THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2021-0357

Marc Mallard

v.

Warden, New Hampshire State Prison

DISCRETIONARY APPEAL PURSUANT TO RULE 7 FROM A JUDGMENT OF THE MERRIMACK COUNTY SUPERIOR COURT

BRIEF FOR THE APPELLEE, WARDEN, NEW HAMPSHIRE STATE PRISON

By the Warden's attorneys,

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(15-minute Oral Argument Requested)

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III. Whether the petitioner has shown that implicit bias affected the jury's verdict in his trial.

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STATEMENT OF THE CASE AND THE FACTS

The petitioner, Marc Mallard, filed a petition for writ of habeas corpus on July 13, 2020, alleging ineffective assistance of counsel during his 2013 jury trial. PA[1] 47. The State answered and the petitioner replied. PA 52. On July 7, 2021, the post-conviction court (*Schulman*, J.) issued a final order in which it dismissed the petitioner's claims and granted judgment to the respondent. PA 81.

This appeal followed.

A. FACTS OF THE UNDERLYING CRIMINAL CASE

The victim, B.L., met the petitioner around 2006, and they started dating six months later. T 82-83. The petitioner was the father of her third child, T.M., born in September 2008. T 83. B.L. lived with her three children in a second-floor apartment on Laurel Street in Concord. T 86. After T.M.'s birth, the relationship between the petitioner and B.L. deteriorated. T 83-84. He started seeing other women, and only saw B.L. and T.M. sporadically. T 84.

B.L. had told the petitioner that she knew he was seeing other women, and they had argued about it. T 90. He would also argue with his other girlfriends, and afterwards return to B.L.; she described the situation as a "constant back and forth." T 90-91. In March of 2012, B.L. had been

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[1] Citations to the record are as follows:
"PA __" refers to the addendum to the petitioner's brief and page number;
"PApp__" refers to the separately bound appendix to the petitioner's brief and page number;
"T __" refers to the transcript of the petitioner's one-day jury trial held July 25, 2013 and page number;

"chatting" through Facebook with one of the petitioner's girlfriends. T 92-93. Around midnight on the night of March 29, 2012, the petitioner called B.L. from the door of her apartment house and asked her to let him in; she did so. T 91. The petitioner was angry at B.L. because she had been communicating with his girlfriend. T 92-93.

B.L. was unsure of the sequence of events, but she testified that the petitioner hit her in the face, giving her a black eye and a split lip. T 93. He wrapped a belt around his hand, told her she was going to die, and tried to put the belt around her neck, but she warded him off with her arm. T 93. He threw her onto the bed and choked her with his hands on her neck, so that she could not breathe. T 93, 98-99. He kept saying things like, "This is what happens when you want to investigate." T 93.

All of a sudden, he stopped and became apologetic. T 100-01. The whole incident may have lasted twenty minutes. T 99. B.L. did not call the police because she felt "embarrassed"; she also lied to her mother about what happened. T 104. She did not go to work the next day so that her bruises would not be noticed. T 102-03, 145-46.

B.L.'s mother testified that B.L. called her the next morning and asked her to keep B.L.'s youngest daughter for an extra day. T 132-34. When B.L. picked up her daughter one day later, she had a bruise on her face (partially covered with makeup), and said that she had fallen, but left in a hurry when her mother started to ask about it. T 134-38.

A Merrimack County grand jury indicted the petitioner on one count of second degree assault, *see* RSA 631 :2, I(f) (Supp. 2013), one count of attempted second degree assault, *see* RSA 629:1 (2007), one count of simple assault, *see* RSA 631:2-a (2007), and one count of criminal

threatening, *see* RSA 631:4 (Supp. 2013). He was tried by a jury in Merrimack County Superior Court (*McNamara,* J.) and was convicted on all counts. T 202-03. The court sentenced him to an aggregate term of ten to twenty years in the state prison, stand committed. PApp 7.

B. THE PETITIONER'S DIRECT APPEAL

The petitioner filed a direct appeal of his convictions to this Court *See* N.H. Supreme Court No. 2013-0673. The petitioner was not represented by trial counsel on appeal, but had separate appellate counsel. PA 50. Through appellate counsel, the petitioner briefed two issues: (1) whether the trial court committed plain error by giving a particular curative instruction; and (2) whether the evidence was sufficient to support the jury's verdicts. While that appeal was pending, the petitioner filed a *pro se* "motion to dismiss the indictment," alleging several constitutional claims. The trial court denied this motion without prejudice because his appeal was pending and he was, at that point, represented by appellate counsel. PA 51. The petitioner did not appeal this denial. PA 51. On January 21, 2015, this Court affirmed the petitioner's convictions. *State v. Mallard*, 2015 WL 11071107 (N.H. Jan. 21, 2015) (unpublished).

C. POST-CONVICTION AND HABEAS RECORD

Following his direct appeal, the petitioner again obtained new counsel. PA 51. On February 12, 2015, the petitioner filed a motion for new trial based on ineffective assistance of trial counsel. PA 51. Post-conviction counsel argued that the petitioner's trial counsel was ineffective for two reasons: (1) he did not object to the curative instruction that was the subject

of the petitioner's direct appeal; and (2) he failed to cross-examine the victim on the content of "certain friendly text messages" she sent the petitioner after the assaults. PA 51.

On June 2, 2015, the trial court denied the petitioner's motion for a new trial. PA 52. On October 9, 2015, the petitioner filed an untimely, *pro se*, motion for reconsideration and a motion for the trial judge's recusal. PA 52. These motions were denied on December 7, 2015. PA 52. The petitioner did not appeal either the counseled motion for a new trial or the *pro se* motion for reconsideration. PA 52.

After these post-conviction motions, the case was dormant for five years. In July 2020, the petitioner, through habeas counsel, filed his petition in the instant case. The parties submitted their pleadings and the petitioner's habeas counsel took a discovery deposition of the petitioner's trial counsel. PA 52. The petitioner has not submitted that deposition into this Court's record.

The post-conviction court held an evidentiary hearing on April 4, 2021 at which the petitioner's trial counsel testified. PApp 180. Throughout his testimony, trial counsel struggled to remember details of the trial. PApp 193, 196-97, 199, 204-06, 220, 225, 228. Habeas counsel first questioned trial counsel questioned about statements trial counsel made in his discovery deposition. PApp 188. In particular, trial counsel was questioned extensively about jury selection. PApp 188-190. Trial counsel testified that the judge who presided over the *voir dire* did not allow attorney-conducted *voir dire* at the time of the petitioner's trial. PApp 188-89. Trial counsel testified that he did not seek to add supplemental questions to the court's

voir dire. PApp 189. He also testified, however, "there was one gentleman who came up with a racially-based problem and was let go." PApp 190.

Trial counsel then testified about his motivation for referring to the petitioner as a "big, menacing black man." PApp 192. Trial counsel believed the State was attempting to exploit racist stereotypes about black men as absentee fathers. PApp 192. In response, trial counsel sought to address the issue of race head-on. "[He] used that term was to throw it out there, and let them know that, okay, now you can see it; now, we're not going to dance around it; this is what's being said." PApp 200. During her examination, habeas counsel repeatedly tied this decision to trial counsel's *voir dire* strategy. PApp 202-04, 215-16.

On July 7, 2021, the post-conviction court issued a final order in which it dismissed the petitioner's claims and granted judgment to the respondent. PA 81. The court noted the evidence that it relied on to make this determination: (1) the transcript of the jury trial, including jury selection; (2) docket documents in the criminal case; (3) trial counsel's discovery deposition; and (4) the April 4, 2021 evidentiary hearing. PA 52.

Based on this evidence, the court first concluded that the petitioner's habeas claim was procedurally barred. The court observed that the petitioner's claim was not barred for failure to adjudicate the ineffective assistance claim in his direct appeal. PA 68. It noted this Court "strongly disfavor[s] adjudication of ineffective assistance claims on direct appeal, even when the error at issue is seemingly apparent in the trial transcript," PA 69 (quoting *State v. Pepin*, 159 N.H. 310, 313 (2009)).

The court concluded, however, that the petitioner's claim was nevertheless barred because he has "already fully litigated a counselled

motion for a new trial in which he argued that trial counsel was ineffective because of what he said, and failed to say, at page 167 of the transcript of the one day jury trial." PA 69. The court observed that the comment which formed the basis of this petition was located on page 108 of the same transcript. PA 69. "To resolve the earlier motion it was necessary to review the entire transcript to argue the issue of prejudice." PA 69.

The court reasoned that the petitioner's experienced post-conviction counsel "reviewed the language at issue today" and "and chose to do nothing about that language and to instead focus on other issues he found more appealing." PA 69. Because the earlier motion for a new trial "was prepared and litigated by an experienced criminal defense attorney who had the full benefit of the trial court record," the court determined that the petitioner could not "serially litigate a claim of ineffective assistance of counsel by filing a string of post-conviction motions and petitions, each one drawing on a different line from the same one-day transcript." PA 69-70.

The court also found that the petition was untimely "under something akin to laches." PA 72. It cited *Roy v. Perrin*, 122 N.H. 88, 100 (1982), and noted that this Court concluded in *Perrin* that the petitioner's claim was barred "because he unjustifiably remained silent about it for four years." PA 72. The court compared *Perrin* with the nine-year dormancy of this case and noted that the delay was prejudicial to its ability to adjudicate the claim. PA 72. Specifically, the court noted trial counsel's "difficulty in recalling precisely what was going through his mind at the time of trial." PA 72. The court further noted that the nine-year delay would undoubtedly "generate an inferior re-trial" and prejudice the State. PA 73.

Although the court dismissed the petitioner's claim on procedural grounds, it also addressed the merits. The court first ruled that the petitioner had proved "that trial counsel rendered constitutionally deficient representation when he used the phrase 'big, menacing black guy' during his cross-examination of [B.L.]." PA 77. The court accepted trial counsel's testimony that he was trying to subvert the stereotype, rather than invoke it literally. PA 77. But the court also found that his execution of this strategy was not rational. Rather than an ironic invocation of a racial trope, the court concluded that "the jury heard only the trope." PA 77.

The court further concluded, however, that the petitioner had failed to prove the prejudice prong of the ineffective assistance test. PA 78. It observed that "the court cannot find that counsel's single reference to [the petitioner's] race call[ed] the jury verdict into question." The court relied on five points to reach this conclusion.

First, the deficiency "was limited to a single word." PA 79. Second, trial counsel "never expressly argued the stereotype." PA 79. Third, trial counsel never revisited the issue in closing or any other point in the trial. PA 79. Fourth, no witness made any reference to counsel's comment or the petitioner's race. PA 79. The court specifically noted that the central witness in the case, B.L., "was clearly not influenced by racial prejudice," because she "made the choice to have a child with [the petitioner] and she wanted to be together with him." PA 79. Finally, "trial counsel's overall argument was that [the petitioner] was <u>not</u> violent during the incident (if there even was an incident)." PA 79. From these facts, the court concluded that "[n]o reasonable juror would have understood trial counsel to be

suggesting that [the petitioner] acted in conformity with an innate propensity toward violence." PA 79.

SUMMARY OF THE ARGUMENT

I. The petitioner has insufficiently developed the record for this Court to decide the merits of his claim. He has failed to provide this Court with a record of jury selection or provide a copy of trial counsel's discovery deposition. The post-conviction court relied on both of these documents to reach its decision. They are, therefore, essential to this Court's ability to review that decision. Moreover, the petitioner's claim revolves around the effect of potential racial bias on the jury. One of the only opportunities to probe jury bias is jury *voir dire*. Without this document, this Court cannot properly evaluate the merits of the petitioner's claim.

II. The petitioner's claim is procedurally barred. The petitioner has previously litigated a counselled post-conviction motion for new trial. A post-conviction court denied that motion and the petitioner decided not to appeal that order. His current petition relies on information that was available to him at the conclusion of trial, and he has provided no new facts or law that might entitle him to relief. This petition, which the petitioner brought almost ten years after his original trial and post-conviction proceedings, represents an unreasonably delay. That delay prejudiced the court's ability to adjudicate his claim and the State's ability to re-try him in the event of a new trial.

III. The petitioner has not shown that implicit bias affected the jury's verdict in his trial. The petitioner makes broad arguments about the nature and effects of implicit bias. He has not, however, demonstrated that such bias affected the outcome of his trial. The post-conviction court afforded the petitioner the opportunity – an evidentiary hearing – to make his case that the jury was affected by trial counsel's remarks. The petitioner did not take advantage of that opportunity.

IV. The petitioner has failed to demonstrate prejudice. Under the two-part *Strickland v. Washington,* 466 U.S. 668 (1984), test for ineffective assistance of counsel, the petitioner must demonstrate both deficient representation of trial counsel and actual prejudice to the outcome of the petitioner's case. The petitioner has failed to marshal the evidence necessary to demonstrate that prejudice. This Court should not presume prejudice because trial counsel's single comment about the petitioner's race was not "so egregious that the defendant was in effect denied any meaningful assistance at all[.]" *Humphrey v. Cunningham*, 133 N.H. 727, 737 (1990). Finally, the application of the "cumulative error" test is inappropriate in this case because the issues that the petitioner describes as "errors" are not errors.

ARGUMENT

I. THE PETITIONER HAS INSUFFICIENTLY DEVELOPED THE RECORD FOR THIS COURT TO DECIDE THE MERITS OF HIS CLAIM.

The petitioner has failed to provide this Court with an adequate record from which to decide the merits of this case. As a general rule, the party bringing the appeal is responsible for presenting this Court with a record sufficient to decide the issue presented. *State v. Menard*, 133 N.H. 710, 711 (1990). Determining if the record provided is sufficient to decide the case poses a "threshold question." *State v. Bergmann*, 135 N.H. 97, 99 (1991).

The petitioner has failed to include two documents – trial counsel's discovery deposition and the transcript of jury selection in the underlying criminal trial – upon which the post-conviction court relied to make its ruling. PA 52-53. Not only did the court rely on both of these documents in its order, the petitioner referred extensively to both the discovery deposition and the events of jury selection during the April 2021 evidentiary hearing, which also informed the court's decision. PA 52; PApp 188-90, 191-92, 200, 202, 214-15, 216-17, 228, 231.

Without these documents, this Court cannot properly assess trial counsel's strategic decisions and review the post-conviction court's determinations regarding either the defective performance or prejudice prongs of the ineffective assistance test. The absence of jury selection is particularly problematic for evaluating the prejudice prong because proper jury *voir dire* "is the appropriate method for inquiry into possible prejudice

or bias on the part of jurors, and ... the procedure used must provide a reasonable assurance for the discovery of prejudice." *United States v. Tiangco*, 225 F. Supp. 3d 274, 289 (D.N.J. 2016) (citing *Waldorf v. Shuta*, 3 F.3d 705, 709 (3d Cir. 1993)).

Because the petitioner focuses so heavily on the possibility that trial counsel's statement inflamed the implicit biases of the jury, the absence of this document from the record is particularly detrimental to his claims. The problem is compounded by testimony from the evidentiary hearing, which suggests one of the potential jurors was dismissed due to "a racially-based problem[.]" PApp 190.

II. THE PETITIONER'S CLAIM IS PROCEDURALLY BARRED.

Habeas corpus is available to remedy "harmful constitutional error" that results in a criminal conviction for which the petitioner is in custody. *State v. Pepin*, 159 N.H. 310, 311 (2009). But "habeas corpus is not a substitute for an appeal." *Avery v. Cunningham*, 131 N.H. 138, 143 (1988); *see also State v. Kinne*, 161 N.H. 41, 45 (2010). Both this Court and the United States Supreme Court have recognized that "procedural defaults may preclude later collateral review." *Avery,* 131 N.H. at 143; *see also. Pepin*, 159 N.H. at 311; *Wainwright v. Sykes*, 433 U.S. 72, 86-87 (1977). This practice prevents "parties from sitting on their claims until circumstances are more advantageous." *Avery*, 131 N.H. at 143–44. In particular, it discourages "defendants serving lengthy sentences to lie back and wait, and to attack the basis of the sentencing after witnesses with relevant knowledge have died or have otherwise become unavailable, or

after pertinent records have become routinely destroyed, lost or otherwise unavailable." *Id*.

The petitioner's claim is procedurally barred because he has "already fully litigated a counselled motion for a new trial in which he argued that trial counsel was ineffective[.]" PA 69. The litigation of that earlier ineffective assistance claim required the petitioner's post-conviction counsel to review the entire trial transcript for evidence of prejudice, including the comment at issue in this petition. "Post-conviction counsel thus chose to do nothing about that language and to instead focus on other issues he found more appealing." PA 69. The petitioner also elected not to appeal the denial of that motion for a new trial.

The petitioner attempts to distinguish a motion for a new trial from a petition for writ of habeas corpus on procedural grounds. PB 23-24. He urges this Court to view these as "two distinct statutory procedures" PB 23. While there may be some variation in the two procedural vehicles, they are functionally equivalent in this instance. A case cited by the petitioner, *State v. Santamaria*, 169 N.H. 722, 726 (2017), reinforces this point. When the *Santamaria* Court concluded that petitioner lacked "sound reasons . . . for fail[ing] to seek appropriate earlier relief," it noted that he could have brought his ineffective assistance claim sooner, "in a motion for a new trial or a petition for a writ of habeas corpus." *Id*. *Santamaria* essentially marked these two available post-conviction procedures as interchangeable, particularly when the issue to be litigated is the ineffective assistance of trial counsel.

This approach is appropriate in this case as well. The petitioner currently seeks the same remedy (a new trial) to vindicate the same

constitutional rights (competent assistance of counsel) based on the same legal theory (ineffective assistance of his trial counsel) that he previously litigated in his post-conviction proceedings. Moreover, the current petition is based "entirely on facts known to him at the conclusion of the trial." *Santamaria*, 169 N.H. at 727. The only noteworthy difference between this petition and his earlier motion for a new trial is that the time for appealing the earlier decision has passed.

He now seeks a writ of habeas corpus, but alleges no new facts or material changes since the time of his original post-conviction proceedings. "[R]epeated applications for a writ of habeas corpus, introducing no new facts material to the issue, will ordinarily be summarily disposed of." *Gobin v. Hancock*, 96 N.H. 450, 451 (1951) (quoting *Ex Parte Moebus*, 74 N.H. 213 (1907)). "It is not alleged that anything has occurred since that decision affecting his legal status, so that the question presented upon this petition, having been determined against him by the former judgment, cannot be against litigated as a matter of right." *Ex Parte Moebus,* 74 N.H. at 213. Because the earlier motion for a new trial "was prepared and litigated by an experienced criminal defense attorney who had the full benefit of the trial court record," (PA 70) the petitioner is not entitled to litigate the same issue again.

The cases cited by the petitioner are inapposite. *Hart v. Warden*, 171 N.H. 709 (2019) was not an ineffective assistance claim. *Hart* involved a competency claim that was not barred for failure to raise it on direct appeal. Unlike the petitioner, Hart had no counsel at trial or on direct appeal and had not previously litigated a post-conviction competency claim. The Court refused to procedurally bar Hart's claim because he lacked the benefit of

counsel and he claimed in his habeas petition that he had not been competent to represent himself at trial or on direct appeal. Hart also based his petition on a change in federal law regarding competency, *Indiana v. Edwards*, 554 U.S. 164 (2008). The petitioner in this case offers similar factual or legal circumstances.

Similarly, the petitioner in *Humphrey v. Cunningham*, 133 N.H. 727, 732 (1990), was not barred from bringing an ineffective assistance claim after the time for a *direct appeal* had expired. As the post-conviction court observed, this petitioner's claim is not barred on the basis that his ineffective assistance claim was not raised on direct appeal. In fact, this Court "strongly disfavor[s] adjudication [of ineffectiveness claims] on direct appeal," and prefers defendants bring such claims in appropriate collateral proceedings. *State v. Thompson*, 161 N.H. 507, 527 (2011). The petitioner's claim is barred, not because he failed to raise this claim in his direct appeal, but because he failed to raise it in his first post-conviction challenge.

Additionally, the petitioner's reliance on this Court's unpublished decision in *State v. Traudt*, No. 2011-0591, 2012 WL 12830664, is unpersuasive. PB 23, 25. The petitioner offers this case for the proposition that this Court reached the merits of an ineffectiveness claim, despite the defendant's previous motions for new trial. PB 25. But the State did not argue that the defendant was procedurally barred in *Traudt* and the post-conviction court did not rely on procedural bar when it dismissed his case. *See Traudt*, No. 2011-0591. Therefore, the issue of procedural bar was not before this Court in *Traudt* and it did not address it.

The petitioner cannot avoid the consequences of a nine-year procedural default by re-captioning his motion for a new trial as a petition for writ of habeas corpus, particularly since he has not alleged any "circumstances justifying [a] delay." *Roy v. Perrin*, 122 N.H. 88, 100 (1982). The post-conviction court likened this unreasonable delay to laches. PA 72. "Laches is an equitable doctrine that bars litigation when a potential plaintiff has slept on his rights." *Town of Seabrook v. Vachon Management*, 144 N.H. 660, 668 (2000) (quotation omitted). In *Perrin*, the defendant remained silent for four years before bringing his petition. In this case, the petitioner has remained silent for nine years, which, under this Court's precedent, is an unreasonable delay.

Still, "[t]he doctrine of laches is not a mere matter of time, [it] is principally a question of the inequity of permitting the claim to be enforced." *Appeal of City of Laconia*, 150 N.H. 91, 93 (2003). Laches bars suit if "the delay was unreasonable and prejudicial." The petitioner's brief does not explain or justify the extensive lapse of time in this case. He states only that he "should not be faulted for not understanding the strength of a racial bias claim until just recently." PB 26. But this claim contradicts his other arguments. Elsewhere he observes that "[i]mplicit racial bias has long been recognized, and its pervasive effect, including how it affects jurors and their decision-making is well-established." PB 21. He notes that "[c]ourts have been historically intolerant of racial discrimination, racial bias in the courtroom, and juror bias." PB 18. He also cites to "a long line of precedent representing that the legal system, although imperfect, has always been intolerant of racial bias." PB 18.

Based on these representations, the petitioner's claim that his delay was reasonable because he was "jaded as to the availability of a remedy" is unpersuasive. In addition to trial counsel, the petitioner was previously represented by appellate counsel and his first post-conviction counsel. The petitioner and his various attorneys possessed all of the information necessary to litigate this issue at the conclusion of trial. Those post-trial attorneys presumably evaluated trial counsel's comment against the applicable law and determined that pursuing it would not be fruitful. Under those circumstances, a delay of almost a decade is unreasonable.

This unreasonable delay was also prejudicial. As the post-conviction court observed, the petitioner's trial counsel struggled to recall details from trial and his own internal thought process after so many years. PA 72; PApp 193, 196-97, 199, 204-06, 220, 225, 228. Counsel's imperfect memory suggests that the testimony of trial witnesses would be at least as challenged. More than likely, the memories of fact witnesses would be even less precise. *Cf. City of Rochester v. Marcel A. Payeur, Inc*., 169 N.H. 502, 508 (2016) ("Statutes of limitations 'reflect the fact that it becomes more difficult and time-consuming both to defend against and to try claims as evidence disappears and memories fade with the passage of time.'" (quoting *Keeton v. Hustler Magazine, Inc*., 131 N.H. 6, 14 (1988)). Because the defendant's delay was both unreasonable and prejudicial, this Court should affirm the post-conviction court's dismissal of his petition.

For similar reasons, the petitioner cannot utilize the doctrine of equitable tolling. "Equitable tolling allows a party to initiate an action beyond the statute of limitations deadline, but is typically available only if the claimant was prevented in some extraordinary way from exercising his

or her rights." *Kierstead v. State Farm Fire & Cas. Co*., 160 N.H. 681, 688, (2010) (quoting *Portsmouth Country Club v. Town of Greenland*, 152 N.H. 617, 624 (2005) (cleaned up)). "Equitable tolling applies principally if the plaintiff is actively misled by the defendant about the cause of action." "[T]he doctrine of equitable tolling is applicable only where the prospective plaintiff did not have, and could not have had with due diligence, the information essential to bringing suit." *Portsmouth Country Club,* 152 N.H. at 624 (quoting *Protective Life Ins. Co. v. Sullivan*, 425 Mass. 615, 682 (1997)). "A party attempting to invoke that doctrine will be held to a duty of reasonable inquiry." *Id*.

First, the petitioner has not provided, and the State has not found, any case in which this Court applied the doctrine of equitable tolling to a petition for writ of habeas corpus. As the cases discussing equitable tolling indicate, the doctrine is an exception to statutes of limitations. But the typical rules of civil procedure do not apply to habeas corpus proceedings and there is no applicable statute of limitations. See *Brooks v. Zenk*, 2017 WL 4464484, at *3, 217-2016-cv-591. Equitable tolling is not, therefore, an appropriate doctrine to apply to habeas cases.

Moreover, even if equitable tolling were available in habeas proceedings, the application of that doctrine would be inappropriate in this case. The single federal case that the petitioner cites to support the application of this doctrine, *Mitchell v. Genovese*, 974 F.3d 638, 651 (6th Cir. 2020), is distinguishable from this case. In *Mitchell's* original trial, a Black prospective juror was struck from the venire on the basis of race in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986). *Mitchell*, 974 F.3d at 651. The district court heard evidence of the *Batson* violation and ordered a

new trial. *Id*. The United States Court of Appeals for the Second Circuit overturned that order based on a misapplication of binding law in a decision that the Second Circuit itself later characterized as a "judicial travesty." *Id*. Upon reviewing a subsequent petition, the Second Circuit found that the earlier "travesty" had presented the "risk of injustice to the parties" and "the risk of undermining the public's confidence in the judicial process." *Id*. at 652.

Unlike *Mitchell*, the petitioner has not identified a gross misinterpretation of law, a change in the law affecting his custody, or other information "essential to bringing the suit" that he "did not have, and could not have had with due diligence" at the time of his prior post-conviction proceedings. *Id*. To the contrary, the petitioner's claim rests "entirely on facts known to him at the conclusion of the trial." *Santamaria*, 169 N.H. at 727. Therefore, even if the doctrine of equitable tolling is applicable to habeas proceedings before this Court, the petitioner has not demonstrated that he would be entitled to its application. For these reasons, the petitioner's claim is procedurally barred.

III. UNSUPPORTED ALLEGATIONS OF IMPLICIT BIAS ARE NOT A BASIS FOR RELIEF FROM THIS COURT.

The petitioner contends that there is implicit bias and that this bias had an effect on the jury in this case. PB 27. The petitioner has not filed a copy of the transcript of jury selection in this case and, therefore, the record is inadequate to consider this claim.

First, although several federal courts have recognized that implicit bias exists, the courts agree that jury *voir dire* should include inquiry into

racial bias only if requested by the defense and if the case raises issues that might arouse implicit bias. *See, e.g., United States v. Youn*g, 6 F.4th 804 (8th Cir. 2021); *United States v. Diaz*, 854 Fed. Appx. 386 (2d Cir. 2021) ("[D]istrict courts generally should question prospective jurors about racial prejudice in any instance where a criminal defendant requests such questioning," but it is only reversible error when "the circumstances of the case indicate that there is a reasonable possibility that racial or ethnic prejudice might have influenced the jury.") (citations omitted)). *See also United States v. Tosca*, 848 Fed. Appx. 371, 371 (11th Cir. 2021) (no abuse of discretion where trial court did not ask prospective jurors if they had "heard of implicit racial basis; believed that it was impossible to have a racial bias without realizing it or intending to have it; interacted with African Americans on a regular basis."); *United States v. Mercado-Garcia*, 989 F.3d 829, 841 (10th Cir. 2021) (trial court acted within its discretion in declining to play a video for the jurors concerning racial bias); *United States v. Adkinson*, 916 F.3d 605 (7th Cir. 2019) (trial court did not err in rejecting "implicit bias" challenge to venue based on racial composition of the jury pool).

In *Young*, the United States Court of Appeals for the Eighth Circuit considered the defendant's claim that the trial court erred by failing to inquire about implicit bias. *Id*. at 806. Before trial, the defendant "submitted twelve proposed *voir dire* questions specifically related to race and explicit or implicit bias," but the trial court declined to ask any of them. *Id*. at 807. The Eighth Circuit started by observing that "[t]he adequacy of *voir dire* is not easily subject to appellate review. *Id*. (quoting *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981) (internal quotation marks

omitted). The court noted that there was "no constitutional presumption of juror bias for or against members of any particular racial or ethnic groups." *Id*. (quoting *Rosales-Lopez*, 451 U.S. at 190).

The Eighth Circuit continued:

> "[A] trial court's failure to inquire as to prospective jurors' ethnic or racial prejudices is constitutionally infirm only if ethnic or racial issues are inextricably intertwined with conduct of the trial, or if the circumstances in the case suggest a *significant likelihood* that racial prejudice might infect the defendant's trial." *United States v. Borders*, 270 F.3d 1180, 1182 (8th Cir. 2001) (emphasis added). In other words, the district court abuses its discretion when it denies the defendant's request to examine jurors on racial bias only where there are "substantial indications of the likelihood" of racial bias affecting the jurors in that case. *Id*. at 1183 (quoting *Rosales-Lopez*, 451 U.S. at 190).

Id. at 808. The Eighth Circuit noted that race was not "inextricably intertwined with conduct of the trial," since the charges involved guns and drugs, and concluded that the defendant could not show that "*voir dire* on race was constitutionally required." *Id*.

Although the Eighth Circuit noted that specific *voir dire* might be required if the crime was a violent crime and involved people of different races, the record as presented here does not support the inference that racial bias was an issue. This is despite the fact that the post-conviction court held an evidentiary hearing and, thereby, provided the petitioner with the opportunity to present evidence to support his theory.

For example, at the April 4, 2021 hearing, the petitioner called only his trial counsel. PApp. 181. The petitioner asserted that counsel was ineffective for not asking for *voir dire* on racial bias "when he himself

would later inject racial bias into the case." PApp. 25. But what the petition, and the hearing, lacked was any attempt to demonstrate that the assertion of implicit racial bias was supported by the record. In other words, the petitioner provided the post-conviction court with no testimony that any one of the jurors who sat on the jury were affected by – or even remembered – trial counsel's remarks. On this record, the post-conviction court correctly concluded that the court could not vacate a conviction "when the legal grounds to do so are absent." PApp. 81.

Moreover, the cases cited in the petitioner's brief do not support his contention that he is entitled to a new trial on that basis. For example, in *State v. Behre*, 444 P.3d 1172 (Wash. 2019), the Supreme Court of the State of Washington recognized that implicit bias may deprive a defendant of "a fair trial by an impartial jury." *Id.* at 1178. The court noted, however, that racial bias is "uniquely difficult to identify"; that "[d]ue to social pressures, many who consciously hold racially biased views are unlikely to admit to doing so"; and that "implicit racial bias exists at the unconscious level, where it can influence [ ] decisions without [ ] awareness." *Id.* at 1178. The court in *Behre* remanded the case for a hearing, noting that it was "essential that before deciding whether to hold an evidentiary hearing, courts thoroughly consider the evidence and conduct further inquiry if there is a possibility that racial bias was a factor in the verdict." *Id.*

In this case, the post-conviction court afforded the petitioner the opportunity to make his case that the jury was affected by trial counsel's remarks. As noted above, the petitioner did not take advantage of that opportunity and, instead, simply criticized trial counsel for his comment. Ineffective assistance of counsel, however, requires more than bad

lawyering by a trial attorney; it requires prejudice that probably affected the outcome of the trial. *See Strickland*, 466 U.S. at 688. The post-conviction court correctly concluded that the record did not support a finding of prejudice. PA 78. Therefore, it correctly rejected the petitioner's request for habeas corpus relief.

The petitioner seems to contend that this Court should simply assume prejudice because implicit bias is so prevalent and conclude, therefore, that a fair trial was impossible in this case. But that is simply not the law. *Cf. McCleskey v. Zant*, 481 U.S. 279, 292 (1987) (noting that a criminal defendant must prove that "purposeful discrimination had a discriminatory effect on him") (internal quotation marks and citation omitted). In *McCleske*y, the defendant had at least shown that there was a statistical likelihood that his sentence was the product of prejudice. *Id.* at 286. In contrast, in this case, the petitioner is simply asking this Court to assume that the jurors had prejudices that were inflamed by trial counsel's remarks and that this reaction affected the verdict. This argument reverses the burden of proof in habeas corpus proceedings. *Pepin*, 159 N.H. at 311 ("To obtain relief, *the petitioner* must show harmful constitutional error." (emphasis added)).

IV. THE PETITIONER HAS FAILED TO PROVE THAT HE SUFFERED PREJUDICE.

"The State and Federal Constitutions guarantee a criminal defendant reasonably competent assistance of counsel." *State v. Sharkey*, 155 N.H. 638, 640 (2007). "To prevail upon a claim of ineffective assistance of counsel, the defendant must demonstrate, first, that counsel's representation

was constitutionally deficient and, second, that counsel's deficient performance actually prejudiced the outcome of the case." *State v. Collins*, 166 N.H. 210, 212 (2014) (citing to *Strickland,* 466 U.S. at 688-89). "A failure to establish either prong requires a finding that counsel's performance was not constitutionally defective." *Id.* at 210-11. As this Court "h[as] adopted the test applicable under the Federal Constitution, [the Court's] analysis of [a defendant's] ineffective assistance of counsel claim will be the same under either constitution." *Grote v. Powell*, 132 N.H. 96, 100 (1989).

"Both the performance and prejudice prongs of the ineffectiveness inquiry are mixed questions of law and fact." *State v. Wilbur*, 171 N.H. 445, 448 (2018) (quotation omitted). "Therefore, [this Court] will not disturb the trial court's factual findings unless they are not supported by the evidence or are erroneous as a matter of law, and [will] review the ultimate determination of whether each prong is met *de novo*." *Id.* (quotation omitted). Likewise, "[i]n an appeal from a denial of a petition for a writ of habeas corpus, [this Court] accept[s] the trial court's factual findings unless they lack support in the record or are clearly erroneous, but review[s] the trial court's legal conclusions *de novo*. *Santamaria*, 169 N.H. at 725 (2017).

"[T]he preferable course in a challenge based on ineffective assistance of counsel is to require the defendant to prove as a threshold matter that the alleged error by counsel prejudiced his case." *State v. Wisowaty*, 137 N.H. 298, 302 (1993). "To satisfy the [prejudice] prong, the defendant must demonstrate actual prejudice by showing that there is a reasonable probability that the result of the proceeding would have been

different had competent legal representation been provided." *State v. Eschenbrenner*, 164 N.H. 532, 539 (2013).

"It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test." *Strickland,* 466 U.S. at 693. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Sharkey*, 155 N.H. at 641. The defendant bears the burden to demonstrate a reasonable probability of a different outcome. "If the defendant is unable to demonstrate such prejudice, [this Court] need not even decide whether counsel's performance fell below the standard of reasonable competence." *State v. Faragi*, 127 N.H. 1, 5 (1985) (citing *Strickland, 466 U.S.* at 697).

As the post-conviction court found in its order denying the petitioner's claim, "[n]o reasonable juror would have understood trial counsel to be suggesting that [the petitioner] acted in conformity with an innate propensity toward violence" when he referred to his client as a "big, menacing black guy." The reference was a phrase in the course of multiple hours of testimony and trial counsel "never expressly argued the stereotype." PA 79. To the contrary, "trial counsel's overall argument was that [the petitioner] was <u>not</u> violent during the incident." PA 79. Neither trial counsel nor any of the witnesses ever revisited the issue at any other point in the trial. PA 79. And as the court pointed out in its order, the victim "was clearly not influenced by racial prejudice," because she "made the choice to have a child with [the petitioner] and she wanted to be together with him." PA 79.

The petitioner repeatedly argues that racial bias is so pernicious that even a "small dose" can prove prejudicial. PB 36-37. He argues that trial counsel's comment "alone undermines confidence in the verdict" because it "appealed to the jurors' . . . biases," and "could only create prejudicial effects." PB 34-35, 38. But he has failed to demonstrate that it *actually did* result in prejudice, *i.e*. that the result of the trial was affected.

This is not a case in which the Court should presume prejudice. "[I]n the context of an ineffective assistance of counsel claim, prejudice is presumed only where circumstances leading to counsel's ineffectiveness are so egregious that the defendant was in effect denied any meaningful assistance at all[.]" *Humphrey v. Cunningham*, 133 N.H., 727, 737 (1990) (cleaned up) (citing *Powell,* 132 N.H. at 101 (1989)). The petitioner's claim does not fall into this category. As the post-conviction court found, the petitioner's counsel made opening and closing statements, examined witnesses, made objections, and pursued a strategy intended to create reasonable doubt about the victim's account of the assault. PA 58-61.

By contrast, *People v. Sanders*, No. 3-18-0215, 2020 WL 7779040 (Ill. Ct. App. Dec. 31, 2020) which the petitioner cites, involved a defense counsel who made no fewer than nineteen overt references to race or racial stereotypes in his closing argument. These included statements such as "he's black and black man belongs in a squad car in a cage," "I would have been scared if I was a white guy in a totally bad place and they had black men," and "Blacks don't trust whites and a lot of whites don't trust blacks. I wouldn't trust them if I was on the south side of Chicago, I'm out of there," among others.

Those references were so many, so egregious, and so near in time to deliberations that the court found they created a "prejudicial lens" that "could not reasonably be disregarded by the jury." *Id*. This case involves no such lens. As the post-conviction court noted, this case involved a single fleeting reference to the defendant's race by his own counsel in the middle of witness testimony. PA 79. Neither defense counsel, nor anyone else ever revisited it. PA 79. And trial counsel's overall strategy was intended to show that the petitioner was not violent. PA 79. This Court should not, therefore, presume prejudice.

The petitioner states that "there is some degree of impossibility in *showing* prejudice." PB 42. His argument on this point is undercut, however, by the absence of jury selection in the record. If evidence of the jurors' pre-existing biases were to be found anywhere in the record, jury selection would be the most likely place to find it. Absent that evidence, this Court has no way to determine from the available record precisely how the jury's biases were probed and addressed before trial.

The defendant also relies on *Pena-Rodriquez v. Colorado*, 137 S. Ct. 855, 870-71 (2017), in which a juror came forth after the verdict to express racial bias. This case is inapposite because it involved the very evidence of actual prejudice that the petitioner claims is impossible to show – a juror with evidence of racial bias in the deliberations. Another case the defendant cites, *United States v. Smith*, No. 12-183, 2018 WL 1924454 at *5, *13-15 (D. Minn. April 24, 2018), also involved a juror who came forward with evidence that race had affected deliberations.

No jurors were contacted in the course of discovery or testified at the evidentiary hearing. These avenues could have provided the evidence of

actual prejudice that the defendant lacks. Because he did not develop the record in this way, this Court is left to speculate as to whether trial counsel's lone comment had the outsize effect that the petitioner now claims. Speculation does not rise to the level of "reasonable probability" needed to meet the prejudice prong of the *Strickland* test.

Finally, the petitioner's "cumulative error" argument is unpersuasive. This Court has adopted the 'cumulative error' test with respect to the errors of a trial court. *See State v. Towle*, 167 N.H. 315, 323 (2015) ("To determine whether alleged cumulative errors require reversal, we first determine whether the trial court did, in fact, err."); *see also State v. Ellsworth*, 142 N.H. 710, 721 (1998) (rejecting claim that trial court erred and concluding that the cumulative error argument was "not persuasive" on that ground). But this Court has never applied the cumulative error test in the context of ineffective assistance claims. The petitioner has not provided a reason to do so now.

The cumulative error does not apply because the petitioner's "errors" were not errors. He notes three aspects of the trial which he claims "contributed to the prejudice:" (1) failure to mitigate concerns of racial bias with specific *voir dire* questions; (2) a line of questioning from the State that the petitioner alleges invoked a racist stereotype; and (3) failure to request a curative instruction.

First he argues that trial counsel erred when he "failed to mitigate" concerns about racial bias by requesting specific *voir dire* on racial bias. However, the post-conviction court noted that this decision was not error, but a rational strategic choice. PA 78. Without the transcript of jury

selection, this Court must rely on the post-conviction court's factual determination in this matter.

Next the defendant argues that "the State elicited testimony from the alleged victim that invoked the 'racist [] stereotype' of a black absentee father." The State has never conceded this and the post-conviction court did not find that this occurred. The court only noted that the petitioner's trial counsel *believed* the State did this, PA 63-64, but the record does not support this claim. The State elicited testimony from the victim about the family dynamic between herself, the petitioner, and their child. The evidence that the defendant was only "sporadically involved" in his daughter's life was not the "invocation" of a stereotype. The State did not generalize and argue that the defendant was an absentee father because of his race. It elicited specific evidence of the particular family dynamics of the parties to this case, which was relevant in this case involving domestic violence.

Moreover, trial counsel objected to this exact line of questioning. The parties then had a bench conference, during which the petitioner's trial counsel argued that the line of questions was inappropriate. PA 67. Far from being an error on the part of trial counsel, this part of the trial shows trial counsel actively combating what he viewed as inappropriate racial stereotyping.

Finally, the petitioner contends that trial counsel's failure to request a curative instruction regarding the aforementioned testimony about the petitioner's parenting was error. It is a meritless contention. The request would have been futile because the trial court stated during the bench conference that "what's come in so far would be admissible insofar as it

shows the motive, as it were, for the altercation that occurred." PA 69. It is unlikely that the court would have issued a curative instruction regarding a line of questioning that it felt was properly before the jury.

This Court should not reach the merits of his ineffective assistance claim for all the reasons stated herein. But if the Court does reach the merits, the defendant has failed to demonstrate actual prejudice and cannot show that the application of the cumulative error rule is appropriate in this case. Therefore, this Court should affirm the post-conviction court's dismissal of the petitioner's claim.

CONCLUSION

For the foregoing reasons, the Warden respectfully requests that this Honorable Court affirm the judgment below.

The Warden requests 15-minute oral argument.

Respectfully Submitted,

WARDEN, NEW HAMPSHIRE STATE PRISON

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January 7, 2022

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CERTIFICATE OF COMPLIANCE

I, Zachary L. Higham, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 8,035 words, which is fewer than the words permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

January 7, 2022 *<u>/s/ Zachary L. Higham</u>*
Zachary L. Higham

CERTIFICATE OF SERVICE

I, Zachary L. Higham, hereby certify that a copy of the State's brief shall be served on Donna Brown and Michael Eaton, counsel for the petitioner, through the New Hampshire Supreme Court's electronic filing system.

January 7, 2022 *<u>/s/ Zachary L. Higham</u>*
Zachary L. Higham