STATE OF RHODE ISLAND

PROVIDENCE, SC.		**SUPERIOR COURT**
	(Filed: November 9, 2023)	
JOSEPH SHEPARD	**:**	
	:	
VS.	**:**	**C.A. No. PM-2020-00259**
	:	
STATE OF RHODE ISLAND	**:**	

DECISION

MONTALBANO, J. Before this Court is an application for postconviction relief filed by Joseph Shepard (Petitioner). *See* First Amended Application for Post-Conviction Relief (First Am. Appl.). Petitioner contends that his conviction and sentence should be vacated on the basis that he received ineffective assistance of counsel. *Id*. ¶¶ 5, 6, 7, 8, 18, and 28. Petitioner further contends that he entered a plea that was not voluntary, knowing, and intelligent. *Id*. ¶¶ 14, 15, 16, and 17. The Court has jurisdiction pursuant to G.L. 1956 §§ 10-9.1-1 and 10-9.1-2.

I

Facts and Travel

On May 11, 2015, a Providence County Grand Jury indicted Petitioner charging him with Count 1: Conspiracy; Count 2: Murder; Count 3: Felony Assault; Count 4: Felony Assault; Count 5: Felony Assault; Count 6: Larceny over $1,500; and Count 7: Leaving the Scene of an Accident Injury or Death Resulting. (Grand Jury Indictment, May 11, 2015.) Petitioner pled not guilty, a trial was scheduled, but on July 11, 2016, Petitioner requested that he be allowed to change his plea to guilty. (Hr'g Tr. 18:3-4, July 11, 2016.) Petitioner pled guilty to the conspiracy to commit a felony charge (Count 1), the assault with a dangerous weapon, to wit, a motor vehicle charge (Count 5), and the larceny over $1,500 charge (Count 6). In exchange for Mr. Shepard's guilty

plea to Counts 1, 5, and 6, the State agreed to dismiss the remaining counts against Petitioner, being Counts 2, 3, 4, and 7. (Plea Form, July 11, 2016; *see also* RCP 48(a) Dismissal.) Petitioner was sentenced to ten years to serve at the ACI on Counts 1 and 6, and to twenty years at the ACI with thirteen years to serve, balance suspended with twenty years' probation on the assault with a dangerous weapon charge (Count 5), and the time to serve was retroactive to October 17, 2014. All sentences were ordered to run concurrently. *Id*.

On January 13, 2020, Petitioner filed his initial petition for postconviction relief, which said petition was amended by an Amended Complaint filed on December 15, 2021. (First Amended Complaint.) On March 6, 2021, Petitioner filed a motion for partial summary judgment and a memorandum in support thereof. On April 12, 2021, the State filed a cross-motion for partial summary judgment and its memorandum in support thereof. On April 25, 2021, the motion justice denied Petitioner's motion for partial summary judgment and granted the state's motion for partial summary judgment. *See* Order, Vogel J., May 4, 2022. The motion justice ruled that if Petitioner was seeking to pursue an ineffective assistance of counsel claim, he must request an evidentiary hearing. *Id*.[1]

[1] The parties moved for summary judgment on the issue of whether the sentence imposed on the Petitioner violated his rights. Quoting from Justice Vogel's decision granting the State's cross-motion for summary judgment:

> "The parties are moving for partial summary judgment on the issue of whether the sentence imposed on Petition[er] violated his rights.
>
> "The court may grant a motion by either party for summary disposition of the application when it appears from the pleadings, depositions, answers to interrogatories, and admissions and agreements of fact, together with any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. 10 R.I. Gen. Laws Ann. § 10-9.1-6(c).

> "The Court has stated that a summary determination under § 10-9.1-6(c) 'closely resembles' a grant of summary judgment under Rule 56 of the Superior Court Rules of Civil Procedure, *Palmigiano v. State*, 120 R.I. 402, 405, 387 A.2d 1382, 1384 (1978); *Reyes v. State*, 141 A.3d 644, 652 (R.I. 2016). In determining the instant motions, the Court will follow the standards set forth in that rule, which provides, in pertinent part:
>
> "(a) A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of twenty (20) days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof . . .
> "(b) A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for summary judgment in the party's favor as to all or any part thereof.
> "(c) The judgment sought shall be rendered forthwith if the pleadings, depositions, documents, electronically stored information, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as matter of law . . . Super. R. Civ. P. 56.
>
> "Summary judgment 'is designed to decide in an expeditious fashion cases presenting groundless claims.' *Bruce Pollak v. 217 Indian Avenue, LLC*, 222 A.3d 478, 481 (R.I. 2019); *Hexagon Holdings, Inc. v. Carlisle Syntec, Inc.*, 199 A.3d 1034, 1038 (R.I. 2019). By a grant of summary judgment, the Court determines that all or some of the issues presented should not proceed to a full hearing or trial. The trial justice should 'deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial.'" *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Docket (Decision, Vogel, J. Apr. 25, 2022, 7-8.)

In granting the State's cross-motion for summary judgment, Justice Vogel clearly articulated her reasons for granting the state's cross-motion. *See id*. She concluded as follows:

> "For the reasons set forth herein, the Court rules that there exists no genuine issue as to a material fact that the sentence imposed on Petitioner did not violate his rights as alleged. The sentence was not grossly disparate from that imposed on Oliver. The trial justice adequately articulated the basis for accepting the agreed upon

Thereafter, Petitioner filed three motions on September 13, 2022:

1. A motion for leave to amend Petitioner's application for post-conviction relief, which was granted by this Court on October 18, 2022; *see* Order, Montalbano, J., November 14, 2022;

2. A motion for funds to obtain medical records which was granted by this Court on October 18, 2022; *see* Order, Montalbano, J., November 14, 2022; and

3. A motion for funds to hire an expert witness which was denied by this Court on October 18, 2022; *see* Order, Montalbano, J., November 14, 2022.

Petitioner also filed a request for issuance of a subpoena duces tecum to the Rhode Island Department of Corrections for the purpose of obtaining copies of his mental health records which was granted by this Court on March 20, 2023. *See* Order, Montalbano, J., March 23, 2023.

This Court conducted an evidentiary hearing on Petitioner's First Amended Application on July 7, 2023.

> sentence even if it exceeded the sentencing benchmarks. Petitioner's claim that the evidence did not support a finding of conspiracy is without merit. As such, Petitioner's motion for partial summary judgment is denied. The State's motion for partial summary judgment is granted." *Id*. at 13.

Consequently, as to Petitioner's claims that his rights were violated because his sentence was grossly disparate from that imposed on a co-defendant, and Petitioner's claims that his sentence violated his rights because the sentencing judge failed to articulate why she was imposing an agreed upon sentence that exceeded sentencing benchmarks, this Court finds that Justice Vogel's decision and order granting the state's cross-motion for summary judgment to be determinative of those issues in this case. *Id*. Therefore, the only matter before this Court with regard to Petitioner's First Amended Application for Post-Conviction Relief is Mr. Shepard's claim of ineffective assistance of counsel which he says makes his plea not a knowing, intelligent, and voluntary one.

II

Standard of Review

Postconviction relief is a statutory remedy for:

> "[a]ny person who has been convicted of, or sentenced for, a crime, a violation of law, or a violation of probationary or deferred sentence status and who claims: (1) That the conviction or the sentence was in violation of the constitution of the United States or the constitution or laws of this state. . . ." Section 10-9.1-1(a). *See Higham v. State*, 45 A.3d 1180, 1183 (R.I. 2012) (quoting *DeCiantis v. State*, 24 A.3d 557, 569 (R.I. 2011)).

In pursuing such claims a petitioner bears the burden of proving — by a preponderance of the evidence — that he is entitled to postconviction relief. *Hazard v. State*, 64 A.3d 749, 756 (R.I. 2013); *Burke v. State*, 925 A.2d 890, 893 (R.I. 2007) (citing *Larngar v. Wall*, 918 A.2d 850, 855 (R.I. 2007)). The proceedings for such relief are "civil in nature." *Ouimette v. Moran*, 541 A.2d 855, 856 (R.I. 1988) (citing *State v. Tassone*, 417 A.2d 323, 326 n.2 (R.I. 1980)). In accordance with the statute, the "court shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented." Section 10-9.1-7.

When there has been a guilty [or nolo contendere] plea, postconviction inquiry focuses on the nature of counsel's advice regarding the plea and the voluntariness of the plea. *State v. Dufresne*, 436 A.2d 720, 722 (R.I. 1981). Furthermore, "[a] defendant who pleads guilty [or nolo contendere] on the advice of counsel must demonstrate at his postconviction hearing that that advice was not within the range of competence demanded of attorneys in criminal cases." *Id*. at 723 (citing *McMann v. Richardson*, 397 U.S. 759, 771 (1970)). In *Dufresne*, counsel advised the defendant to plead guilty to a reduced charge of second-degree murder after incriminating statements had been admitted against him, which our Supreme Court concluded was "within the range of competence demanded of criminal attorneys." *Id*. at 724.

III

Analysis

Petitioner argues his plea should be vacated on constitutional grounds alleging that he received ineffective assistance of counsel from Attorney Terry Livingston (Attorney Livingston). Petitioner further contends that he entered a plea that was not voluntary, knowing, and intelligent, in violation of Rule 11 of the Superior Court Rules of Criminal Procedure.

A

Compliance with Rule 11

Rule 11 states, in pertinent part:

> "A defendant may plead not guilty, guilty or, with the consent of the court, nolo contendere. The court may refuse to accept a plea of guilty and shall not accept such plea or a plea of nolo contendere without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. . . ." Super. R. Crim. P. 11.

Waivers of constitutional rights must consider the totality of the circumstances and the waivers must be "voluntary and knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Johnson v. Mullen*, 390 A.2d 909, 912 (R.I. 1978). "At the conclusion of a plea hearing, the trial justice should be able to say with assurance that the accused is fully aware of the nature of the charge and the consequences of the plea." *Camacho v. State*, 58 A.3d 182, 186 (R.I. 2013). That objective can be obtained by: "(1) an explanation of the essential elements by the judge at the guilty plea hearing; (2) a representation that counsel had explained to the defendant the elements he admits by his plea; (3) defendant's statements admitting to facts constituting the unexplained element or stipulations to such facts." *Id*. at 186. In the final analysis, "[t]he applicant bear[s] the burden of proving by a preponderance

of the evidence that [he or she] did not intelligently and understandingly waive [his or her] rights." *Id*. at 186-87.

In the present case, Petitioner alleges his plea was not made knowingly and voluntarily because, (1) his attorney, Mr. Livingston, did not explain to him the elements of each offense (First Amended Application, ¶¶ 14-16); (2) he was not advised by his attorney, Mr. Livingston, that with regard to count 5 the benchmarks recommended a maximum sentence of five (5) years to serve at the ACI, and that had he been so apprised he would not have pled, and would have insisted on going to trial, *Id*. ¶¶ 17, 19; (3) at the time petitioner entered his plea he was not taking his prescribed medications, *Id*. ¶ 20; (4) segregation in a high security prison in the months preceding his plea affected his ability to think clearly and rationally, *Id*. ¶ 29; and (5) Attorney Livingston failed to request a competency examination in order to determine whether petitioner was competent either to stand trial or to enter a knowing, intelligent and voluntary plea, *Id*. ¶ 27.

The Court notes at this juncture that in his first amended application, Petitioner avers that the sentencing justice failed to give specific reasons on the record for an upward departure from the sentencing guidelines. *Id*. ¶ 11.[2] Additionally, Petitioner argues his sentence is grossly disproportionate to the sentences imposed on his co-defendants. *Id*. ¶¶ 12-13.[3]

Viewing the entire record of the plea colloquy, this Court hereby determines that Petitioner's plea was made knowingly, intelligently, and voluntarily. At the outset of the plea, the Honorable Justice Vogel inquired about Petitioner's education and whether Petitioner was under the influence of drugs or alcohol. *See* Ex. C, Sentencing Hr'g Tr. 6:14-17, July 11, 2016 (Ex. C).

[2] This issue was addressed and resolved in favor of the State by Ms. Justice Vogel when she granted the State's cross-motion for partial summary judgment. *See* Order, Vogel, J., May 4, 2022.
[3] *Id*.

Petitioner acknowledged that he went over the plea form with his lawyer before signing. *Id*. at 7:11-13. Critically, the following exchange took place between the court and Petitioner:

> "THE COURT: Did you go over this form with your lawyer before you signed it?
>
> "DEFENDANT: Yes, your Honor.
>
> "THE COURT: Did Mr. Livingston answer any and all questions you had concerning your decision to change your plea as well as what's contained in this form?
>
> "DEFENDANT: Yes, your Honor.
>
> "THE COURT: Are you satisfied with the Mr. Livingston's representation of you?
>
> "DEFENDANT: Yes, your Honor." *Id*. at 7:11-20.

Importantly, Petitioner's first argument is unavailing as Attorney Livingston testified at the postconviction relief hearing that he discussed the elements with Petitioner, both, of the offenses he was charged with, and the elements of the charges he was pleading to. *See* postconviction relief Hr'g Tr. 46:13-14, 53:12-23, July 3, 2023 (relief Tr.)[4] Additionally, Petitioner's argument that he was not advised about the sentencing benchmarks is equally unavailing. Attorney Livingston testified that he had conversations with Petitioner about the benchmarks. Specifically, he testified that he told Petitioner:

> "They want murder, they want manslaughter, there's a dead body. This isn't your run-of-the-mill ADW [Assault with a Deadly Weapon]. You're not going to get a benchmark case. They think they're being reasonable. This is the lowest they're going to go. I said something about eight years, and he said, I'd take eight years right now. I said, when you look at it, this is nine years because you're doing four; you're not getting the four back. This is concurrent and retro to the time you started the four. It's an additional nine years." *Id*. at 59:9-25.

[4] The hearing date was Friday July 7, 2023 despite the transcript reflecting July 3, 2023. *See* relief Tr. at 1.

The Court notes that the Rhode Island Sentencing Benchmarks for Felony Assault with or without a deadly weapon when serious injury results are four to five years. *See* R.I. Super. R. Sentencing Benchmarks, Felony Assault, ¶ 10. Departures from the sentence range should be made only when substantial and compelling circumstances exist, including harm to the victim, defendant's criminal record, whether the crime was part of an isolated offense or part of an organized enterprise, and the circumstances of the commission of the crime. *See id*. at Using the Benchmarks, ¶ 1.

Next, Petitioner's argument that at the time of the plea he was not taking his prescribed medications and that this affected his thinking necessarily fails as the record shows otherwise. The sentencing justice asked Petitioner prior to his plea whether he was on any drugs or alcohol. Ex. C at 6:14-17. This Court does not find Petitioner's argument that he did not consider prescription drugs as "drugs," persuasive. *See* relief Tr. at 31:8-14. Moreover, Attorney Livingston testified at the postconviction relief hearing that Petitioner never mentioned anything about Petitioner's mental health to him prior to, or after, Petitioner entered his plea. *Id*. at 56:19-21.

Further, Petitioner's argument that segregation in a high security prison prior to his plea impacted his ability to think clearly and rationally is unpersuasive. Not only did Petitioner answer the sentencing justice's questions clearly, but he provided an apology to the family of the victim that was articulate and thoughtful. Ex. C at 43:10-19.

Finally, Petitioner's argument that neither the court nor his attorney requested a competency evaluation to see if he could stand trial or enter a plea is without merit. The case was scheduled for trial and neither the court nor the defense questioned competency. Clearly, based on the plea colloquy, under the totality of the circumstances, Petitioner was competent to both go to trial (assist in his defense/strategy) *or* take a plea. Attorney Livingston had no reason to question

competency as Petitioner never mentioned his mental health to Mr. Livingston. *See* relief Tr. at 56:19-21. Moreover, Attorney Livingston testified that Petitioner was one of the more articulate and intelligent clients that he ever had. *Id*. at 56:21-23. Additionally, Petitioner would send Attorney Livingston legal research, witness notes, witness inconsistencies, and consistently questioned everything. *Id*. at 45:4-13.

In the final analysis of the plea colloquy, Petitioner acknowledged that he knew he was giving up certain constitutional rights and that Attorney Livingston went over them with him. Ex. C at 20:7-17. The court informed Petitioner of the constitutional rights he was relinquishing by virtue of his plea. *Id*. at 18:21-20:9. The court asked the Petitioner if he agreed with the facts he was pleading to as read by the prosecutor and he agreed to the facts as read, and Petitioner agreed that the State could prove the facts as read beyond a reasonable doubt if the case went to trial. *Id*. at 26:8-27:21. Ultimately, the Court found that Petitioner had the capacity to understand the nature and consequences of his plea, including the waiver of his constitutional rights. *Id*. at 37:20-23. The Court found that the plea was made knowingly, intelligently, and voluntarily, with knowledge and understanding of all matters set forth in the affidavit and Petitioner pled guilty. *Id*. at 38:2-9.

Petitioner acknowledged that Attorney Livingston went over the plea form with him and answered all of his questions. Moreover, Petitioner admitted to the facts underlying the charged offenses and incorporating the elements of those offenses. *See Camacho,* 58 A.3d at 186. Petitioner was also informed of his constitutional rights that he was giving up by entering his plea. *See Desamours v. State,* 210 A.3d 1177, 1183 (R.I. 2019) (no Rule 11 violation for "bare-boned" plea colloquy where Superior Court justice advised applicant of rights he was waiving by entering plea and applicant confirmed his relinquishment of those rights). This Court is satisfied that Petitioner's plea was a voluntary, knowing, and intelligent plea, and that the requirements of Rule 11 and the

Fourteenth Amendment were complied with in this case.

B

Ineffective Assistance of Counsel

When evaluating allegations of ineffective assistance of counsel, Rhode Island Courts have adopted the two-pronged standard enunciated in *Strickland v. Washington*, 466 U.S. 668 (1984). *Perkins v. State*, 78 A.3d 764, 767 (R.I. 2013); *see Guerrero v. State*, 47 A.3d 289, 300 (R.I. 2012) (citing *Strickland*, 466 U.S. 668). "Applicants are required to demonstrate that: (1) counsel's performance was deficient in that it fell below an objective standard of reasonableness … 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." *Tassone v. State*, 42 A.3d 1277, 1284-85 (R.I. 2012) (internal quotation marks and citations omitted). If an applicant for postconviction relief does not make both showings, "'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). Our Supreme Court has stated when ruling on an ineffective assistance of counsel claim, courts should consider counsel's performance in its entirety. *Hazard*, 64 A.3d at 756. Thus, "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)).

1

First Prong

The first prong of the *Strickland* analysis requires the applicant to "demonstrate that 'counsel's performance was deficient, to the point that the errors were so serious that trial counsel

did not function at the level guaranteed by the Sixth Amendment.'" *Guerrero*, 47 A.3d at 300 (quoting *Brennan v. Vose*, 764 A.2d 168, 171 (R.I. 2001)). To do so, Petitioner must show that "counsel's advice was not within the range of competence demanded of attorneys in criminal cases." *Neufville v. State*, 13 A.3d 607, 610 (R.I. 2011). Our Supreme Court "requires that scrutiny of counsel's performance be highly deferential, and 'every effort [must] 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.'" *Tassone*, 42 A.3d at 1285 (alteration in original) (quoting *Lynch v. State*, 13 A.3d 603, 606 (R.I. 2011)).

Counsel's performance, therefore, "must be assessed in view of the totality of the circumstances and in light of 'a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" *Hazard v. State*, 968 A.2d 886, 892 (R.I. 2009) (quoting *Heath v. Vose*, 747 A.2d 475, 478 (R.I. 2000)). With regard to the first prong, this Court must consider whether Mr. Livingston's advice to Petitioner regarding a potential plea to the assault with a dangerous weapon charge was within the range of competence demanded of attorneys in criminal cases. *See Neufville*, 13 A.3d at 610. The Court's scrutiny of Mr. Livingston's performance must be highly deferential, and it must make every effort to eliminate the distorting effects of hindsight, reconstruct the circumstances of Mr. Livingston's challenged conduct, and evaluate same from his perspective at the time. *See Lynch*, 13 A.3d at 606.

Petitioner argues that his counsel's performance was deficient because, (1) he was not advised by Attorney Livingston that the sentencing benchmarks recommended a maximum sentence of five years to serve and that he would have insisted on going to trial had he been so apprised, *See* First Am. Appl., ¶¶ 5, 6, 18; (2) Attorney Livingston failed to negotiate a sentence within the range recommended by the sentencing benchmarks, *Id*. ¶¶ 7-8; (3) Attorney Livingston

knew that Petitioner was being deprived of his prescribed medications prior to his plea and never notified the court of same, *Id*. ¶¶ 21-22; (4) Attorney Livingston knew the negative effects that high security segregation was having on Petitioner's mental health and did not notify the court of same, *Id*. ¶¶ 23, 25, 26, 28; and (5) Petitioner did not have time to consider the State's offer and was coerced into accepting the offer by Attorney Livingston, *Id*. ¶ 30.

At the postconviction relief hearing, Attorney Livingston testified that he has been an attorney for thirty-two years, handled fifty jury trials as a prosecutor, and has prosecuted and defended capital cases. *See* relief Tr. at 39-40:8. With regard to both the violation hearing and the possible trial on the new charges, Attorney Livingston described his thought processes, case strategy, discussion with Petitioner about sentencing benchmarks,[5] and tactical decisions he made:

> "Q: So the State wanted to go to a violation hearing . . .?
>
> "A: That was my understanding. And so then we sat down and talked, all right, so, you know, Joe, here's the guidelines, you're on probation for robbery, and I believe it was a 15-year sentence, 5 years to serve and 10 suspended. The guidelines on a robbery was – I think it was 8 to 12. I believe that was the number.
> So I said our argument would be with this mitigation – he had some health issues, a bullet in the back . . . and so we're going to use that as mitigation and also argue that he's admitting violation. . . . *Id*. at 43:1-16.
>
> "And we went over the elements and the evidence down the road when we both had it all. . . . And I said, Joe, I agree with you. I think it's a very, very weak murder, they can't prove the co-defendant intentionally hit Mr. Rodriguez with the intention of killing him." *Id*. at 46:13-20.

Mr. Shepard, to the contrary, testified at the postconviction relief hearing that when he met with Mr. Livingston, he never discussed the sentencing benchmarks for any of the charges he was

[5] Attorney Livingston referred to the sentencing benchmarks several times as guidelines but later testified that "guidelines" is the federal term for the benchmarks. *See* relief Tr. at 44:5-8.

facing. This Court finds Mr. Shepard's testimony in that regard not credible. The pretrial offers from the State initially contemplated that Mr. Shepard would plead either to second-degree murder or manslaughter. Attorney Livingston presented these offers from the State to Mr. Shepard, who responded that he would not have on his record that he killed someone. *Id*. at 49:12-14. Attorney Livingston, in the context of continuing plea negotiations, specifically advised Mr. Shepard with regard to the assault with a dangerous weapon charge that "you're not going to get a benchmark case." *Id*. at 59:17. This Court finds that Petitioner's claims that his counsel Mr. Livingston's performance was deficient because he failed to advise Petitioner about the applicable sentencing benchmarks for an assault with a dangerous weapon charge, and because he failed to negotiate a sentence within the range suggested by the benchmarks to be without merit.

Once Mr. Shepard rejected the initial offers from the State, Attorney Livingston diligently prepared for trial, filing several motions on Mr. Shepard's behalf, and discussing trial strategy in detail with the Petitioner:

> "Q: Did you discuss all of the different motions and different strategies that you had with Mr. Shepard?
>
> "A: Every single motion that I had, every piece of evidence that we had was all not only shared with Mr. Shepard, was discussed back and forth, including trial strategy, what our strategy was going to be on defeating the murder or the manslaughter or the ADW [assault with a dangerous weapon]." *Id*. at 48:19-25.

At the same time Mr. Livingston was preparing for trial, plea negotiations with the State continued. Attorney Livingston testified about his plea discussions with Petitioner:

> "Q: So during the time that you're preparing for trial, did you ever have any discussions with Mr. Shepard about potentially entering a plea?
>
> "A: Yes, numerous times. I should say I brought all offers to Mr. Shepard. So I brought the original offer. And now, if memory serves me, I think it was 25. . . . I think the next offer was the 30, 18, 30

> years, 18 to serve on the manslaughter. I brought that to Mr. Shepard. He said, no way, I'm not pleading to any charge that would have on my record that I killed someone. I'm not doing it. So the prosecutor contacted me and said have you had any discussions about the 30 years, 18 to serve with Mr. Shepard. . . . I said I have, and they said, He's rejecting it? And they said, what doesn't he like, the charge or the time? I said both, the charge and the time. . . . So on that final offer, the one that he ultimately pled to, he thought it was high. . . . I said without your prior record and without the dead body . . . you're not going to get a benchmark case. They think they're being reasonable. This is the lowest they're going to go." *Id*. at 49:3-8, 10-20, 59:5-6, 11-12, 17-19.

When it became time for trial and Petitioner changed his mind and wanted to enter a plea, Attorney Livingston testified credibly as to his process in discussing the plea form with the Petitioner. Attorney Livingston indicated that he would have reviewed the plea form in its entirety with Petitioner, that he would have discussed the rights Petitioner was giving up in more detail, the elements Petitioner was pleading to, and let Petitioner know he was facing life plus ninety-five years at trial. *Id*. at 52:10-11, 53:9-11, 53:12-14, 54:11-16. Attorney Livingston testified that he told Petitioner that the decision to enter into a plea deal was ultimately the Petitioner's to make. *Id*. at 58:2-6.

Petitioner argues that Attorney Livingston's performance was deficient for failing to raise Petitioner's mental health issues and lack of medication to the sentencing justice. Petitioner further argues that at the time of the plea on July 11, 2016, Attorney Livingston's performance was deficient because he knew the negative effects that being housed in high security were having on him, and he failed to notify the court of the same. Both arguments are without merit. Attorney Livingston testified credibly that Petitioner never mentioned mental health issues to him. *Id*. at 55:6-9, 56:19-21. Mr. Shepard described in some detail the negative effects which being housed in high security had upon him, concluding, "[y]ou don't understand how bad the affect is with High Security and Seg until you're not in that environment no more . . . And my anxiety, my

PTSD, the slamming of the doors, you're watching people hurt themselves to get medical attention." *Id*. at 8:8-13.

Mr. Livingston testified, however, that Mr. Shepard did not want to be in High Security because "they didn't have the programs that he wanted to get into . . . ." *Id*. 56:13-15. Attorney Livingston further testified that prior to the time Petitioner entered his plea and after he entered his plea, he (Attorney Livingston), never recalled him (Mr. Shepard) "ever mentioning anything about his mental health," and that his interactions with Mr. Shepard were such that he felt Mr. Shepard was one of the more articulate and intelligent clients he had ever had. *Id*. at 56:19-23. And in reviewing the plea colloquy (Ex. C) it is clear that Mr. Shepard indicated to the sentencing judge that he was not under the influence of alcohol or narcotics, did not mention that he was having any mental health issues or issues with being housed in High Security or Segregation, and indicated to the sentencing judge that he was satisfied with Mr. Livingston's representation. *Id*. at 6:13-16, 7:18-20.

Finally, Petitioner argues that he did not have time to consider the State's offer and was coerced into accepting the plea by Attorney Livingston. For his part, Attorney Livingston testified credibly that the decision was the Petitioner's and that he expected a trial on the day of the plea. *Id*. at 49:21-24. Moreover, that he met with Petitioner several times in the days leading up to the plea. *Id*. at 50:1-2. Finally, with Petitioner's assent, a decision was made to allow all three co-defendants to be in the courtroom the day of the plea and for them to meet alone to discuss what they wanted to do. *Id*. at 51:8-52:2.

This Court finds that Attorney Livingston's discussions with Petitioner and representation during the plea negotiations was reasonable "in view of the totality of the circumstances." *Hazard*, 968 A.2d at 892. Attorney Livingston was diligently preparing for trial but ultimately Petitioner

chose to plead. Petitioner's decision to plead was informed by Mr. Livingston's considered advice and experience, enabling him to weigh the potential consequences of going to trial as opposed to accepting a plea.

In "look[ing] at the entire performance of counsel," the Court is satisfied that Petitioner received effective assistance of counsel. (Alteration in original; internal quotation marks omitted.) *Tassone*, 42 A.3d at 1286. The Court cannot conclude that Attorney Livingston's performance "was deficient in that it fell below an objective standard of reasonableness." (Internal quotation marks omitted.) *Id*. at 1284; *see Page v. State*, 995 A.2d 934, 945 (R.I. 2010). This Court is satisfied that Attorney Livingston's performance prior to a potential trial, during plea negotiations, and his representation during the hearings certainly fell within the wide range of reasonable professional assistance to which Petitioner was entitled. Accordingly, Petitioner has not satisfied the first prong of the *Strickland* test.

2

Second Prong

Because of Petitioner's failure to prove that Attorney Livingston's representation was constitutionally deficient, the Court need not—and will not—address the second prong of the *Strickland* standard. *Page*, 995 A.2d at 945 (declining to consider the second *Strickland* prong when "counsel's performance was reasonable and, as such, did not run afoul of even the first prong . . . under the *Strickland* test"). Nevertheless, this Court notes that Petitioner was in no way prejudiced by Attorney Livingston's representation of him. It is clear to this Court that Petitioner received effective assistance of counsel and a just result was produced. *Bustamante*, 866 A.2d at 522.

IV

Conclusion

In light of the foregoing, the Court concludes that Petitioner has not satisfied his burden of proving by a preponderance of the evidence that postconviction relief is warranted. Furthermore, this Court is satisfied that defense counsel provided competent and professional services in defense of the charges against Petitioner. Accordingly, the First Amended Application for Post-Conviction Relief is denied and dismissed.

Counsel shall submit an appropriate order for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**Joseph Shephard v. State of Rhode Island**
CASE NO:	**PM-2020-00259**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**November 9, 2023**
JUSTICE/MAGISTRATE:	**Montalbano, J.**
ATTORNEYS:	
For Plaintiff:	**Ronald C. Desnoyers Jr., Esq.**
For Defendant:	**Judy Davis, Esq.**