STATE OF VERMONT

SUPERIOR COURT — CIVIL DIVISION
Windsor Unit — Docket No. 167-4-16 Wrcv

IN RE: ERIC DALEY,
Petitioner for Post-Conviction Relief,

v.

THE STATE OF VERMONT,
Respondent.

Opinion and Order on Petition for Post-Conviction Relief

Petitioner Eric Daley has filed this claim for post-conviction relief (PCR) alleging ineffective assistance of his trial counsel. The Court held a hearing on the matter on February 11, 2019, at which the Court accepted testimonial evidence and voluminous exhibits. Subsequently, the parties filed post-trial memoranda. Petitioner is represented by Robert Appel, Esq., and the State is represented by State's Attorney David Cahill. Although Respondent previously sought dismissal and/or summary judgment based on abuse of writ, the State in its memorandum asserts that it no longer wishes to pursue that defense and, instead, requests that the Court issue its post-trial judgment on the merits of the PCR petition as amended. Petitioner requests that the Court grant his petition but seeks only a new sentencing with the assistance of effective defense counsel.[1]

[1] It is unclear to the Court whether the two purported errors by defense counsel concerning failing to file motions to suppress could warrant only a new sentencing. If those failures amounted to ineffective assistance that prejudiced the defense, the

After reviewing the evidence submitted in connection with the PCR Petition, including the testimony offered at trial by Petitioner, his legal expert, and the State's legal expert, the Court makes the following determinations.

Factual and Procedural Background

On June 15, 2003, Petitioner was stopped for speeding while traveling southbound on Interstate 91 by Vermont State Police Trooper Michael Smith. *State v. Daley*, 2006 VT 5, ¶ 2, 179 Vt. 589, 589. Trooper Smith took Petitioner's paperwork, went to his cruiser, and after "five or six minutes," returned to ask Petitioner a series of investigative questions. The trooper asked Petitioner "between five and seven times" during the roadside detention for consent to search his vehicle. Petitioner repeatedly refused to give the requested consent. Both men became somewhat agitated.

Trooper Smith issued Petitioner tickets for speeding and for not wearing a seatbelt, and proceeded to walk back to his cruiser. After starting back to his cruiser, the trooper "holler[ed], hey hold on a second[.]" Petitioner did not know if the trooper had forgotten to give him something or "what the deal was at the time." Petitioner looked at his rearview mirror "and that's when [he] noticed that there was a second vehicle behind [Trooper Smith's.]" Trooper Smith returned to Petitioner's vehicle and told him they were calling in a K-9 unit to check his car for

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remedy would likely be to place Petitioner back in the position he was in prior to his entering any plea agreement and without the benefits of that agreement. Given the Court's determination of these issues, it need not struggle with that legal question.

illegal substances. Petitioner asserted to the officers that they could not do that as he had done nothing wrong. (At the time, Petitioner had in the trunk of his car illegal drugs, including marijuana, ecstasy, and LSD.)

After unsuccessfully trying to reach his New Hampshire attorney, Petitioner drove off. He at hearing testified that he did not think that he spun or squealed his tires as he left. The Court finds that testimony incredible. At the time, Petitioner knew that he had a not insubstantial amount of illegal substances in the trunk of his car. He had been told a K-9 unit would be checking his vehicle. Petitioner had been told to wait. He knew two police cars were behind him. He was aware that the illegal drugs likely would be discovered by the police dog. His subsequent efforts to elude the officers at high speed also provide evidence of his state of mind. Given those facts, the Court concludes that Petitioner spun his tires as he left the scene at an increasingly high level of speed.

Further, prior to the trial in this PCR matter, Petitioner stipulated to the facts as found by the Vermont Supreme Court in connection with his underlying cases. (PCR Trial Transcript, p. 193). In the Supreme Court decision, the Court noted that Defendant had squealed his tires and driven away from the traffic stop at a high rate of speed. *Daley*, 2006 VT 5, ¶ 2, 179 Vt at 589.

The two cruisers gave pursuit. The troopers followed Petitioner as he attained speeds approaching 120 miles-per-hour and wove between other cars on the highway. Other officers responded to the pursuit, including Vermont State Police Sergeant Michael Johnson, who deployed a "spike strip" or "spike mat" on

the highway, which was designed to puncture tires of fleeing vehicles. When Petitioner encountered traffic backed up from the spike strip, he chose to drive into the median. He lost control of his vehicle, and struck and killed Sergeant Johnson. Following the collision, Petitioner fled the scene on foot. He absconded and was eventually apprehended in Pennsylvania.

During the criminal proceedings that followed, Petitioner was originally represented by then-attorney Kevin Griffin. Subsequently, he was represented by Attorney Matthew Harnett. At sentencing, he was also represented by Attorney Kathleen Moore.

Attorney Harnett negotiated the plea agreement that led to Defendant's sentence. Per that agreement, Defendant agreed to plead guilty to grossly negligent operation with death resulting, attempting to elude, involuntary manslaughter, leaving the scene of an accident with death resulting, felony possession of marijuana, possession of LSD, and possession of ecstasy. Both sides agreed to a contested sentencing where the State could argue for up to thirty-three years, *id.*, and Defendant could argue for any lawful sentence.

As part of the plea deal, evidence shows that Petitioner obtained three critical things: (1) the federal government agreed not to prosecute the case, a prosecution that could have subjected Petitioner to the death penalty; (2) the State agreed not to seek life imprisonment or a charge with a presumptive 20-year minimum; and (3) the State of New Hampshire agreed not to prosecute Petitioner

for unrelated felonies that might have resulted in consecutive jail sentences. (PCR Trial Transcript at pp. 38-39); Exhibit 3 (plea agreement).

After a lengthy sentencing hearing, Petitioner was sentenced as follows: (1) twelve to fifteen years each as to manslaughter and gross negligent operation, and three to six months for attempting to elude; (2) twelve to fifteen years for leaving the scene of an accident, to run consecutive to the first group; and (3) two to three years for possession of marijuana, six to twelve months for possession of LSD, and six to twelve months for possession of Ecstasy, for a total of two to three years, to run consecutive to the sentences in the other groups. (Exhibit 11 at pp. 113, 117, 120). The total sentence was twenty-six to thirty-three years. (Id. at p. 121).

The PCR Claims

Petitioner's PCR filing focuses on the conduct of Attorney Harnett, who is now deceased. At the time of the representation, Attorney Harnett had many years of experience handling complex criminal matters in the State of Vermont. He was a founding member of the Defender General's Serious Felony Unit, and is and was highly regarded, even by Defendant's expert. (PCR Trial Transcript at p. 117).

Based on three principal claimed errors, Petitioner and his expert Attorney Paul Volk argue that his trial counsel's performance fell below professional standards and that it is reasonably probable that he would have received a lesser sentence if he had received competent representation. First, Attorney Harnett did

not file a motion to suppress and dismiss based on the allegedly unsupported transition of the motor vehicle stop into a drug investigation without an articulable suspicion of criminal activity. Second, Attorney Harnett did not view the laying of the spike strips as an unconstitutional seizure of Petitioner or move on that basis to suppress the events that followed the deployment of the spike strips. Third, at Petitioner's sentencing, defense counsel inadequately prepared Petitioner for his testimony and for allocution and recommended that he testify in his own behalf. Petitioner was then subjected to cross-examination by the prosecutor who elicited a series of admissions from Petitioner, described by Petitioner to be "very damaging."

The admissions elicited by the prosecutor included that Petitioner had: driven on the date of the charged offense; driven in excess of 100 miles per hour; steered his vehicle to the left, prompting him to lose control of his vehicle; and fled the scene of the fatal accident. Additionally, the prosecutor elicited admissions from Petitioner as to his possession of two pounds of marijuana at the time of the alleged offenses; possession of LSD and Ecstasy; gross negligent operation and eluding; and the volitional nature of his actions on the date of the offense.

The State and its expert Attorney Colin Seaman[2] counter, *inter alia*, that Petitioner has failed to prove by a preponderance of the evidence that his counsel fell short of established professional norms by declining to draft or file motions to suppress and dismiss, that Petitioner's testimony at sentencing was the result of

[2] Both attorneys proffered by the parties as experts have significant expertise in the area of criminal defense practice. The Court affords both expert status.

ineffective assistance of counsel, and that there was a reasonable probability of a better outcome for Petitioner if trial counsel has filed such motions or had Petitioner not taken the stand.

Standard of Review

On a petition for post-conviction relief, the petitioner has the burden of showing "'by a preponderance of the evidence, that fundamental errors rendered his conviction defective.'" *In re Combs*, 2011 VT 75, ¶¶ 9-10, 190 Vt. 559, 561 (quoting *In re Liberty*, 154 Vt. 643, 644 (1990) (mem.)); *accord Strickland v. Washington*, 466 U.S. 668, 694 (1984). An ineffective assistance of counsel claim requires a two-pronged analysis that is the same under both the United States and Vermont Constitutions. *Id*. ¶ 9 (citing *In re Russo*, 2010 VT 16, ¶ 16, 187 Vt. 367). First, the petitioner must show that his counsel's performance "'fell below an objective standard of reasonableness informed by prevailing professional norms.'" *In re James Burke*, 2019 VT 28, ¶ 18 (citing *In re Dunbar*, 162 Vt. 209, 212 (1994)). Second, the petitioner must further demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Combs*, 2011 VT 75, ¶ 9 (internal quotation marks and citations omitted). In other words, the petitioner must show that defense counsel's performance resulted in prejudice. *See Strickland*, 466 U.S. at 694.

Importantly, the Vermont Supreme Court has emphasized that:

> Trial counsel is allowed much discretion in decisions regarding trial strategy, and we will not measure counsel's competence based on the failure of that strategy. Instead, we must assess whether counsel's decisions were within the range of competence demanded of attorneys

> in a criminal case at that time. Furthermore . . . fairly assessing counsel's performance 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. Due to the difficulties of making such an evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . .

Combs, 2011 VT 75, ¶ 10 (internal citations and quotation marks omitted). The Vermont Supreme Court has made clear that the "petitioner's burden in ineffective assistance of counsel cases 'is a heavy one.'" *Id.* (quoting *Dunbar,* 162 Vt. at 212, 647 A.2d at 319).

Discussion

I. The Failure to Challenge the Unlawful Extended Detention at Roadside by Filing or Drafting a Motion to Suppress

Petitioner first contends that trial counsel failed adequately to research and prepare a motion to suppress and dismiss based on the Vermont State Police's unlawful extended roadside stop. The State counters that defense counsel was aware of the potential for a motion involving such issue (as was the State's Attorney), but, instead, elected to raise it as a mitigating factor. The State maintains that the decision was "strategic in nature, rather than a negligent omission."[3]

[3] While the issue of the propriety of the roadside delay is one that both sides agree was an issue a defense attorney should have been aware of and raised somehow, at the time of this proceeding, the law was not completely settled on the issue. In Vermont, *State v. Sprague*, 2003 VT 20, ¶ 22, 175 Vt. 123, 131, had held that an "exit order" required some additional justification; however, our High Court had not specifically dealt with the general issue of delay during a traffic stop. On the federal level, some circuits had permitted a "*de minimis*" delay to perform a K-9

At the outset, the Court, again, takes note that Attorney Harnett's extensive experience as a criminal defense attorney, his having been regarded as "competent and then some," and his having served as a resource for both consultation and referrals for criminal cases—at the least, in state court—is undisputed. (PCR Trial Transcript at pp. 115-118). It is further undisputed that Mr. Harnett faced "a very difficult case to defend on its merits," (Petitioner's Post-Hearing Memorandum at p. 9), the prosecutor "was a very capable and thorough attorney," and "[t]his was an extremely high-profile case, for valid reason." (PCR Trial Transcript at p. 114). In light of these circumstances, and, given the difficulty in evaluating counsel's performance retrospectively, the Court sees no reason to withhold the usual discretion afforded to trial counsel in making decisions regarding trial strategy. *Combs*, 2011 VT 75, ¶ 10.

Here, the Court is not persuaded that trial counsel failed to do the necessary research or to consider filing or drafting a motion to suppress. To the contrary, an email from the prosecutor to defense counsel, dated February 12, 2004, confirm the evidence at the PCR hearing that the "scope of detention" was an issue that was raised by both Attorney Griffin and Attorney Hartnett. It reads:

> So my thoughts are as follows . . . the evidence is very strong . . . defense has a few legal issues . . . *scope of the detention* . . . does this

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sniff, for example. *See*, *e.g.*, *U.S. v. Morgan*, 270 F.3d 625, 632 (8th Cir. 2001) (roadside delay of "well under ten minutes" permissible under Fourth Amendment). It was not until 2015 that the United States Supreme Court confirmed that any delay in a roadside encounter must be justified based on, at least, minimal suspicion of wrongdoing. *Rodriguez v. U.S.*, 135 S.Ct. 1609, 1614-1615 (2015).

> rise to "depraved heart" murder . . . Miranda questions at time of arrest."
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> None of the legal defenses will be case dispositive. In other words, this case will get to a jury and it is hard to see a jury being too sympathetic to your client.

(Exhibit 20) (emphasis added).

Additionally, an August 31, 2004 email from defense co-counsel Kathleen Moore to Karen Kellogg, Attorney Harnett's administrative assistant, states:

> The State Troopers who stopped, detained, released and then attempted to detain without justification Eric Daley were not behaving as any citizen in Mr. Daley's position would have expected them to on that day. Mr. Daley had a right to leave when he did, and had the State Police not interpreted that as some sort of insult which demanded redress in the form of a high speed chase and use of deadly force, Sgt. Johnson would still be with his family.

(Exhibit 4).

Attorney Moore also testified at her deposition that she thought she and Attorney Harnett had "kicked [the option of filing pre-trial motions] around long and hard," but that the decision as to whether or not to file a formal motion rested with Attorney Harnett. (Exhibit 60 at p. 43). She further testified that "[t]here were a lot of issues and . . . facts that needed to be considered . . . by the attorney . . . who would ultimately . . . reach a . . . conclusion with respect to whether or not a plea should be entered . . . in this matter." (Exhibit 60 at p. 42).

This evidence, thus, reflects that Attorney Harnett was aware of a potential motion or motions based on the alleged unlawful detention, but after consideration that included deliberation with co-counsel, herself a former Chief of the Criminal Bureau in the Attorney General's Office in the Commonwealth of Massachusetts

(Exhibit 60 at p. 4), opted for another strategy. They chose to raise the issues surrounding the allegedly illegal detention in a sentencing memorandum to be considered in mitigation. That memorandum and the cases cited therein plainly establish that trial counsel competently researched the relevant law and made arguments to the Court concerning those precedents. (Exhibit 6).

"With respect to petitioner's ineffective-assistance-of-counsel claim, the test is not whether there were other strategies available to defense counsel, but instead 'whether trial counsel had *any* reasonable strategy and whether [he] pursued it with adequate preparation and diligence.'" *In re Brooks*, No. 2017-253, 2018 WL 3022683, at *3 (Vt. June 15, 2018) (citing *In re Russo*, 2010 VT 16, ¶ 16, 187 Vt. 367) (quotation omitted). In this case, Attorney Harnett elected to pursue the alleged unlawful detention as a mitigating factor at sentencing, rather than as a basis for a motion to suppress. There is no claim that trial counsel did not adequately or diligently prepare for the presentation of the purported unlawful roadside stop as a mitigating factor at sentencing. Under *In re Russo*, Attorney Harnett had a strategy as to how best to raise the detention issue.

Indeed, trial counsel was aware of the difficult facts in this case and, as an experienced criminal defense attorney, would have had some perspective on how the case might be regarded by the prosecutor, a jury, or the trial court. Trial counsel elected not to seek suppression and, instead, proceeded on the strategy of using the unlawful detention as a mitigating factor at sentencing. That judgment choice does not preclude the Court from indulging the requisite presumption that

"counsel's conduct f[ell] within the wide range of reasonable professional assistance." *Combs*, 2011 VT 75, ¶ 10.

Petitioner's and Attorney Volk's assertion that a motion to suppress based on the alleged illegal stop would have "shifted the plea negotiations," fails to demonstrate that Attorney Harnett's decision in this instance amounted to inadequate representation. On the other side of the equation are the merits of the motion and how such a motion, which attempted to shift blame to the police for the events, would have been received by the public and those in charge of making plea offers. The response may well have been to keep life in prison, the death penalty or New Hampshire prosecutions on the table. The Court is not persuaded that it should second guess Attorney Harnett's determination in that regard at this late stage.[4]

Petitioner has also failed to show prejudice flowing from the failure to file such a motion. Petitioner asserts that the prejudice is "really self-evident." The Court disagrees. The Court is not persuaded that there was a reasonable probability that the filing of a motion to suppress and dismiss would have been successful or resulted in a different outcome. Petitioner's contention that such a motion would have placed the State at risk of the "potential suppression of ALL

[4] Attorney Volk also suggested at hearing that he may have drafted the motion to suppress and presented it to the prosecutor, but not necessarily filed it, in an attempt to obtain a better deal. (PCR Trial Transcript at p. 93). The Court is not persuaded that raising the suppression issue in correspondence and in discussions between counsel, as was done here, as opposed to submitting a draft memorandum, as proposed by Attorney Volk, is a distinction that could sink an attorney below the level described in *Strickland*.

incriminating evidence under the 'fruit of the poisonous tree doctrine,'" is not persuasive.

Petitioner is correct that the United States Supreme Court has held that evidence must be excluded if discovered consequent to an illegal search. *See Wong Sun v. U.S.*, 371 U.S. 471, 484-485 (1963). If, however, "a defendant's response to an illegal stop is itself a new, distinct crime, then the police constitutionally may arrest the defendant for that crime," *U.S. v. Bailey*, 691 F.2d 1009, 1017 (11th Cir. 1982), *cert. denied,* 461 U.S. 933 (1983), and "the fruit of the poisonous tree doctrine does not apply to new crimes committed by an individual who has been unlawfully detained." *Accord U.S. v. Awadallah*, 349 F.3d 42, 81 n.8 (2d Cir. 2003)) (citing *U.S. v. Pryor,* 32 F.3d 1192, 1195–96 (7th Cir. 1994)); *United States v. Smith,* 7 F.3d 1164, 1167 (5th Cir. 1993); *U.S. v. Mitchell,* 812 F.2d 1250, 1253 (9th Cir. 1987); *U.S. v. Garcia–Jordan,* 860 F.2d 159, 161 (5th Cir. 1988); *Bailey,* 691 F.2d at 1017; *U.S. v. King,* 724 F.2d 253, 256 (1st Cir. 1984).

In a similar vein, while it has long been established in Vermont that the taint of an initial illegality can infect evidence subsequently obtained, *State v. Badger*, 141 Vt. 430, 439 (1982), it is also true that an intervening event can "break the causal chain and dissipate the effect of the taint." *Id*. (citing *United States v. Toral*, 536 F.2d 893, 896 (9th Cir. 1976); *Brown v. Illinois*, 422 U.S. 590, 603 (1975); *Clewis v. Texas*, 386 U.S. 707, 710 (1967)).

Multiple external jurisdictions have held that a defendant's attempt to flee the scene of an alleged illegal stop is an intervening event that provides an

independent basis for an arrest and/or the admissibility of evidence discovered thereby. *See*, *e.g.*, *Feathers v. Aey*, 319 F.3d 843, 852 (6th Cir. 2003) ("[T]he 'fruit of the poisonous tree' doctrine, . . . which bars the introduction of evidence that is the product of an unconstitutional search, seizure, or interrogation, cannot apply in this context to prevent officers from arresting those who commit crimes *during* an unconstitutional search, seizure, or interrogation. If the doctrine did cover such situations, an individual who is unconstitutionally seized would have license to commit any offense he or she desired and could not be arrested for it."); *U.S. v. Sprinkle*, 106 F.3d 613, 619 (4th Cir. 1997) (defendant who fled patdown, then drew gun and fired it at officer, committed new crime distinct from any crime he might have been suspected of at time of prior illegal stop, which purged the taint of that stop); *U.S. v. Dawdy*, 46 F.3d 1427 (8th Cir. 1995) (Even if state trooper's initial stop and arrest of defendant were invalid, defendant's resistance when state trooper attempted to handcuff defendant provided independent grounds for his arrest; thus, evidence discovered in subsequent searches of defendant's person and his automobile was admissible.); *U.S. v. Boone*, 62 F.3d 323, 326 (10th Cir. 1995) (defendant's independent and voluntary decision to throw bottles containing drugs out of vehicle window during high speed chase sufficient intervening conduct to remove taint from prior illegal search of vehicle); *Bailey*, 691 F.2d at 1017 (Even assuming initial arrest of defendant was unlawful, defendant had no right to flee and to strike agent in effort to escape recapture; thus, probable cause existed for second arrest for resisting arrest, and search incident to second arrest was lawful

and illicit drugs discovered thereby were not subject to suppression as "fruits of the poisonous tree."); *State v. Hosier*, 454 S.W.3d 883, 892-893 (Mo. 2015) (*en banc*) (Even if real-time cell phone location data order on which search warrant for the car was partly based was entered in violation of defendant's Fourth Amendment rights, evidence was purged of the primary taint, in that warrant was also based on intervening factors such as car chase that defendant led police on when they tried to stop him.).[5]

The Court finds this line of cases to be persuasive. When Petitioner fled from the officers whom he alleges illegally detained him for a drug investigation without sufficient articulable suspicion, his subsequent actions led to new and independent bases to arrest him—*i.e.*, the commission of new crimes, including grossly negligent operation of a motor vehicle, and leaving the scene of a fatal accident. The Court agrees with the State's expert that this conduct was separate and independent from the initial unlawful roadside stop and comprised intervening events that attenuated any taint from the initial illegality. As such, suppression of

[5]The "attenuation doctrine" is similar in that it "provides for admissibility when the connection between unconstitutional police conduct and the evidence is sufficiently remote or has been interrupted by some intervening circumstance[.]" *Utah v. Strieff*, 136 S.Ct. 2056, 2058 (2016) (citing See *Hudson v. Michigan*, 547 U.S. 586, 593 (2006)). It is broader in that the conduct that breaks the causal chain need not be the defendant's conduct. *Id*. The attenuation doctrine would also support a break in the causal chain in this case based on Defendant's subsequent criminal conduct and the lack of bad faith or flagrancy of the law enforcement officers' conduct. *See Brown*, 422 U.S. at 604.

the evidence, would not have been warranted, and the Court discerns little leverage with which trial counsel had to bargain on Petitioner's behalf.[6]

The trial judge's consideration of this point at sentencing echoes this Court's own view. The trial judge examined whether the allegedly illegal police conduct during the stop somehow mitigated Petitioner's conduct. In dismissing that contention, she stated: "even if there was no right at that point of the police to detain Mr. Daley and that he felt that there was no right and that he felt that he was treated unjustly and that he should be entitled to leave and even if it was reasonable for him to be angry about that, the actions that followed were independent actions starting at the time that he decided to leave." (Exhibit 11 at p. 105).

Accordingly, Petitioner has not demonstrated a reasonable probability that trial counsel's failure to file or draft a motion to suppress regarding the legality of the roadside detention amounted to inadequate representation or resulted in any prejudice to the defense.

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[6] *State v. Sprague* does not counsel a different result. In *Sprague*, the defendant, who had been stopped for speeding, had consented to searches of his person, car, and home, subsequent to an illegal seizure of the defendant effectuated by a police officer's request, without an objective basis, for the defendant to exit the vehicle. 2003 VT 20, ¶ 32, 175 Vt. 123, 135-36. Consequently, his consents to search were tainted and ineffective, subjecting all evidence seized to suppression. *Id.* ¶¶ 32-34, 175 Vt. at 136. Significantly, in *Sprague*, "there were no intervening events to attenuate the taint of the initial illegality." *Id.* ¶ 32, 175 Vt. at 135-36. By contrast, as discussed above, Petitioner's own conduct gave rise to intervening events that served to purge any taint and remove any justification for suppression.

II. The Failure to View the Laying of the Spike Strips as an Unconstitutional Seizure and Filing a Motion to Suppress

Petitioner raises as a second error trial counsel's failure to view the laying of a spike strip that prevented Petitioner from continued movement as a seizure. In deploying the spike strip, the Vermont State Police exercised deadly force, Petitioner argues, "given the likelihood that [P]etitioner would lose control of his vehicle upon hitting either the spike strips, or as [he] testified at hearing, veering left to avoid hitting civilian vehicles that were between his vehicle and the spike strip." As a result, "[e]ffective legal representation" required trial counsel to move to suppress the events after the deployment of the spike strip based on an unreasonable seizure. According to Attorney Volk, trial counsel's decision not to prepare and file a motion to suppress relative to those issues did not rise to the "minimally competent standard of representation." Petitioner also notes that the decedent officer's estate brought a civil suit against the State of Vermont for its negligence in contributing to the officer's death, which suit was settled in favor of decedent's family.

In response, the State and its expert assert that defense counsel made a strategic decision not to file motions on the deployment of the spike strip and that, in any event, Petitioner has not proven that professional norms mandated the drafting or filing of such motions so as to satisfy the first prong of the *Strickland* test. The State acknowledges that Attorney Volk described the motions to suppress based on the spike strip as "cogent" and "supportable," but emphasizes that Attorney Volk never reviewed defense counsel's complete case files to know

whether the issue was researched. The State further argues that no prejudice flowed from the failure to file a motion that was unlikely to succeed.

As an initial matter, the Court finds it more likely than not that Attorney Harnett did not examine whether the use of the spike strip might amount to a constitutional violation. It is true that the Petitioner's sentencing memorandum addressed the propriety of the spike strip, arguing that its deployment violated Vermont State Police Policy. It is also true that Attorney Volk did not review all of Attorney Harnett's research files to allow him to conclude definitively that no research was done concerning whether use of the spike strip amounted to a seizure. On the other hand, Attorney Volk persuasively testified that he visited with Attorney Harnett prior to his death and Attorney Harnett indicated he had not considered a possible constitutional dimension to the use of the strip. The Court accepts that testimony.[7]

While the Vermont Supreme Court has not addressed whether the laying of a spike strip amounts to a seizure, the United States Supreme Court has held that

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[7] While the Court accepts the veracity of Attorney Volk's testimony, Attorney Harnett was also close to death at the time of their discussion and, though oriented, the passage of time may have dulled his memory as to the issue. (PCR Trial Transcript at p. 144). To that point, the Court notes Exhibit 30, which is a memorandum from Attorney Moore to Attorney Harnett dated August 2004. In that memorandum, she specifically discusses the concept that the spike mat was an improper use of force against the Petitioner under the standard enunciated by *Graham v. Connor,* 490 U.S. 386, 396 (1989) (although she did not specifically cite the case). The tone of the memorandum and her "anticipat[ion]" that Attorney Harnett would be raising that issue, along with others, suggests that the topic of the spike mat being a Fourth Amendment seizure was discussed and considered by the defense at the time.

a Fourth Amendment seizure occurs "only when there is a governmental termination of freedom of movement *through means intentionally applied*." *Brower v. Cty. of Inyo*, 489 U.S. 593, 596-97 (1989) (emphasis in original). In this respect, it is "enough for a seizure that a person be stopped by the very instrumentality set in motion or put in place in order to achieve that result." *Id*. at 599. The suit in *Brower* was brought under 42 U.S.C. § 1983 by the estate of the decedent killed after the stolen car he had been driving at high speeds to elude law enforcement pursuing him crashed into a police roadblock. *Id*. at 593. The roadblock consisted of an 18-wheel truck placed across the highway in the path of decedent's flight and behind a curve, with a police cruiser's headlights aimed so as to blind the decedent driver on his approach. *Id*. The *Brower* Court took care to contrast a roadblock from a police car pursuing with flashing lights, or a police officer in the road signaling an oncoming car to halt, where "a roadblock is not just a significant show of authority to induce a voluntary stop, but is designed to produce a stop by physical impact if voluntary compliance does not occur." *Id*. at 598. The *Brower* Court concluded that the decedent had been subjected to a Fourth Amendment seizure by placement of the roadblock. *Id*. at 593, 599; *see California v. Hodari D.,* 499 U.S. 621, 626 (1991) (seizure under Fourth Amendment requires some application of force by law enforcement).

With the *Brower* standard in mind, the Court finds that the laying of a spike strip so as to terminate Petitioner's movement in the instant case likely amounted to a seizure or, at least, an attempted seizure. Petitioner testified at his PCR

hearing that as he was "coming around a corner" in Norwich, with police officers in pursuit, "all [he] saw was brake lights, in both lanes" and there "was nowhere to go." He said that he "had no idea why they were stopped at the time" and that his options were "to drive into those vehicles or go into the median and essentially kill [himself]." (PCR Trial Transcript, pp. 25-26). Petitioner testified that he "chose to hit the median," that he "tried to slow down as much as possible," but estimated that he was driving "about ninety" at the time, and that he "had no control over the direction of the vehicle[.]" (PCR Trial Transcript, pp. 26-27).

Based on this testimony, Petitioner's freedom of movement did not necessarily end "*through means intentionally applied.*" *Brower*, 489 U.S. at 596-97. While it is undisputed that law enforcement had put down the spike strip in order to stop Petitioner's vehicle,[8] Petitioner did not himself drive over the spike strip. But, his actions were in direct response to the traffic congestion or disturbance caused by the preceding cars, one of which had struck the spikes. He was meant to be stopped by the physical obstacle of the spike mat and was stopped not directly, but as a consequence of it having been deployed. *Cf. id.* at 599; *U.S. v. Al Nasser*,

[8] In its previous summary of the events resulting in the charge of involuntary manslaughter against Petitioner, the Vermont Supreme Court explained that the decedent police officer had lay down spike mats "to stop the fleeing vehicle" driven by Petitioner-Defendant, as he was approaching the site where the spike mats were deployed "and coming fast." *See State v. Daley*, 2006 VT 5, ¶ 3, 179 Vt. 589, 589. As Petitioner-Defendant was pulling behind a vehicle, the vehicle struck the spikes, and Petitioner-Defendant "swerved sharply to the left and lost control of his car . . . crossed onto the grass median, spun down a slope, and struck Sergeant Johnson, who was thrown about ninety feet by the collision." *Id.* ¶ 4, 179 Vt. at 589-90.

555 F.3d 722 (9th Cir. 2009) (no seizure where defendant voluntarily stopped his vehicle at spot Border Patrol agents had stopped two other vehicles, after one agent shined his flashlight into defendant's vehicles, but agents did not intend for him to stop or direct him to stop and the vehicles creating traffic congestion causing him to stop were not a roadblock intended to stop him).

The fact that a seizure or attempted seizure likely occurred, however, does not end the inquiry. The Court must next determine whether the failure to file a motion concerning that point amounted to ineffective assistance of counsel. In that regard, for a number of reasons, the Court concludes that such a motion was unlikely to have succeeded and, if filed, could have had adverse impacts on plea negotiations.

The polestar for seizures under federal and state law is reasonableness. When a roadblock involves a seizure that is "less intrusive than a traditional arrest," such as simply stopping a person and asking the person to identify him or herself and explain what the person is doing, the standard for reasonableness:

> "depends on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers." . . . Consideration of the constitutionality of such seizures involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty."

Brown v. Texas, 443 U.S. 47, 50-51 (1979) (internal citations omitted). On the other hand, when force is used to effect a seizure, the determination of whether such force is "reasonable" under the Fourth Amendment "requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth

Amendment interests against the countervailing governmental interests at stake." *Graham v. Connor*, 490 U.S. 386, 396 (1989) (internal quotation marks and citations omitted).

Recognizing that "the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it," *id.* (citing *Terry v. Ohio*, 392 U.S. 1, 22 (1968)), the United States Supreme Court has explained that the proper application of the test of reasonableness "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.* (citing *Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985)).

Courts make determinations of reasonableness based on an examination of the totality of the circumstances. *Graham*, 490 U.S. at 396. Further, the question is judged from the perspective "of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* That standard allows "for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Id.,* at 396–397.

Under the above precedents, the Court concludes that the use of a spike mat in this case was not unreasonable. Although Petitioner was initially stopped for a traffic violation and there were no allegations that Petitioner had posed a threat to

the safety of the officers at that time, as discussed above, Petitioner committed serious and dangerous new crimes once he fled the roadside stop, including grossly negligent operation and attempting to elude a police officer. In doing so, Petitioner advanced down the interstate, weaving between other cars, at very high speed, in a desperate attempt to evade arrest. His conduct plainly increased the urgency of public safety concerns. At that time, Petitioner posed a clear, significant, and immediate danger to all of the many people using the roadway that day, as well as to the pursing law enforcement officers. Such conduct tilted the constitutional balance between the public interest in seizing Petitioner and Petitioner's right to personal security decidedly in favor of interference by law enforcement.

The United States Supreme Court has emphasized that it is constitutionally reasonable for the police to use deadly force against a fleeing suspect when the suspect poses an imminent threat of serious physical harm to others. *Cf. Tennessee v. Garner*, 471 U.S. 1, 11 (1985) ("Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force.

Other courts reviewing claims of Fourth Amendment violations under comparable circumstances to those in this case have found the use of spike strips and roadblocks to be constitutional uses of force. *See*, *e.g*, *U.S. v. Hernandez-Garcia*, 284 F.3d 1135, 1140 (9th Cir. 2002), *as amended on denial of reh'g and reh'g en banc* (May 9, 2002) (agent's use of spike mat to stop van driven by

defendant, after agents had seen van and two other vehicles come across border in area frequently used by alien smugglers, at place not designated as point of entry, then cross traffic onto interstate highway over median, was not basis for invalidating defendant's arrest or suppressing evidence); *Cole v. Bone*, 993 F.2d 1328, 1332-35 (8th Cir. 1993) (high-speed pursuit of driver of by state troopers was not a seizure for Fourth Amendment purposes, nor were shots fired at driver's truck or rolling or stationary roadblocks, which did not stop driver; but trooper's shooting of driver in the head, resulting in death, amounted to seizure that was not "objectively unreasonable" where driver ran several motorists off the road, threatened the safety of many others, and had been careening through traffic for fifty miles with no signs of stopping, despite troopers' efforts to stop truck).

Though not issued prior to the events at issue here, later United States Supreme Court Cases have affirmed repeatedly the constitutionality of law enforcement's use of even deadly force in the face of a fleeing vehicle that poses a significant danger to the public. In *Scott v. Harris*, 550 U.S. 372, 372 (2007), the Court held that a county deputy's conduct in terminating a high-speed chase by pushing the rear of the fleeing motorist's vehicle with his own car, causing the motorist's vehicle to crash and rendering the suspect a quadriplegic, was reasonable. In that case, the Court emphasized:

> Whereas [the deputy]'s action—ramming respondent off the road—was *certain* to eliminate the risk that respondent posed to the public, ceasing pursuit was not. First of all, there would have been no way to convey convincingly to respondent that the chase was off, and that he was free to go. Had respondent looked in his rearview mirror and seen the police cars deactivate their flashing lights and turn around, he

> would have had no idea whether they were truly letting him get away, or simply devising a new strategy for capture. Perhaps the police knew a shortcut he didn't know, and would reappear down the road to intercept him; or perhaps they were setting up a roadblock in his path. *Cf. Brower*, 489 U.S., at 594, 109 S.Ct. 1378. Given such uncertainty, respondent might have been just as likely to respond by continuing to drive recklessly as by slowing down and wiping his brow.
>
> Second, we are loath to lay down a rule requiring the police to allow fleeing suspects to get away whenever they drive so recklessly that they put other people's lives in danger. It is obvious the perverse incentives such a rule would create: Every fleeing motorist would know that escape is within his grasp, if only he accelerates to 90 miles per hour, crosses the double-yellow line a few times, and runs a few red lights. The Constitution assuredly does not impose this invitation to impunity-earned-by-recklessness. *Instead, we lay down a more sensible rule: A police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death*.

Id. at 385 (emphasis added); *see Plumhoff v. Rickard*, 572 U.S. 765, 776 (2014) (officer acted reasonably under Fourth Amendment when he fatally shot a fugitive driver who was about to resume a flight that posed a danger to those on the road).

Similarly, in *Mullenix v. Luna*, 136 S.Ct. 305 (2015), the Court found reasonable an officer's decision to fire shots into a fleeing vehicle that posed a threat to the public and officers attempting to apprehend the driver. Of note in that decision is the fact that the sole dissenting Justice argued that the police should have used a spike strip—as a less lethal alternative. In addressing that argument, the Court stated:

> Spike strips, however, present dangers of their own, not only to drivers who encounter them at speeds between 85 and 110 miles per hour, but also to officers manning them. *See, e.g., Thompson v. Mercer*, 762 F.3d 433, 440 (C.A.5 2014); Brief for National Association

> of Police Organizations et al. as Amici Curiae 15–16. Nor are spike strips always successful in ending the chase. *See, e.g., Cordova v. Aragon*, 569 F.3d 1183, 1186 (C.A.10 2009); Brief for National Association of Police Organizations et al. as Amici Curiae 16 (citing examples). The dissent can cite no case from this Court denying qualified immunity because officers entitled to terminate a high-speed chase selected one dangerous alternative over another.

Mullenix v. Luna, 136 S.Ct. 305, 310 (2015).[9]

In addition to those legal points, the same strategic concerns mentioned in Section I above would also have been relevant to asserting this claim. Again, in a theme echoed by the State's expert and Petitioner himself, it was critically important to obtain a plea that limited Petitioner's exposure to the death penalty, to life in prison, and to additional prosecutions by other authorities. (PCR Trial Transcript at pp. 38-39). Filing a motion that placed blame for the death of Trooper Johnson on the police may well have spoiled those settlement negotiations.

With those considerations in mind, the Court is unable to find that Petitioner has proven by a preponderance of the evidence that failing to file a motion concerning the spike mat amounted to ineffective assistance of counsel.

It also cannot conclude that, even had trial counsel filed a motion to suppress on this basis, the outcome of the proceeding would have, with reasonable

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[9] Defendant dismisses such case law because it arises in the context of claims under 42 U.S.C. § 1983 and focuses on whether the conduct at issue violated "clearly established law." While *Mullenix* does limit itself to that inquiry, both *Harris* and *Plumhoff* specifically hold that the conduct at issue did not violate the Fourth Amendment. *See Harris*, 550 U.S. at 372; *see also Plumhoff*, 572 U.S. at 766. Moreover, given the *per curiam* nature of the holding in *Mullenix* and its similarity to *Harris* and *Plulmhoff*, the Court believes *Mullenix* also supports the conclusion that the police conduct in this matter was reasonable.

probability, been different. First, as discussed above, to the extent a seizure occurred, the Court determines that it was not unreasonable. Accordingly, the motion was unlikely to succeed. Second, there has been no evidence to suggest that the prosecutor at the time would have contemplated a different plea arrangement had trial counsel approached him with a motion to suppress on that ground. In fact, the Court agrees with the State's expert that filing such a motion may have had just the opposite result and may have steeled the State's desire for a life sentence and prosecution by other authorities.

Third, the sentencing court also considered the issue of the alleged improper use of the spike mat. Petitioner argued that the deployment of the mat was not in keeping with State Police Policy. The sentencing court rejected the contention that the use of the spike mat should be a mitigating factor. The judge emphasized that Petitioner had "other choices available" to "prevent the unnecessary crash," including "slowing down, staying in his lane," and "going over the strips[.]" (Exhibit 11 at p. 106). Although considered by the trial judge as mitigation evidence and without a constitutional dimension, the Court believes such statements provide insight into how the sentencing court, at least, would have viewed a motion to suppress based on the same circumstances.[10]

[10] Nor does the fact that the State may have settled a civil suit concerning the death of Sergeant Johnson have any bearing on the outcome of the criminal proceeding or serve to undermine any claim that Petitioner's grossly negligent operation produced the death of the officer. *Cf. State v. Lovelace*, 738 N.E.2d 418, 426 (Ohio App. 1999) ("Defendant's grossly negligent acts consisted of his seeking to elude the pursuing law enforcement officers by charging through traffic at extremely high speeds. Had defendant stopped as he should have, the accident

In light of the above, Petitioner's second claimed error on the part of trial counsel is also unavailing.

III. Preparation of Petitioner to Testify and Allocute and Recommendation That Petitioner Testify

Petitioner lastly contends that Attorney Harnett's representation at sentencing was ineffective because he did not prepare Petitioner for his testimony or advise him of his right of allocation and because he advised Petitioner to testify, which resulted in admissions from Petitioner on direct-examination and subjected petitioner to a "vigorous and very effective cross-examination" by the State's Attorney.

The State argues that Petitioner's position fails on the grounds that: it was ultimately Petitioner's decision to take the stand; Attorney Harnett did prepare Petitioner for his testimony and advise him of his rights; Attorney Harnett followed a reasonable strategy focusing on humanizing Petitioner, and, in any event, Petitioner's testimony did not prejudice him because the facts elicited from him on cross-examination were already known to the Court. For the following reasons, the Court agrees with the State's ultimate conclusion.

A. Preparation for Testimony and Allocution

The State correctly observes that the decision whether to testify rested with the Petitioner himself. *See In re Trombly*, 160 Vt. 215, 218 (1993) (citing American

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would not have occurred." (internal quotation omitted)). The issues raised and the factors that may have influenced any civil case involving the officer, have no bearing on the PCR claims raised in this matter.

Bar Association Criminal Justice Standards, The Defense Function § 4-5.2(a)). Such a decision is to be made "after full consultation with counsel." *Id*. The evidence shows that Attorney Harnett advocated to have Petitioner testify and that Attorney Moore disagreed with that approach. (Exhibit 60 at p. 77).

In the Court's view, an attorney's advice concerning whether to testify could form the basis for an ineffective assistance of counsel claim, even though the ultimate decision lies with the client. The decision of whether to accept a plea agreement is similar. It is the client's decision whether to take a plea deal. But, it is done with advice of counsel. If that advice falls below the applicable standard of professional care, it can amount to ineffective assistance of counsel. *See, e.g., State v. Bristol*, 159 Vt. 334, 337-38 (1992) (emphasizing that fundamental attorney error at the plea bargain stage may invalidate a conviction and explaining duties of defense counsel at this stage and instances of incompetence) The same is true here.

The Court agrees with Petitioner and Attorney Volk that a complete failure to prepare a defendant for his sentencing testimony and apprise him of his allocution rights would also fall below the standard of care of a competent attorney. As a factual matter, however, the Court is not persuaded that Attorney Harnett failed to meet with Petitioner to discuss his case, failed to prepare him for his testimony, and failed to advise him of his right of allocution. First, although Petitioner testified as to those facts, he also indicated that his memory of these events, which occurred 15 years ago, was "fuzzy, to say the least," (PCR Trial

Transcript at p. 51), and much of his testimony was phrased in terms of "I don't recall" or "I don't remember" such a meeting or interaction. *See, e.g.,* (PCR Trial Transcript at p. 46). He also admitted that he would "get some things wrong" in his testimony because the events were so long ago. The Court, thus, has serious doubts about Petitioner's ability to recall events accurately and without bias.

Second, the State introduced exhibits that establish both that Attorney Harnett met with Petitioner concerning his testimony and prepared him for that enterprise. Contrary to Petitioner's testimony, Exhibits 31, 32, and 33 tend to show that Attorney Harnett met with and Petitioner three times in the two-week period leading up to the sentencing hearing. Again contrary to Petitioner's testimony, Exhibit 33 contains handwritten notes from Attorney Harnett that appear to describe preparation topics for Petitioner's testimony. Indeed, it is titled: "Eric's Outline for Testimony." The substance of the Outline corresponds to the topics covered during Petitioner's actual testimony. Specifically, it lists items including: character traits ("willingness to succeed," "smart," "not violent," "loves family," "good person"), aspirations ("off drugs/stay off," "family someday," "schooling continue," "want to go to security wk/Green Mtn Concert Service"), personal history ("never made some choices-would change choices make diff lifestyle," "always problems w/police & at home"), his response to the fatal collision

("scared for life after," "didn't know hit him), and instructions ("show remorse," "admit poor choices (life)").[11]

Third, the Court finds Petitioner's claim that Attorney Harnett placed him on the stand with no preparation to be inconsistent with the attorney's level of experience and expertise. And, Attorney Harnett's notes provide powerful evidence that he, in fact, made efforts to prepare Petitioner in the weeks preceding the sentencing hearing.

Fourth, at the PCR hearing, Petitioner initially stated he was unaware of his right of allocution and only on cross-examination did he fall back to the position that he learned of that right on the day of sentencing. The Court is also unpersuaded as to that factual assertion. Such testimony is belied by the allocution itself, which was delivered without hesitation and echoed themes mentioned in Attorney Harnett's notes and discussed during Petitioner's testimony. The transcript of Petitioner's allocution reveals that Petitioner expressed remorse for his part in the officer's death, while also referencing positive relations with teachers, as well as that allegedly "illegal search and seizure."

[11] Exhibits 31 and 32 provide additional evidence of meetings to prepare Petitioner for the sentencing hearing. Exhibit 31, dated "9/1/04" with heading "Conf E. Daley," notes that Petitioner's parents would be attending the sentencing hearing and included their phone numbers, references a motor vehicle incident, DUI, and a simple assault, as well as mentions problems between Petitioner and his mother and stepdad. Exhibit 32, dated "9/8/04" also bearing the heading, "Conf. E. Daly," further notes that Petitioner's younger brother would be attending the hearing, states that "Eric says was going home, not Springfield," and that the result of an LSI (presumably, a Level of Service Inventory) was 20, according to "E.D." (Exhibit 32).

(Exhibit 11, pp. 95-96). In making each of these points, Petitioner had the opportunity to potentially recast himself in a sympathetic, "human" light, indicating that there was deliberation over what he would say during the allocution.

The claim is further belied, again, by Attorney Harnett's expertise and experience as a defense counsel, and the "strong presumption" that trial counsel's conduct conformed with prevailing professional norms. *See Combs*, 2011 VT 75, ¶ 10. And, it is belied by Petitioner's own criminal record. Petitioner testified as to his prior criminal record, which reflects a number of convictions. (PCR Trial Transcript at pp. 12-13, 51). For each of those, he would have been afforded a right of allocution prior to sentencing. Petitioner's testimony that he was unaware of such a right or only learned of it on the day of sentencing is simply not credible.

B. Attorney Harnett's Recommendation That Defendant Testify at the Sentencing Hearing

Petitioner testified that it was trial counsel's idea to have Petitioner take the stand at his sentencing hearing. (PCR Trial Transcript at p. 46).[12] He, along with

[12] Former co-counsel Attorney Moore testified in a deposition that she had no "specific recollection" of any conversations with Attorney Harnett about Petitioner taking the stand at his sentencing hearing, but that she knew they "talked about it" and that they "disagreed," and "it wasn't a good feeling." (Exhibit 60 at p. 78). Attorney Moore was unable to recall the reasons Attorney Harnett had for putting Petitioner on the stand, but stated that she had always assumed that Petitioner's former defense attorney had withdrawn over a disagreement with the client about testimony. (Exhibit 60 at pp. 78-79). For purposes of this Opinion and Order, the Court will assume that Attorney Harnett either recommended or, at least, supported Defendant's decision to testify.

his expert, maintain that such advice amounted to ineffective assistance of counsel because it subjected him to a strong cross-examination where he made a number of negative admissions and engaged in an argument with the prosecutor. Attorney Volk further opined that such testimony was unnecessary because Petitioner could have made all of the same points he raised during his direct examination thought allocution, a process that would have avoided the dangers of cross-examination. Attorney Volk indicated that he would call his client to the stand only in the rarest of cases.[13]

Attorney Seaman had a similar personal view, but also stated that taking the stand may have been justified in this case as an effort to "humanize" the Petitioner to the Court. Further, Direct testimony from Petitioner also allowed Attorney Harnett to lead Petitioner through positive points about Petitioner's background, to discuss rehabilitation efforts he had been making, and to admit numerous exhibits to support his points. (Exhibit 10 at pp. 199-95; Exhibit 11 at pp. 4, 11). Specifically, Petitioner was able to read aloud a clearly thought out, written apology, take responsibility for his part in the officer's death, convey what his state of mind was as the events unfolded, explain why he had fled the scene of the accident, and describe his emotional response to learning about the officer's

[13] It is worth noting, however, that in one of the primary cases relied upon by the Petitioner, *In re Williams*, 2014 VT 67, 197 Vt 39, Attorney Volk served as an expert for the State. He maintained that defense counsel had acted competently, and the petitioner in that case had taken the stand at sentencing. *Id*., ¶ 26, 197 Vt. at 46.

death. (Exhibit 10 at pp. 173-190). Ultimately, the testimony gave Petitioner one additional chance to express remorse for his conduct.

It is a close call as to whether the advice to testify fell below the professional level of care, and it is especially difficult to judge that recommendation over a decade later, without input from counsel, and well removed from maelstrom of the trial setting. Indeed, this particular sentencing hearing was incredibly difficult for the defense, and even Attorney Volk admitted it was an "uphill battle." Petitioner had received a very damning Pre-Sentence Investigation report (PSI), which showed serious risk factors. (Exhibit 5 at pp. 30-36). During day one of the sentencing and in the PSI, the State had presented evidence concerning the high speed chase; Petitioner's apparent disregard for the safety of others; his status as a drug dealer; hid serious risk of reoffence; and his criminal record, which included violations of probation and an earlier instance of leaving the scene of an accident that involved injuries following a high-speed chase. (Exhibit 5 at pp. 31-34; Exhibit 9 at pp. 167, 173, 200). The family of Sergeant Johnson was present at the hearing as were numerous law enforcement officers. (Exhibit 9 at p. 2; Exhibit 10 at pp. 139-171). The media provided heavy coverage of the case. *See also* State's Post-Hearing Memorandum at pp. 9-10 (describing additional hurdles faced by the defense at sentencing).

Against such long and difficult odds, the option of having Petitioner testify becomes more of a potential option. As noted by the State's expert, it was a "strategic choice" and trial counsel's decision on it should receive deference.

Combs, 2011 VT 75, ¶ 10, 190 Vt. at 561. In that regard, Attorney Harnett's experience and expertise was conceded by the defense expert as was his competence "in virtually all cases in which [Attorney Volk had] dealt with him." (PCR Trial Transcript at pp. 117-18). No doubt, the issue was well considered. Attorney Harnett's co-counsel shared with him that she was not in favor of that approach. (Exhibit 60 at p. 78). On the other hand, the Court agrees with the State that testifying provided the Petitioner with some benefits, as outlined in the preceding paragraphs. It is also mindful that that standard for this type of claim is whether "whether trial counsel had *any reasonable* strategy." *In re Russo*, 2010 VT 16, ¶ 16, 187 Vt. at 373 (emphasis added).

In this instance, Attorney Harnett plainly had a rational strategy. Though she did not recall significant discussions about Petitioner's testimony, Attorney Moore testified in her deposition that, in preparing for sentencing she and Attorney Harnett communicated "about everything that had to do with sentencing," including: what might appeal to the sentencing judge in terms of the client "under the horrific circumstances of the case," and how they would deal with "the hoards [sic] of people" that would attend the proceeding, "on top of the usual stuff for sentencing." (Exhibit 60 at pp. 75-76). She recalled speaking with Attorney Harnett "at great length" in preparation for sentencing, and although she "did not make any arguments at sentencing," they "did discuss it a lot." (Exhibit 60 at p. 70).

Facing an imposing gauntlet of opposing forces, the Court cannot conclude that the uncommon recommendation for Defendant to testify fell below the standard of professional competence.

Even if that conclusion were incorrect, however, Petitioner's PCR claim would still founder on the shoal of the second prong of the *Strickland* test: prejudice. Although the prosecutor may have elicited admissions from Petitioner on cross-examination, the sum and substance of those facts were hardly in dispute – they had already been presented through other evidence. For instance, several of the State's witnesses had testified to observing Petitioner in his car driving on I-91 at a speed that "buffeted" one witness's vehicle, "swerve[ing] left," "fishtail[ing]" across the median, making impact with the police officer, and then running from the scene of the accident. (Exhibit 10, pp. 12, 23, 37-38, 40, 46). Trooper Michael Smith testified that he maintained distance behind Petitioner's vehicle traveling at 120 m.p.h., (Exhibit 9, p. 173), and Petitioner stated in his statement for the PSI that after leaving the roadside stop, he was "pursued at a high rate of speed." (Exhibit 5 at p. 6).

Another officer, Timothy Oliver, testified to a search having been executed on Petitioner's vehicle, resulting in the discovery and seizure of marijuana, LSD or acid, and Ecstasy, photos of which were admitted into evidence. (Exhibit 9, pp. 63-68). The sentencing judge made it clear that she accepted the thrust of these facts

as accurate and reliable" when she addressed Petitioner's objections to the PSI. (Exhibit 11 at pp. 100).[14]

Similarly, the Court cannot conclude that the oral back and forth between the State's Attorney and Petitioner was prejudicial. Petitioner and the State's Attorney sparred over the propriety of the extension of the traffic stop. That same point was a theme of the Petitioner's sentencing memorandum. Further, as noted in Exhibit 30 and Exhibit 60 at pp. 83-84, the defense strategy was to attempt to impress upon the court that multiple factors contributed to the death of Sergeant

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[14] The PSI also recounted that: Petitioner had "fled the scene" with "speeds in excess of 110 mph"; Petitioner was observed to "weave in and out of traffic;" Sergeant Timothy Page had advised Sergeant Michael Johnson to deploy the spike strip; Sergeant Page saw Sergeant Johnson run across Interstate 91 before Petitioner lost control of his vehicle and slid sideways into the media; Sergeant Page saw Sergeant Johnson "being thrown backwards high into the air" and Petitioner "running toward and the [sic] over the guardrail"; and after the accident, Petitioner's car was searched and a backpack was found containing 2 bags with approximately 477 grams of marijuana in each, a bag of 27 grams of marijuana, a bag of .372 grams of cocaine, blotter paper containing 127 mg of LSD, and ecstasy. (Exhibit 5 at pp. 4-5). In addressing Petitioner-Defendant's objection to the description of the events of June 15, 2003 in the PSI, the sentencing judge stated:

> The Court has heard a great deal of additional evidence and has read all of the eighteen depositions that were submitted as part of the sentencing material, and while it is true that these four paragraphs represent a summary version of the events and that there is additional evidence, these four paragraphs are accurate and reliable as they are while there is more that's in evidence and has been taken . . . into account by the Court. So the Court is not going to eliminate any of those paragraphs, and the facts are accurate and reliable and have been used. They are certainly not the only basis for the Court's understanding of the incidents. There's quite a lot of factual material about that.

(Exhibit 11, p. 100-101).

Johnson, including the improper traffic detention and the improper use of the spike mat. The sentencing court was, thus, well aware of the defense position as to the as to the illegality of the traffic detention. (Exhibit 11 at p. 105) (acknowledging possible impropriety of the detention but refusing to give it any weight in mitigation due to Petitioner's subsequent independent misconduct).

In light of the foregoing, the Court cannot conclude that the cross-examination of Petitioner resulted in any prejudice with respect to Petitioner's admissions concerning driving at high speed on the date in question, driving off the road, leaving the scene of the accident, being in possession of illicit substances, or concerning his assertion as to the traffic detention.

The Court is, likewise, unable to find a reasonable probability that but for defense counsel's chosen trial strategy, the result of the sentencing proceeding would have been different. Petitioner cites *In re Williams*, 2014 VT 67, 197 Vt. 39 to argue that Attorney Harnett's incompetence at sentencing prejudiced his case. Petitioner's reliance is misplaced.

In *Williams*, the 19-year-old defendant with an IQ of 86 pled guilty to four counts of involuntary manslaughter and moved for post-conviction relief based on ineffective assistance of counsel. *Williams*, 2014 VT 67, ¶¶ 1-2, 197 Vt. at 41. The involuntary manslaughter charges stemmed from the deaths of a tenant and her three grandchildren caused by a fire that started in the first-floor apartment where the petitioner had lived with roommates. *Id.*, ¶ 3, 197 Vt. at 41. The petitioner had stated in a police interview that he caused the fire by lighting paper in a waste

basket and was also reported to say that the fire was "all [his] fault" and that he "didn't mean for anything, for any of this to happen." *Id.*, ¶¶ 4, 7, 197 Vt. at 42. After the petitioner-defendant entered into a plea agreement, a PSI was submitted recommending a sentence of 40 to 60 years based on the need for punishment, and a sentencing hearing occurred in which the family and friends of the victims testified at length. Other than presenting the testimony of the petitioner, defense counsel had done scant investigation and offered little evidence or argument in support of a lower sentence. *Id.*, ¶ 10, 197 Vt. at 43. The court thereafter imposed the recommended sentence, and the petitioner filed a PCR petition. *Id.*

The PCR court concluded that defense counsel's performance at sentencing fell below the standards required for a criminal defense attorney, resulting in prejudice to the petitioner. *Id.*, ¶ 11, 197 Vt. at 43. In affirming the PCR court's decision, the Vermont Supreme Court highlighted the points in the PSI that were favorable to the petitioner that could have been raised and investigated by the defense: "his lack of a criminal record, absence of drug or alcohol use, his graduation from high school as a foster child, his remorse, his efforts to get people out of the burning building, and his description by people who knew him 'as a good person, a hard working person, and a person who they would not expect to have committed an offense such as this.'" *Id.*, ¶ 39, 197 Vt. at 53. The Vermont Supreme Court further observed that, although there were at least five people who spoke in favor of the petitioner, defense counsel failed to offer testimony in support of the petitioner's positive characteristics, resulting in a "largely one-sided"

sentencing hearing. *Id*., ¶ 41, 197 Vt. at 53. For these and other reasons, the Vermont Supreme Court agreed with the PCR court that "the defects in defense counsel's performance were sufficient in their seriousness and in their probable effect on the court to support a finding of actual prejudice." *Id*., ¶ 48, 197 Vt. at 56.

The circumstances in this case are distinguishable from those in *Williams* in substantial ways. In contrast to the petitioner in *Williams*, Petitioner here had a prior record involving a similar offense that also resulted in a crash and the abandonment of injured parties (Exhibit 5 at pp. 32-33; PCR Trial Transcript at pp. 53-54); there were multiple opportunities in this situation for Petitioner to avoid the crash by stopping or slowing down at any point or driving over the spike mat; Petitioner did not possess such a low IQ; Petitioner struck a police officer who eventually died of his injuries; and, instead of remaining on scene to assist with the aftermath of the collision, Petitioner left the area. Lastly, the minimal effort of the attorney in *In re Williams* pales in comparison to the rigorous arguments, investigations, sentencing memorandum, examinations, and exhibits prepared and/or performed by Attorney Harnett. There is simply no convincing evidence from which the Court could conclude that the results of the sentencing would have been different had Petitioner not testified. Indeed, just the opposite is likely true.

At the PCR hearing in this case, expert defense counsel on both sides acknowledged the challenging nature of the case against Petitioner. In State's Attorney Robert Sand's February 12, 2004 email to defense co-counsel Kathleen Moore, the prosecutor described the evidence against Petitioner as "very strong"

and that it was "hard to see a jury being too sympathetic to [Petitioner]." (Exhibit 20). Similarly, Attorney Moore testified at her deposition on May 4, 2018 as follows:

> This was a case that had so much emotion, and, um, angst and anger and, uh, desire for justice, in quotes, um, that it was clear that Mr. Daley was gonna be, um, made an example of and he was going to be punished, um, to the extent that he could [sic] punished, he was gonna be punished. There was, um, there were people there lining up to get in, um, to get a look at Eric Daley. There were, um, lots of families and lots of kids there and it was just high, high, um, emotion and pressure and I don't think there's a single thing anybody could've said or, um, presented, or not presented, or not said that would've changed that fact.

(Exhibit 60, p. 79).

While trial judges have "wide discretion to fashion appropriate sentences," the sentencing court must consider "the nature and circumstances of the crime, the history and character of the defendant, the need for treatment, and the risk to self, others, and the community at large presented by the defendant." *State v. Lumumba*, 2014 VT 85, ¶ 23, 197 Vt. 315 (citing 13 V.S.A. § 7030(a)) (emphasis added). Here, the trial judge was required to consider circumstances that the defense co-counsel agreed involved "hurdles that no one was going to overcome." (Exhibit 60 at p. 80).[15]

Indeed, the sentencing judge's careful opinion discussing how it balanced the various sentencing factors is likely the best evidence showing that the decision to testify did not have a negative impact on Petitioner's sentence. Nowhere in that

[15] Attorney Moore further testified that the "bottom line" was that "in the fever of the moment . . . Mr. Daley was doomed." (Exhibit 60 at p. 90).

ruling is there any reference to Petitioner's lack of candor during his testimony or to his argument with the State's Attorney. The only references in the judge's ruling to Petitioner's testimony are positive ones, focusing on Petitioner's apology, his engagement with education courses in prison, and capability for rehabilitation. (Exhibit 11 at p. 111).

A review of the sentencing court's ruling indicates that the most important factors diving Petitioner's sentence were: Petitioner's history of nearly identical driving behavior; Petitioner's reckless, high-speed driving posed an extreme danger to many members of the public; Petitioner's numerous opportunities to end the chase and avoid the tragedy; Petitioner's failure to stop and render assistance after the crash; and the fact that Petitioner's criminal conduct took the life of a Vermont State Trooper with a family. (Exhibit 11 at pp. 106-109).

The key statements of the sentencing court as to the most serious offense are as follows:

> Mr. Daley was driving at an extremely high rate of speed on a public highway, 110 to 120 miles an hour. The traffic was moderately heavy. It was on a weekend where there was more traffic than there often might be on the interstate.
>
> He was weaving in and out. . . .
>
> There were other vehicles with many passengers. . . .
>
> There was a person, a pedestrian, Sergeant Johnson, the trooper, at the side of the road close to the traffic o the interstate, and Mr. Daley was driving in such a manner that he had no ability to maintain control of the fast-moving force that he had put into place and to be able to respond to something unexpected that might come along in the road such as a trooper doing his job of attempting to slow down a car going way too fast.

He had the opportunity to avoid what happened by slowing down, staying in his lane or simply driving straight on through the spikes. Although, in Mr. Daley's account, the Simpson vehicle moved a little bit over to the left, the evidence suggests that the Simpson vehicle stayed in its lane and that there was not another vehicle directly in front of him obstructing his ability to slow down and drive through on the passing lane.

The circumstances show a very high likelihood of hurting someone badly. This is just as about as bad as it gets in terms of gross, negligent and reckless use of a vehicle on a public highway. . . .

As far as the history and character of the defendant with respect to these offenses, he had been engaged in a high-speed pursuit before, three years earlier at the age of twenty. At this time, he was age twenty-three. It involved a police pursuit and a motor vehicle. He had passengers in the car, put others at risk by fast and dangerous driving, not only driving too fast but driving too fast under dangerous circumstances; in that situation, poor road conditions.

In that situation, it also resulted in a crash. He had a criminal record from this, was on probation, was unable to accept accountability for what he had done in connection with an opportunity to do that through the reparative board and wound up serving some time on work crew.

So he had had the opportunity from that prior experience to try to self-correct, to learn not to be so impulsive and restless – reckless under those circumstances, to learn not to flee from the police and engage in dangerous driving, but this behavior had not changed. . . .

With respect to the risk to self, others and the community at large, Mr. Daley has shown that he does represent a significant risk to himself, to others on the road, to police officers who may become involved in a chase when he's trying to elude them, to innocent persons who were either driving or doing their job.

So the Court concludes that there is a need, based on his history, to separate him from the community long enough so that he's not going to continue a pattern of repeating this dangerous behavior.

With respect to deterrence, this is a very serious matter. We've all seen people driving on the road in an extremely reckless manner, putting others at risk, and it is important for the Court in this context

> to send a clear message to the community at large that this is impermissible behavior. Not only should that – should the possibility of hurting someone deter people, but if that's not enough, then a punishment that would result in the deprivation of freedom is also necessary in order to make sure that people have clearly, in their consciousness, that his is impermissible behavior.
>
> There is a strong societal interest in making a clear statement that we simply will not tolerate this behavior and won't tolerate the impact that it has on the community, both with individual families and to all who are affected in the manner in which Sergeant Johnson himself, his family and his community was affected.
>
> In this case, there's also a need for a specific deterrent to Mr. Daley. This did happen before. There was the high-speed chase before, and it did not change behavior, and clearly it's important to have a much stronger response in order to prevent this in the future. . . .
>
> The final factor is punishment, and the Court does have to take into account that anyone who kills a person in a manner that is – to use the words of someone else – stupid and violent, a person who is – happens to be along the side of a highway and, in this case, one doing their job of public safety, but any person who is near to high-speed traffic on a public highway, must be punished for it, whether that – whether the person who's [sic] life is lost is a state trooper or anyone else.
>
> And this is an offense that is one for which punishment is warranted. It represents a statement on behalf of our community that you cannot take a life in this manner without being punished, and it is difficult to imagine conduct with a – with a higher degree of gross negligence and recklessness than putting in motion a motor vehicle at a hundred to 120 miles an hour flying down the highway with other vehicles and pedestrians and all visible and not taking the action necessary to avoid what happened in this case. . . .

(Exhibit 11 at pp. 107-113).

Given the sentencing court's primary focus on Petitioner's prior record of similar misconduct and his personal conduct as the high-speed pursuit came to an end, the need for general and specific deterrence, and the need for punishment,

Petitioner has failed to meet the "heavy" burden of demonstrating prejudice in connection with the decision to testify.[16]

Conclusion

While skilled attorneys may have taken different approaches to the defense in this action, the Court concludes that Attorney Harnett had a rational strategy that was designed, first and foremost, to obtain a plea agreement that would avoid the possibility of the death penalty, of a presumptive minimum sentence, and of the prospects of a New Hampshire consecutive jail sentence. Given the considerable adverse facts, he then sought to diffuse the causes of the crash among the Petitioner, the allegedly illegal detention, and the improper use of the spike mat. He then sought to humanize Petitioner through both an allocution and testimony—supported by exhibits—that highlighted Petitioner's remorse and his efforts at rehabilitation. After considering all of the appropriate factors, the sentencing court gave a strong, though not the maximum, sentence on the most serious charges.

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[16] The Court is not persuaded by Petitioner's argument that his lengthy sentence alone is proof that Attorney Hartnett's strategy did not work and amounts to prejudice. First, there is no suggestion in the sentencing court's ruling that Petitioner's performance on the stand resulted in an increase in Petitioner's sentence. Second, the mere "failure" of a calculated defense strategy does not alone amount to prejudice. *Cf. In re Dunbar*, 162 Vt. 209, 212 (1994) ("failure of [a] strategy is not the standard by which a reviewing court will measure trial counsel's competence"). Third, Petitioner did not receive the maximum possible sentence. In fact, the court sentenced Petitioner to a minimum sentence below that requested by the State. (Exhibit 11 at pp. 70-71). It is likely that the positive points concerning rehabilitation that were discussed during Petitioner's testimony and actually referenced by the court at sentencing had a *favorable* impact on his sentence.

The Court concludes that the result in this case cannot be blamed on any professional incompetence of Attorney Harnett. As Attorney Moore summed up: "I don't to this day, believe that anybody could've … gotten any better at that time, at that place, on that case for Eric Daley." (Exhibit 60, p. 79). The Court agrees.

Based on the foregoing, the petition for post-conviction relief is denied.

Dated this __ day of August, 2019, at White River Junction, Vermont.

_____
Timothy B. Tomasi
Superior Court Judge