (quoting Jaiman v. State, 55 A.3d 224, 238 (R.I. 2012), is unable to conclude that counsel's representation in this matter was constitutionally deficient. Petitioner has failed to establish the first prong of Strickland.

Lacking proof of the likelihood of success, Petitioner cannot succeed on the prejudice prong of Strickland.

D

As to P2/2002-2748B

In his Amended PCR, Petitioner wrote that his attorney filed several motions, a Motion for Disclosure of the Confidential Informant and a Motion to Suppress.[24] Petitioner alleged both motions were heard and denied. Additionally, in his Amended PCR, Petitioner claimed to have "information within [Petitioner's] personal knowledge that the State could not produce any witness who could say that [Petitioner] had engaged in any drug transactions." Petitioner further

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[23] As to P2/2001-1539A, Petitioner's Amended PCR, "this belief was based upon information provided to him by his attorney." This admission corroborates Smith's recollection that before the plea was entered he discussed the facts with Petitioner.

[24] See Count IV, ¶ 5. In reviewing the Court's file in P2/2002-2748B, Mr. Corley, on behalf of Petitioner, filed a Motion to Suppress, a Motion for Disclosure of Confidential Informant and a Motion to Compel the State to Provide Promises, Rewards or Inducements Offered to Any Witness.

alleged the State could not provide the identity of the confidential informant that provided the basis for the search warrant.[25]

Petitioner alleged his defense attorney knew that the State lacked witnesses to connect him with drug dealing, but did not share this information with him; and that defense counsel "mislead" [Petitioner] to think said witnesses were available. And that, because of this, Petitioner pled to the reduced charge of one count of possession of marijuana, which he would not have done had the true information been provided.[26]

In P2/2002-2748B, Petitioner testified without any supporting evidence that ". . . I've come to find out that they [the State] never had a confidential informant.[27] So, this information was not shared with me by my attorney. Had I known this, I would have proceed (sic) to trial."

As previously noted, the police narrative filed in this Information stated that members of the Providence Police Department's "Special Services Division," for two months prior to July 9, 2002, were investigating illegal narcotics trafficking at 912 Chalkstone Avenue. Information revealed two subjects, residing in two separate apartments, were selling and storing marijuana at this location.

More significantly, the police narrative said "a confidential and reliable informant (provided information) that both subjects were using the basement to store their drugs. Another Providence Police Officer assigned to the A.T.F. task force "assisted in cultivating information that the two subjects involved (Petitioner and another subject identified as "G") were also selling

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[25] See Count IV, ¶ 6.
[26] See Count IV, ¶ 6-7.
[27] Petitioner later testified that he found this out by examining "paperwork" within the Court's file. In neither his pro se pleadings nor the Amended PCR did Petitioner claim this information constituted "newly discovered evidence" of facts not previously presented, justifying relief under § 10-9.1-1(4).

marijuana in exchange for guns. Based upon this information, a search warrant was signed by a District Court judge.

Petitioner confirmed that Mr. Corley, his attorney, filed a motion with the court asking that the identity of the confidential informant be disclosed to him. Petitioner agreed that he discussed this strategy with his attorney. Petitioner agreed that not only was that motion filed but that it was actually argued before the court before it was denied.

Petitioner agreed that on the day of trial, Oct. 20, 2003, he pled to the amended charge of misdemeanor possession of marijuana and dismissal of the other charges in exchange for a sentence of one-year probation" at the verge of going to trial."[28] (Resp't's Ex. E, Full.)

Mr. Corley's testimony was consistent with Petitioner in that he was aware the State claimed to have used a confidential informant during the investigation of the original charges brought against Petitioner. Mr. Corley agreed with Petitioner that he discussed strategy with Petitioner seeking to learn the identity of the informant by filing an appropriate motion with the court. Mr. Corley agreed with Petitioner that on the day trial was scheduled to begin, the State agreed to amend the original felony charge to one count of an amended charge of possession of marijuana, dismiss two additional felony counts in exchange for Petitioner's plea of nolo contendere.

In reviewing the testimony from Petitioner and his former attorney, the transcript from the prior proceeding and the documents within the courts file, this Court does not agree and therefore does not find that Mr. Corley's advice to Petitioner was below the advice demanded

[28] As the date of this charge was July 9, 2002 and the Petitioner had, prior to that date, been convicted of at least three prior possession of marijuana convictions, (P2/1998-2369A, P2/2000-1176A and P2/2000-1178A) that this matter was resolved by amendment to simple possession of marijuana in and of itself should qualify as a minor miracle and does bear favorably on the effectiveness of his attorney in P2/2002-2748B.

from an attorney in a criminal case. Petitioner has failed to prove that the advice given by his former attorney was constitutionally deficient.

Beyond his claim that Mr. Corley was negligent in his representation, Petitioner additionally claims that his attorney "knew that the State lacked witnesses to connect him with drug dealing, but did not share this information with him; [and/or] "mislead [Petitioner] to think said witnesses [informants] were available." "Mislead[ing]" means "[d]elusive; calculated to be misunderstood," Black's Law Dictionary 1015 (7th Ed. 1999). These additional claims, taken as alleged, are very disturbing. Because Petitioner, rather than alleging some omission or negligent conduct by his former attorney, is obliquely alleging that his attorney deliberately engaged in conduct amounting to fraud, which was detrimental to his client.

"To establish a prima facie case of common law fraud in Rhode Island, 'the plaintiff must prove that the defendant 'made a false representation intending thereby to induce plaintiff to rely thereon, and that the plaintiff justifiably relied thereon to his . . . damage.'" Women's Dev. Corp. v. Central Falls, 764 A.2d 151, 160 (R.I. 2001) (quoting Travers v. Spidell, 682 A.2d 471, 472-73 (R.I. 1996)) (internal quotation marks omitted).

Petitioner voluntarily invoked this Court's jurisdiction pursuant to chapter 9.1 of title 10 of the Rhode Island General Laws. Petitioner, having voluntarily done so, is charged with knowing that all of the rules of civil proceedings, including the burden of proof, apply in post-conviction matters. Sec. 10-9.1-7. Consequently, Petitioner must prove Mr. Corley "made a false representation intending thereby to induce petitioner to rely thereon." See Women's Dev. Corp., 764 A.2d at 160. If successful on this element, Petitioner would have to "prove [he] justifiably relied thereon to his . . . damage." Id.

Addressing those elements in their order, first Petitioner would have to prove that there was a "false representation" made by Mr. Corley. "False" means "[u]ntrue"; "[d]eceitful"; "lying." Black's Law Dictionary 618 (7th ed. 1999). A "representation" is "[a] presentation of fact—either by words or by conduct—made to induce someone to act . . ." Id. at 1415. The only evidence offered to establish there was a "false representation" by Mr. Corley was Petitioner's testimony.

Nowhere in Petitioner's testimony did he state precisely what he claims was said or done by Mr. Corley calculated, by Mr. Corley, to be misunderstood by Petitioner. Petitioner testified that years later, while doing research in the court's file, he [learned] that the informant never existed "because I couldn't have known it any other way. You know, he didn't tell me himself." Petitioner testified he could not recall verbatim what he was told about the informant. Additionally, in examining the transcript from Petitioner's plea on October 20, 2003,[29] there were no instances noted by this Court where there was a pause reflected in the proceedings or any other indication that Petitioner and Mr. Corley spoke privately "off the record."

From his own testimony Petitioner said "he," referring to Mr. Corley, "didn't tell me himself." Mr. Corley could not recall having any discussions about the unavailability of the confidential informant at the time the matter was called for trial. Petitioner did not direct this Court to anything within the court's file to corroborate his claim. Petitioner did not offer the testimony of any other person to attest to his claim. Treating Petitioner's testimony stating "he didn't tell me himself" as being credible undercuts his claim that Mr. Corley offered a false representation.

[29] See Pet'r's Ex. 7, Full.

Left to speculate, this Court concludes that the only logical basis of Petitioner's supposition, that the confidential informant(s) never existed, was the executed "dismissal under Criminal Rule 48(a)" form filed in P2/2002-2748B dated October 20, 2003 which states, "unable to disclose C. I . . . " It is axiomatic that being "unable to disclose" is clearly not the same as saying "we [the State] concede the non-existence of the claimed informant" or "we the State declare the C.I. never existed."

Far from being a "mockery of justice," the evidence of Mr. Corley's performance in this matter, pursuing a motion to learn the identity of the confidential informant, successfully negotiating an amendment from more serious charges to a less serious charge, demonstrates that advice of Petitioner's attorney was well within the range of competence expected and demanded of an attorney in a criminal case. This Court rules Petitioner has failed to establish that his former attorney's conduct was deficient under Strickland.

Further, based upon the total lack of evidence cited above, this Court rules Petitioner has failed to prove his claim that his former attorney in anyway "misled" Petitioner into the plea to the amended charge in P2/2002-2748B.

E

Prejudice

This Court will address Petitioner's claim that his former attorneys were ineffective, resulting in his pleas, thereby prejudicing him notwithstanding its earlier findings. If and when an applicant is able to demonstrate that counsel's performance was deficient under the Strickland test, the applicant then bears the burden of proving that prejudice actually resulted from the deficient performance. See Strickland, 466 U.S. at 668; Chalk v. State, 949 A.2d 395, 399 (R.I. 2008).

To prove prejudice under the second part of the Strickland analysis, "[t]he 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 part of the test focuses on the reliability of the outcome of the proceeding. The errors committed by defense counsel must be so serious and severe as to "warrant setting aside the judgment of a criminal proceeding." Id. at 691.

When a court is faced with a claim of ineffective assistance of counsel, "in a plea situation, the defendant must demonstrate a reasonable probability that but for counsel's errors, he or she would not have pleaded guilty and would have insisted on going to trial." State v. Figueroa, 639 A.2d 495, 500 (R.I. 1994) (citing Hill, 474 U.S. at 59).

A "reasonable probability" in these matters requires Petitioner to prove more than just saying "If my attorneys had provided me the advice, I would have gone to trial." It requires that Petitioner show the motion to suppress would have been successful.

Even if a petitioner 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 petitioner then must go on to establish that counsel's performance resulted in serious prejudice that undermined his or her right to a fair trial. See 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 petitioner 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") (citation omitted).

In P2/2000-1178A, Petitioner at his hearing testified, "I would have definitely moved forward with the suppression" had his attorney told him there could have been grounds to do so.[30] In P2/01-1539A, Petitioner testified at his hearing "Yes. As the previous cases, I would have proceeded because I believe I would have seen clearly the violation, the intrusion in this case" had his attorney told him it was a possibility to file a motion to suppress.[31] In P2/2002-2748B, Petitioner testified had his attorney told him ". . . they didn't have a witness . . . they never truly have (sic) an informant . . ." and ". . . I believe I would have proceeded to trial . . . ."[32]

Even if the court accepted all of this testimony as totally credible, this testimony standing alone does not demonstrate a reasonable probability that his motion(s) to suppress would have

[30] See Pet's Ex.1, Full at 19: 2-5.
[31] See Pet's Ex.1, Full at 25: 18-25, 26: 1.
[32] See Pet's Ex.1, Full at 30: 16-20, 31: 2-6.

been successful. See Strickland, 466 U.S. at 694; Brown, 964 A.2d at 527. This is particularly true in P2/2002-2748B when there is not a scintilla of proof of the predicate facts.

IV

Conclusion

For all the reasons stated in this Decision, this Court denies Petitioner's Petition for Post-Conviction Relief in its entirety. This Court finds that there were no professional errors committed by any of his prior attorneys.

Counsel are directed to confer and to submit to this Court forthwith for entry an agreed upon form of order and judgment consistent with this Decision.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	Anthony Lipscomb, Petitioner v. State of Rhode Island, Respondent
CASE NO:	PM/2010-3377
COURT:	Providence Superior Court
DATE DECISION FILED:	June 20, 2013
JUSTICE/MAGISTRATE:	Clifton, J.
ATTORNEYS:	
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For Respondent:	Paul A. Carnes, Esq.