STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: July 13, 2015)

RAYMOND D. TEMPEST, JR.	:	
	:	
V.	:	**C.A. No. PM 04-1896**
	:	
STATE OF RHODE ISLAND	:	

DECISION

"The arc of the moral universe is long, but it bends towards justice."

— Martin Luther King, Jr.

PROCACCINI, J. Before the Court is the application of Raymond "Beaver" Tempest (Mr. Tempest) for postconviction relief, seeking to vacate his conviction. As this Court considers Mr. Tempest's petition, it is mindful that this case has consumed the collective consciousness of northern Rhode Island—especially the City of Woonsocket—for the past thirty-three years. Emblematic of our state's compact size, this is a case about which many hold an opinion; everyone seems to know someone involved or something about the facts surrounding the tragic murder of Doreen Picard and the subsequent conviction of Mr. Tempest for that crime. Notwithstanding this widespread public interest, debate, and opinion, it is the Court's duty to undertake a detached and neutral analysis, conscientiously applying the law of the State of Rhode Island to the expansive factual record that has been developed by the parties.

On April 22, 1992, Mr. Tempest was found guilty of second degree murder for brutally beating Doreen Picard to death with a lead pipe ten years prior. Having maintained his innocence throughout incarceration, Mr. Tempest now contends that his conviction must be overturned in light of newly discovered evidence, governmental misconduct in violation of due

process guarantees, ineffective assistance of counsel, as well as clear evidentiary support for his innocence. For the reasons discussed below, Mr. Tempest's petition is hereby granted. Jurisdiction is pursuant to G.L. 1956 §§ 10-9.1-1 et seq.

I

Facts and Travel

The following narrative offers a succinct glimpse into the crimes that transpired on February 19, 1982 and the events that unfolded thereafter. To present the entire saga of this case—with all of its baffling twists, turns, and seemingly incongruent particulars—would serve only to confound the reader and muddy the waters of a thirty-three year old case, the factual complexity of which stands unparalleled in the history of Rhode Island postconviction relief.[1] Other relevant details will be provided, where necessary, in the body of this Court's analysis.

At approximately 3:20 on the afternoon of February 19, 1982, fifteen-year-old Lisa Wells[2] (Lisa or Ms. Ladue) came home to the triple-decker apartment at 409 Providence Street in Woonsocket, Rhode Island. She checked the mail, walked around the exterior of the building, and entered the tenement home through the back door. (Trial Tr. 541:24-25, Apr. 1, 1992.) En route, according to her testimony at trial, she noticed an unfamiliar maroon car parked in the driveway. Id. at 541:4-13. When Lisa entered the building, she noticed three-year-old Nicole Laferte (Nicole) sobbing in the hallway, saying that her "mother was downstairs sick."[3] Id. at

[1] The hearing for the instant petition was conducted over a period of ten weeks requiring twenty-four days of testimony and 209 exhibits, including the 1992 trial transcript consisting of 2188 pages.

[2] Lisa Wells later married and took the surname Ladue.

[3] Nicole lived on the first floor of the apartment building with her mother, Susan Laferte (Ms. Laferte), infant sister, and father while Lisa occupied the second floor with her mother and stepfather, Douglas Heath (Mr. Heath).

542:2. Lisa brushed off Nicole's actions as a cry for attention "because [she] heard some moving around downstairs" and went up to her apartment. Id. at 542:3-4.

Mr. Heath arrived home from work ten minutes later and, like Lisa, entered the apartment building through the back. At the time he arrived, the driveway was empty. (Trial Tr. 147:20-22, Mar. 30, 1992.) When he walked in the rear hallway on the first floor, he saw Nicole, still crying, and "[s]tanding at the door to go down into the cellar." Id. at 148:16. Mr. Heath stopped and asked Nicole what was wrong. Nicole replied that her mother was downstairs, "lying down." Id. at 149:16.

When Mr. Heath descended the stairs into the basement, he was met with a grisly scene. As he stated at trial, "there was blood everywhere[;] . . . it was on everything[,]. . . splattered . . . on the pipes[,] . . . on the washer and the dryer [and] on the floor." Id. at 151:4-18. "[L]ooking across the cellar[,] [Mr. Heath] saw a body, a person, between the washer and the dryer sitting . . . . [He] couldn't recognize who th[e] person was [because there] was so much blood[.]" (Trial Tr. 138:25-139:3, Mar. 27, 1992.) Mr. Heath would later learn that this person was his upstairs neighbor, twenty-two-year-old Doreen Picard. Next, he looked around and saw Ms. Laferte on the left side of the basement, "lying face down in a pile of -- puddle of blood." Id. at 139:5-6.[4] Sensing the urgency of the situation, Mr. Heath ran upstairs to call the police to get help for the two women who had been so brutally attacked. Id. at 139:6-7. He also grabbed two towels, presumably hoping to render some first aid. Id. at 140:18. However, when Mr. Heath returned back to the cellar, he "just looked around" and realized "the towels w[ould]n't [be] of any help[.]" Id. at 140:20-22.

[4] Ms. Laferte survived the attack despite the violence inflicted upon her. Due to her traumatic brain injury, however, she remains unable to recall the events surrounding her assault.

Due to the extent of the injuries sustained and the deluge of blood at the scene, first responders believed the attacks were the result of a shooting. It was only later, upon Ms. Laferte's admission to the hospital, that it was learned the wounds were the result of blunt force trauma. (Trial Tr. 193:13-18, Mar. 30, 1992.) Meanwhile, the crime scene was "never properly secured" or "cordoned off" while a swarm of officers packed into the basement. (Trial Tr. 2066:6-7, Apr. 20, 1992.) Nevertheless, the only person available to gather evidence was "totally unfamiliar with B.C.I.[5] procedures and the handling of the evidence." Id. at 2066:13-14. Midway through the night, the police captain arrived, having "spent several hours in a bar" before taking the reins in directing the processing of the scene. Id. at 2068:7.

The investigation at 409 Providence Street was conceded to be "a disaster" by the State. Id. at 2065:5-6. Assistant Attorney General James Ryan (Mr. Ryan) stated at trial that the severe lack of physical evidence was due to the fact that "the job [i.e. the necessary investigatory procedures] didn't get done" and that "[e]very police officer from the Woonsocket Police Department seems to have been there except for the ones who should have been there." Id. at 2066:20-23. Noting the "chaos" and "disorder" surrounding the collection of evidence, Mr. Ryan went on to say that "the end result[] is that the crime scene was contaminated." Id. at 2067:14-17. Nevertheless, four days after the murder, the police were able to locate a lead pipe that Mr. Ryan would later identify as the murder weapon at trial. Despite the efforts of the Woonsocket Police Department, for nine long years no one was charged in connection with this heinous act until, on June 5, 1991, a Grand Jury indicted Mr. Tempest for the murder of Doreen Picard.

[5] B.C.I. is an acronym for Bureau of Criminal Investigations.

Then, in April 1992, he was put on trial. The State put forward a parade of witnesses—Ronald Vaz, John Guarino, Donna Carrier, and Loretta Rivard—each claiming that Mr. Tempest had confessed to Doreen Picard's murder in his or her presence years earlier. In spite of a dearth of physical evidence tying Mr. Tempest to the scene and at least partial impeachment of these inculpatory witnesses, Mr. Tempest was found guilty. His conviction was affirmed by our Supreme Court on January 11, 1995. State v. Tempest, 651 A.2d 1198 (R.I. 1995). Twenty years later, the Court now considers Mr. Tempest's petition for postconviction relief.

II

Standard of Review

Postconviction relief is a statutory remedy for

> "[a]ny person who has been convicted of, or sentenced for, a crime, a violation of law, or a violation of probationary or deferred sentence status and who claims:
> "(1) That the conviction or the sentence was in violation of the constitution of the United States or the constitution or laws of this state; [. . .]
> "(4) That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
> "(5) That his or her sentence has expired, his or her probation, parole, or conditional release unlawfully revoked, or he or she is otherwise unlawfully held in custody or other restraint; or
> "(6) That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding, or remedy[.]" Sec. 10-9.1-1(a).

In pursuing such claims, a petitioner "bears the burden of proving, by a preponderance of the evidence, that he is entitled to postconviction relief." Burke v. State, 925 A.2d 890, 893 (R.I. 2007) (citing Larngar v. Wall, 918 A.2d 850, 855 (R.I. 2007)). The proceedings for such relief are "civil in nature." Ouimette v. Moran, 541 A.2d 855, 856 (R.I. 1988) (citing State v. Tassone, 417 A.2d 323 (R.I. 1980)). In accordance with the statute, "[t]he court shall make specific

findings of fact, and state expressly its conclusions of law, relating to each issue presented." Sec. 10-9.1-7.

III

Analysis

A

Laches

Before diving headlong into the substance of Mr. Tempest's claims, the Court must first address the threshold matter of the State's affirmative defense, which it claims is a complete bar to the instant action. The State asserts the equitable doctrine of laches, claiming that Mr. Tempest's twenty-year slumber before bringing this petition bars any path to relief. [6]

The doctrine of laches is embodied in the maxim that "those who sleep on their rights must awaken to the consequence that they have disappeared." Jackson v. Thomson, 53 A. 506 (Pa. 1902). In Raso v. Wall, our Supreme Court held that laches is applicable in the context of postconviction relief, despite statutory language that such a petition "may be filed at any time." 884 A.2d 391, 395 (R.I. 2005) (citing § 10-9.1-3). In order to prevent an unlimited Open Season on postconviction petitions, the Court "construe[d] the statutory term [within § 10-9.1-3] as meaning at any reasonable time." Id. (emphasis in original). As such, "the state has the burden

[6] Mr. Tempest contends that this Court should simply bypass the discussion of laches as he qualifies for review of his arguments on the merits through the gateway claim of actual innocence. By way of such a gateway claim, a petitioner may bypass any procedural bar and have "his constitutional claim considered on the merits[,]" Schlup v. Delo, 513 U.S. 298, 315 (1995) (internal citations omitted), upon demonstration that "no reasonable juror would have found the [petitioner] guilty." Id. at 329. However, such a doctrine is inapplicable; the claims here are not alleged to be procedurally barred. Rather, laches seeks a remedy grounded in equity to prevent a claim asserted by a petitioner who has slept on his rights. See Calcagni v. Cirino, 62 R.I. 49, 2 A.2d 891, 892 (1938) (warning against "a promiscuous interchanging of procedure in law and in equity").

of proving by a preponderance of the evidence that the applicant unreasonably delayed in seeking relief and that the state is prejudiced by the delay." Id. (emphasis in original). These issues are questions of fact dependent on the circumstances of a particular case. Id. at 396 (citing Lombardi v. Lombardi, 90 R.I. 205, 209, 156 A.2d 911, 913 (1959)). The Court is vested with equitable discretion to weigh the laches defense, Andrukiewicz v. Andrukiewicz, 860 A.2d 235, 241 (R.I. 2004), and must make appropriate findings of fact and conclusions of law in support of its decision. Raso, 884 A.2d at 396.

"While it is important that one convicted of crime in violation of constitutional principles should be accorded relief, it is also important that reasonable diligence be required in order that litigation may one day be at an end." Honeycutt v. Ward, 612 F.2d 36, 42 (2d Cir. 1979). "The law ministers to the vigilant not to those who sleep upon perceptible rights[;] . . . a criminal defendant cannot routinely be rewarded for somnolence and lassitude." Puleio v. Vose, 830 F.2d 1197, 1203 (1st Cir. 1987). As such, "[t]here comes a time when the 'prejudice' precondition to a finding of laches can be presumed." Mattatall v. State, 947 A.2d 896, 900 n.6 (R.I. 2008) (citing N. Trust Co. v. Zoning Bd. of Review of Westerly, 899 A.2d 517, 520 (R.I. 2006) (mem.)). Nevertheless, "mere lapse of time is not enough to support a claim of laches." Goff v. U. S. Fid. & Guar. Co., 72 R.I. 363, 371, 51 A.2d 558, 562 (1947). It is well-settled that "any excuse for delay, which excuse takes hold of the conscience of the [court] and makes it inequitable to interpose the bar of laches, is sufficient." Id. Simply put, laches "eschews mechanical rules" and relates solely to "the inequity of permitting the claim to be enforced[.]" Holmberg v. Armbrecht, 327 U.S. 392, 396 (1946). "The courts are reluctant to sustain the defense of laches, and in a case where the delay in filing the suit can be reasonably explained or justified, such a defense will not be heard." Whitehaven Util. Dist. of Shelby Cnty. v. Ramsay,

387 S.W.2d 351, 353 (Tenn. 1964).

Accordingly, in order to succeed on its laches defense, the State must do more than merely cry prejudice: it must prove that Mr. Tempest's delay was "inexcusable" and "unexplained[.]" Raso, 884 A.2d at 396 (internal citations omitted); see Sandvik v. Alaska Packers Ass'n, 609 F.2d 969, 973 (9th Cir. 1979) (holding that under the doctrine of laches, "the presence of prejudice does not necessarily require dismissal"). To properly decide this issue, the Court must examine whether '"there has been a lack of due diligence on the part of the defendant in bringing forth the claim[.]"' Raso, 884 A.2d at 395-96 (quoting Wright v. State, 711 So.2d 66, 67 (Fla. Dist. Ct. App. 1998)); see also Morales v. Moore-McCormack Lines, Inc., 208 F.2d 218, 221 (5th Cir. 1954) (holding that, in order to avoid laches defense, a party is "required to proceed with the diligence of an ordinarily prudent person"); Holland v. Florida, 560 U.S. 631, 653 (2010)) (stating, in the analogous context of equitable tolling for federal habeas petitions, that due diligence "is reasonable diligence, not maximum feasible diligence") (internal citations and quotations omitted). Especially in the context of postconviction relief, "[c]ourts must 'indulge every reasonable presumption against waiver' and 'acquiescence in the loss of fundamental rights' is not to be presumed." Hamilton v. Watkins, 436 F.2d 1323, 1326 (5th Cir. 1970) (finding no "waiver based on delay of appellant in asserting his rights") (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

Delay may be reasonable when "used to evaluate and prepare a complicated claim"[7]; "when 'lack of funds precludes a party from retaining a lawyer to pursue a claim'"[8]; or when a petitioner "continue[s] to voice his objections . . . and attempt[s] to become fully informed and

[7] Evergreen Safety Council v. RSA Network Inc., 697 F.3d 1221, 1227 (9th Cir. 2012) (internal citations omitted).
[8] Markey v. Carney, 705 N.W.2d 13, 23 (Iowa 2005) (quoting 27A Am. Jur. 2d Equity § 168, at 648 (1996))

resolve the matter,"[9] rather than stand "mute . . . [in] protracted silence"[10] and acquiesce. Importantly, "[l]aches will not be imputed to one who has been justifiably ignorant of the facts creating his right or cause of action, and who, therefore, has failed to assert it." Alexander v. Phillips Petroleum Co., 130 F.2d 593, 606 (10th Cir. 1942).[11]

In the instant petition, Mr. Tempest brings a series of claims in support of vacating his 1992 conviction: newly discovered evidence regarding DNA test results and factual inconsistencies related to inculpatory witness statements, disclosure violations under Brady,[12] violation of due process rights resulting from police incompetence and misconduct leading to the procurement and presentation of fallacious testimony, as well as ineffective assistance of counsel. It is apparent to the Court that the discovery of the bases for these distinct claims arose, or should have arisen, at different points in the time leading up to the filing of the instant petition. However, considering the myriad issues developed as potential claims (which are all inextricably linked), as well as the scope and complexity of the case as a whole, the most balanced and equitable approach is to examine Mr. Tempest's general course of conduct over the past twenty years. See A.C. Aukerman Co. v. R.L. Chaides Constr. Co., 960 F.2d 1020, 1038

[9] King v. Innovation Books, a Div. of Innovative Corp., 976 F.2d 824, 833 (2d Cir. 1992).
[10] Southside Fair Hous. Comm. v. City of N.Y, 928 F.2d 1336, 1355 (2d Cir. 1991); see also 27A Am. Jur. 2d Equity § 132 ("Courts look favorably upon a plaintiff who promptly and/or repeatedly protests the alleged wrong on learning thereof, and who thereafter does not acquiesce to the alleged wrong.").
[11] See also 27A Am. Jur. 2d Equity § 133 ("Time expended in an investigation necessary to learning of the claim or of the facts surrounding the claim generally is not held against the plaintiff[.]").
[12] "The United States Supreme Court in Brady held that a criminal defendant's due-process right to a fair trial is violated whenever, subsequent to an accused's request, the prosecutor intentionally or unintentionally suppresses exculpatory evidence that has a material bearing on questions of guilt or punishment." State v. Wyche, 518 A.2d 907, 908 (R.I. 1986) (citing Brady v. Maryland, 373 U.S. 83, 87 (1963)).

(Fed. Cir. 1992) (holding that the "facts of unreasonable delay . . . must be proved and judged on the totality of the evidence presented"); Lavin v. Bd. of Educ. of City of Hackensack, 447 A.2d 516, 521 (N.J. 1982) (finding it "fair and equitable to treat all claims . . . in like manner" for the purposes of laches). As such, this Court must look to whether his actions are marked by "somnolence and lassitude," Raso, 884 A.2d at 394 n.8 (internal citations omitted), or whether he has demonstrated "the diligence required of [a] reasonably prudent person[.]" Morales, 208 F.2d at 221.

After consideration of the testimony and exhibits outlining the efforts of Mr. Tempest to develop a comprehensive, multi-claim postconviction relief petition, the Court finds that Mr. Tempest's delay was not unreasonable, and, as a result, the State's defense of laches fails. Indeed, to hold otherwise would evince total ignorance of the harsh realities of Mr. Tempest's circumstances and this case as a whole. The record establishes that Mr. Tempest has maintained his innocence since the inception of his prosecution and, following affirmation of his conviction, worked alongside family and friends to set in motion the events that culminated in the New England Innocence Project convincing a sizeable and experienced international law firm to champion his cause before this Court.[13]

To fully comprehend the reasons for the twenty-year delay in bringing the instant petition, the Court must consider the unique "'circumstances of th[is] particular case.'" Arcand v. Haley, 95 R.I. 357, 364, 187 A.2d 142, 146 (1963) (quoting 30 C.J.S. Equity § 115 at 528). By way of background, Mr. Tempest dropped out of school in the ninth grade to work as a floor

[13] Mr. Tempest is assisted in the instant petition by the Boston office of McDermott Will & Emery, a firm with over 1100 attorneys and a presence throughout the globe including offices in New York, Chicago, Los Angeles, London, Paris, Rome, and Seoul. Their white-collar criminal defense practice group—the head of which is Michael Kendall, one of Mr. Tempest's attorneys—has tried hundreds of cases in both federal and state court.

boy at a plastics manufacturing plant. (Tr. 6:16-8:4, Mar. 18, 2015). As a result, he struggled to read and write before obtaining his GED in prison in the early 2000s. Id. at 7:5-16. In the wake of his conviction and subsequent incarceration, Mr. Tempest lacked the funds with which to retain a postconviction attorney. Id. at 97:1-2. As such, he took it upon himself to repeatedly write letters to a minister—one Mr. McCloskey, who ran an innocence project in New Jersey—whom he had heard about from fellow inmates, seeking to enlist his help. Id. at 97:7-98:7. His pleas for assistance were unavailing, however, as Mr. Tempest was informed that his postconviction petition was "too much of a case for [Mr. McCloskey] to handle." Id. at 99:2-3.

Mr. Tempest also worked alongside Evelyn G. Munschy (Ms. Munschy)—whom he described as like a second mother, id. at 9:3—in looking into the circumstances surrounding the murder of Doreen Picard and its investigation by the Woonsocket Police Department. Ms. Munschy had first grown close to Mr. Tempest when he worked at her husband's automotive shop as a boy. (Tr. 3:22-4:25, Feb. 24, 2015.) They became so close, in fact, that during the course of Mr. Tempest's trial in 1992, Ms. Munschy and her husband put up their house as collateral for his bail. Id. at 8:8-10. Following the affirmation of his conviction, Ms. Munschy sought "to try to help him to prove his innocence." Id. at 9:3-4. Despite not having any legal training or experience as an investigator, id. at 9:22-25, Ms. Munschy "spent a lot of time going to the archives in Pawtucket," id. at 11:5, and also hunted through the case file of Mr. William Dimitri, Mr. Tempest's attorney at trial and on appeal. Id. at 11:18-12:2.

In 2000, Ms. Munschy spent approximately thirty to forty thousand dollars of her own personal money to hire a private investigator, Martin Yant (Mr. Yant), to look into Mr. Tempest's case. Id. at 8:16-9:15. Over the course of Mr. Yant's investigation, Mr. Tempest spoke with Mr. Yant frequently on the telephone and had him visit the Adult Correctional

Institute (ACI) on multiple occasions. (Tr. 29:14-15, Feb. 5, 2015.) By the end of Mr. Yant's involvement, he had billed over two hundred hours and performed a substantial amount of uncompensated work, id. at 86:12-16, reading transcripts provided by Ms. Munschy, scouring the Woonsocket Police Department records, and working "on the ground" to retrieve information in Rhode Island. Id. at 30:12-20.

Despite the development of promising inroads over the course of eighteen months, the money ran out, and Ms. Munschy could no longer afford to pay for the investigator's services. (Tr. 10:11-17, Feb. 24, 2015.) Mr. Tempest's sister, Barbara Small, also contributed her personal funds towards paying Mr. Yant, similarly spending a substantial sum until she no longer had the capital to do so. Id. at 9:5-15; 10:14. Although the funds were no longer available to retain the private investigator, Ms. Munschy kept in contact with Mr. Yant, whereby he would answer any questions she and Mr. Tempest had as well as call them when he thought of something pertinent to the case. Id. at 10:15-17.

In 2001, Ms. Munschy began writing to Betty Ann Waters, Esq. (Ms. Waters) after seeing on television how she had "helped her brother become exonerated." Id. at 13:21-22.[14] Initially, Ms. Waters was unable to offer any assistance, stating that she "had no intention of pursuing a legal career" but wished Mr. Tempest luck. Id. at 13:24-14:2. Undeterred, Ms. Munschy reached out to the New England Innocence Project (the NEIP) repeatedly from 2001 to 2004. After four or five letters, Ms. Munschy was finally able to strike up a dialogue, and the NEIP agreed to review the case. Id. at 15:10-19. At this time, Ms. Waters was volunteering with the NEIP and, beginning in 2003, began reviewing the transcripts from Mr. Tempest's trial. (Tr. 37:10-38:18, Mar. 16, 2015.) She worked alongside the NEIP such that she "would do any of

[14] Ms. Waters received considerable media attention for her successful efforts on behalf of her brother who was exonerated through DNA testing while serving a life sentence for murder.

the ground work looking for evidence, talking to people in Rhode Island [while the NEIP] w[as] in charge of all the paperwork, any filings, all that kind of paperwork that they would do." Id. at 39:6-10.

In 2004, Ms. Waters filed a miscellaneous petition for deoxyribonucleic acid (DNA) testing in the Tempest case. Id. at 57:6-13. Once this petition was granted, she began "working with [the Attorney General]'s office trying to get the testing in order of what would be tested when and where." Id. at 58:11-12. Over the course of the next decade, she worked closely with the Rhode Island Department of Health and Orchid Cellmark to have DNA analysis performed on blood and hair recovered from the scene. She also sought to recover evidence that had been lost, ultimately finding some—while critical pieces such as Doreen Picard's sweater, which seemingly vanished in the chaos that was the crime scene at 409 Providence Street, remain lost. Id. at 63:11-64:2. Furthermore, notwithstanding some roadblocks outside Mr. Tempest's control—including when the law firm where the NEIP was housed in 2006 "fell apart," id. at 99:24, and when Harvard Law School's innocence project team failed to "adequate[ly] review" his file in the academic year of 2010 (Tr. 14:8-16, Feb. 6, 2015)—Mr. Tempest and his legal team did not falter. Though requests for DNA testing began in 2004, the last results came over a decade later in 2015, forming the body of a core claim within the instant petition—newly discovered evidence. Additionally, it was not until late 2009 that the NEIP expanded its case review to include evaluation of non-DNA postconviction issues, which now comprise the majority of the petition before the Court. Id. at 12:13-21.

This marked doggedness in pursuit of relief by Mr. Tempest, his friends, family, and pro bono legal team[15] does not even begin to approximate the Rip Van Winkle-esque slumber on one's rights necessary for a finding of laches. Compare Harris v. Pulley, 885 F.2d 1354, 1367 (9th Cir. 1988) (finding no laches in habeas case where "counsel acted with reasonable diligence") with Lake Caryonah Improvement Ass'n v. Pulte Home Corp., 903 F.2d 505, 510 (7th Cir. 1990) (finding laches where plaintiff "behaved more like Rip Van Winkle than 'the early bird'"). Furthermore, despite the State's assertions to the contrary, Mr. Tempest's decision—in light of his limited resources—to focus on developing a potentially more promising claim rather than prioritize another does not somehow portend somnolence.[16]

Ultimately, "the applicability of the defense of laches in a given case generally rests within the sound discretion of the trial justice." Hazard v. E. Hills, Inc., 45 A.3d 1262, 1270 (R.I. 2012); accord Chambers of S.C., Inc. v. Cnty. Council for Lee Cnty., 315 S.C. 418, 421, 434 S.E.2d 279, 280 (1993) ("The court is vested with wide discretion in determining what is an unreasonable delay."). While laches is "an ad hoc balancing of equities," Scholes v. Lehmann, 56 F.3d 750, 761 (7th Cir. 1995), the Court, in its examination of the relevant case law, views the following factors, as assembled, particularly instructive: (1) the complexity of the claims brought; (2) the relative resources a petitioner has at his disposal; (3) contribution to delay by the opposing party; and, most importantly, (4) the overriding interests of justice.

Delay resulting from a "complicated claim" that "require[s] much more time to evaluate and prepare" weighs against a finding of laches. Lotus Dev. Corp. v. Paperback Software Int'l,

[15] In addition to six attorneys from McDermott Will & Emery, Mr. Tempest is also represented by local counsel, Lauren Jones and Ms. Waters.

[16] See SynQor, Inc. v. Artesyn Techs., Inc., No. 2:07-CV-497-TJW-CE, 2011 WL 2729214, at *6 (E.D. Tex. July 13, 2011) (finding no laches in analogous patent context where plaintiff "had limited resources and had to prioritize which claims to pursue at which times").

740 F. Supp. 37, 82 (D. Mass. 1990). "Delay has been held permissible, among other reasons, . . . when it is used to evaluate and prepare a complicated claim[.]" Danjaq LLC v. Sony Corp., 263 F.3d 942, 954 (9th Cir. 2001) (internal citations omitted). Importantly, where "the length of the investigation is a reflection of the complexity of the fact pattern[,] [the resulting delay] does not support a laches defense." Sec. & Exch. Comm'n v. Gulf & W. Indus., Inc., 502 F. Supp. 343, 348 (D.D.C. 1980); see also Blyer v. Domsey Trading Corp., No. 91 CV 1304, 1991 WL 148513, at *2 (E.D.N.Y. July 30, 1991) (finding delay "not excessive given the complexity of the case").

To begin, the Court notes that the State's attempt to meet its burden of proof in establishing its defense of laches falls woefully short, resting entirely on its cross-examination of witnesses and the offer of nine death certificates into evidence. See Raso, 884 A.2d at 395 (R.I. 2005) (holding that "the state has the burden of proving by a preponderance of the evidence that the applicant unreasonably delayed in seeking relief"). Despite its insistence that Mr. Tempest could have—at some undefined "earlier" time—utilized the Rhode Island Public Defender's Office or a court appointed attorney in developing his comprehensive postconviction petition, the State put forth no witness in support of such an assertion. Indeed, the State has failed to prove that Mr. Tempest's decision not to utilize the Public Defender's Office was somehow unreasonable; it has presented no evidence that the Public Defender's Office would have been able to a) take the case; b) dedicate sufficient resources to developing the present claims; or c) bring the petition faster than Mr. Tempest's counsel. See Louro v. State, 740 A.2d 343, 344 (R.I. 1999) (noting the "limited resources" of the Rhode Island Public Defender's Office).[17]

[17] Any comment made in reference to the Rhode Island Public Defender's Office is in no way meant to disparage that office. This Court holds the Rhode Island Public Defenders in the highest regard in its efforts to provide highly competent representation to its clients within the

Ultimately, the Herculean task of investigating Mr. Tempest's case cannot be understated. At the outset, Mr. Tempest struggled to find anyone willing to take his case due to the staggering enormity of such an undertaking. Simply put, the breadth and scope of the case are considerable to say the least—any analysis by a putative legal team would require not only examination of the evidence gathered at the crime scene but also the fastidious scrutinizing of the paper trail of police and trial counsel's records leading up to, and through, the trial ten years later. Furthermore, once a defense team was assembled, they were forced to clear hurdle after hurdle in pursuing the instant petition; e.g., conflicting reports, a myriad of witnesses with contradictory statements, faded memories, and missing physical evidence. In fact, numerous witnesses involved in the preparation of the instant petition testified to the factual labyrinth encountered by any investigator bold enough to venture to tackle the case.

Mr. Yant, in the course of his work as a private investigator for twenty-four years and author of Presumed Guilty: When Innocent People Are Wrongly Convicted, has personally been involved in hundreds of so-called wrongful conviction cases. (Tr. 27:12-28:3, Feb. 5, 2015.) Of those hundreds of investigations—sixteen of which were successful, including two cases in which the petitioner had been initially sentenced to death—Mr. Yant noted that "only . . . one other case . . . was as complicated as the Tempest case." Id. at 33:22-23. Similarly, Gretchen Bennett, former Director of the NEIP, stated that this case was "without question the most complex, . . . [and] the most difficult . . . case[] that came through NEIP during [her] tenure there." (Tr. 12:9-12, Feb. 6, 2015.) Indeed, the State—after assembling a team of four seasoned

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limits of its staff and resources which are beyond its control. Moreover, it is obvious that as many of the witnesses who testified against Mr. Tempest possessed lengthy criminal records, it is highly probable that the Public Defender's Office would have declined representation due to a conflict of interest.

attorneys to defend this petition—conceded in argument that this "was a complex massive case." Id. at 11:7-8.

With this in mind, the delay of approximately twenty years, while staggering on a superficial level, is of no moment. "[T]he mere lapse of time does not constitute laches." Hyszko v. Barbour, 448 A.2d 723, 727 (R.I. 1982). This is especially true in the postconviction context, where the investigation of a case frequently spans decades before facts surface such that it becomes ripe for review. The average length of incarceration for a falsely convicted prisoner exonerated by the Innocence Project is 14 years.[18] (http://www.innocenceproject.org/free-innocent/exonerating-the-innocent, retrieved Apr. 17, 2015 at 3:11 p.m.). The number is even higher in cases involving non-DNA claims. (Tr. 19:4-5, Feb. 6, 2015, testimony of Ms. Bennett) (stating that the national average for such claims is "somewhere around 18 years"). As such, "the cases recognize the great difficulty involved inasmuch as these cases are complex and call for painstaking preparation, all of which takes time." United States v. Lee Way Motor Freight, Inc., 625 F.2d 918, 935 (10th Cir. 1979) (rejecting laches defense in analogous context). After substantial effort by the NEIP working in conjunction with Suffolk University Law School, which reviewed and prepared this matter for referral, McDermott Will & Emery committed six lawyers to this case, expended over 6000 attorney and staff hours, and spent in excess of $161,000 in investigatory expenses since 2012 in bringing Mr. Tempest's petition. (Aff. Michael Kendall, Ex. 138.) As is readily apparent, such pro bono services exhaust significant firm resources, and the State has offered no evidence that these services were rendered in an inefficient manner or without justification. Moreover, these efforts—both in labor and financial

[18] As one example of the time between incarceration and release, James Bain spent thirty-five years in prison and was finally "freed December 16, 2009, after new DNA testing demonstrated his innocence of a 1974 Lake Wales kidnapping and rape of a nine-year-old boy." Jesse H. Diner, A Plea to Learn from Past Injustices, Fla. B.J., Apr. 2010, at 6, 8.

expense—further demonstrate the obstacles that a public defender or appointed counsel would have faced in representing Mr. Tempest.

Analogously, with regard to habeas petitions, federal courts in the past have looked to Rule 9(a),[19] "based upon the equitable doctrine of laches[,]" to determine whether to consider the merits of such a claim. Davis v. Dugger, 829 F.2d 1513, 1518 (11th Cir. 1987). As the Eleventh Circuit noted, under this regime, "none of [its] prior decisions upholding Rule 9(a) dismissals [of habeas petitions] have involved delays of less than fifteen years between sentencing and the filing of the federal habeas petition." Id. at 1519. In fact, in applying Rule 9(a), federal courts refused dismissal even where the habeas petition was brought decades after conviction. See e.g., Myers v. Wash., 646 F.2d 355, 361-62 (9th Cir. 1981) aff'd on remand, 702 F.2d 766 (9th Cir. 1983) (internal citations omitted) (reaching merits despite twenty-year delay where "appellant could not have had knowledge of the grounds for his petition by the exercise of reasonable diligence before the prejudice occurred").

Furthermore, before the creation of Rule 9(a), circuit courts also similarly declined a finding of laches raised in response to delayed habeas petitions. See Hairston v. Cox, 459 F.2d 1382, 1386 (4th Cir. 1972) (finding no laches despite twenty-six-year delay between finality of

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[19] Rule 9(a) of the Rules Governing Section 2254 Cases in the United States District Courts, 28 U.S.C., provided as follows:

> "Delayed Petitions. A petition may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred."

The Court notes that the introduction of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) "superceded Rule 9(a) and, thus, replaced the doctrine of laches with a bright-line limitations period." Lee v. Sec'y, Dep't of Corr., No. 1:12-CV-00169-MP-GRJ, 2014 WL 204834, at *2 (N.D. Fla. Jan. 16, 2014).

conviction and filing for federal habeas relief); Hamilton, 436 F.2d at 1326 (same despite a thirty-eight-year delay); Hawkins v. Bennett, 423 F.2d 948, 951 (8th Cir. 1970) (same despite forty-two-year delay). As noted by Justice Scalia, prior to the AEDPA, "the passage of time alone could not extinguish the habeas corpus rights of a person subject to unconstitutional incarceration . . . [and] this doctrine was so well entrenched that the lower courts regularly entertained petitions filed after even extraordinary delays." Day v. McDonough, 547 U.S. 198, 215 (2006) (Scalia, J., dissenting). Accordingly, the chronological interval between Mr. Tempest's conviction and petition is neither unique nor dispositive. Furthermore, the length of time taken to develop the instant petition is particularly understandable in light of Mr. Tempest's limited ability, while incarcerated, to pursue the investigation necessary to bring these claims in a case which all parties agree is both massive in scope and inexorably complex.

With regard to the resources of the petitioner, the State's suggestion that Mr. Tempest's station in life is irrelevant[20] "is reminiscent of Anatole France's biting comment that 'The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.'" Powell v. Zuckert, 366 F.2d 634, 638 (D.C. Cir. 1966) (quoting Griffin v. Illinois, 351 U.S. 12, 23 (1956) (Frankfurter, J., concurring)). As the Powell Court stated,

> "The law need not be so blind. If poverty creates a barrier to litigation in particular cases, a court, in applying the equitable doctrine of laches, must open its eyes to this fact. If, as in this case, the evidence reveals diligence on plaintiff's part in attempting to overcome the barrier, then he has not slept on his rights and laches should be denied." Id.

[20] See State's Post-Hearing Memorandum at 10 (arguing that "Tempest [ ] had the means to seek post-conviction relief" sooner).

Throughout Mr. Tempest's quest for postconviction relief, he was left to the charity of family, friends, and pro bono legal assistance to push his case forward. See South Carolina v. Stinney, Order Vacating Judgment at 9 (S.C. Cir. Ct. Dec. 17, 2014) (on file with author) (stating that, in granting coram nobis where defendant had been executed seventy years prior, "[w]hile this Court would have preferred this motion been brought twenty-five years earlier, . . . it is only now that legal counsel has offered pro bono services in an attempt to remedy a potential injustice")[21]; see also Horace v. Wainwright, 781 F.2d 1558, 1565 (11th Cir. 1986) (finding no laches where habeas petitioner "lacked funds and knowledge to take advantage of a lawyer's advice as to what, if any, protections were available to him"); Adam v. Adam, 624 A.2d 1093, 1096 (R.I. 1993) (holding that "plaintiff had an adequate excuse for delaying her claim" insofar as she "could not afford to retain an attorney").

Ms. Bennett of the NEIP testified that the case required "[v]ery brave counsel with significant resources." (Tr. 15:10, Feb. 6, 2015.) Ms. Munschy's courage is apparent in her tireless efforts to aid Mr. Tempest with his case, expending significant time and money—despite having no legal background—in order to further gather information supporting Mr. Tempest's claim of innocence. Ms. Waters' bravery is self-evident as well in her stubborn pursuit of the instant case for over a decade despite no personal remuneration. Furthermore, the substantial costs and attorney hours expended by McDermott Will & Emery as well as the NEIP demonstrate the expanse of resources necessary to properly delve into such an investigation.

Additionally, the Court takes particular note of the fact that a significant component of Mr. Tempest's claim—DNA analysis of crime scene evidence—stems from the right of an

[21] It bears noting that in Rhode Island, "substitution of the postconviction remedy for the writs of error coram nobis and habeas corpus, respectively, effected a change in procedure, but not in substance." State v. Duggan, 414 A.2d 788, 792 n.4 (R.I. 1980).

indigent defendant to seek such testing at state expense, a path unavailable in Rhode Island until 2002 through the enactment of § 10-9.1-12.[22] Once this statute was passed, Ms. Waters filed a timely motion seeking, and eventually obtaining by court order, the right to proceed with potentially exculpatory DNA testing. In this case, the State was ordered to expend a significant amount of money for such analysis. As Dr. Rick Staub of Orchid Cellmark testified, such testing does not come cheap—analyzing a single hair bears a price tag of $2850. (Tr. 130:5-8, Mar. 13, 2015.) In the preparation of Mr. Tempest's petition, nine hairs were tested over the course of the last decade. Ultimately, the upfront costs alone in investigating Mr. Tempest's case reached the level of several hundred thousand dollars. Simply put, this was no small undertaking—likely not within the resources of our Public Defender's Office[23] or a private attorney from the court appointment list.

Next, the Court turns to examine whether the State contributed to the delay in bringing the instant petition. While Mr. Tempest tries to avail himself of the doctrine of unclean hands—i.e., that whoever "comes into Equity must come with clean hands"—he does so fruitlessly. In re Hat, 363 B.R. 123, 139 (Bankr. E.D. Cal. 2007). Such a doctrine "'becomes operative only when a complainant must depend on his own improper conduct to establish his rights against the other parties to the suit.'" Sch. Comm. of Pawtucket v. Pawtucket Teachers Alliance, Local No. 930, AFT, AFL, 101 R.I. 243, 257, 221 A.2d 806, 815 (1966) (quoting Cirillo v. Cirillo, 77 R.I.

[22] The Court pauses to note that, as of July 2015, such DNA testing in Rhode Island has expanded to include all those who have been convicted—not simply those currently incarcerated. Sec. 10-9.1-11.

[23] Ms. Bennett spoke with Rhode Island public defender, Michael DiLauro, whom she regularly consults with in Rhode Island innocence project cases. While Ms. Bennett never explicitly asked the Public Defender's Office for assistance—due to her belief that the office lacked the resources to handle the case—Mr. DiLauro had no recommendations regarding private counsel capable of representing Mr. Tempest nor did he suggest that his office undertake Mr. Tempest's representation. (Tr. 16:24-17:21, Feb. 6, 2015.)

223, 226, 74 A.2d 440, 76 A.2d 71, 442 (1950)). The State does not raise the shield of laches up as a sword after having fraudulently interfered with Mr. Tempest's petition. See Cohn v. Kramer, 124 F.2d 791, 800 (6th Cir. 1942) ("The law of laches should be used as a shield and not a sword."). Even in the context of the alleged Brady violation, the State did not improperly interfere with Mr. Tempest's search for records after his conviction or wrongfully inhibit him from bringing the petition sooner. Cf. Meader v. Norton, 78 U.S. 442, 458 (1870) (holding that a defense of laches "cannot prevail where the relief sought is grounded on a charge of secret fraud").

Notwithstanding the lack of unclean hands, the State did contribute to Mr. Tempest's delay in substantial—albeit legally proper—ways, particularly with regard to the DNA testing. See N. Pac. Ry. Co. v. Boyd, 177 F. 804, 824 (9th Cir. 1910), aff'd, 228 U.S. 482 (1913) ("Where the party interposing a defense of laches has contributed to or caused the delay, he cannot take advantage of it."); Walker v. Oak Cliff Volunteer Fire Prot. Dist., 807 P.2d 762, 768 (Ok. 1990) ("When delay is caused by an adverse party, that party may not use the defense to his/her benefit."). Despite having obtained a conviction based entirely on circumstantial evidence, the State vigorously opposed Mr. Tempest's request for DNA testing (Tr. 57:22-23, Mar. 16, 2015), and filed a Motion for Extension of Time to review their records and to review their own transcripts, ultimately delaying the grant for testing by six months. Id. at 58:1-8. Additionally, the State caused a delay of ten months before allowing testing of a sample that had to be consumed for a proper assay. (Tr. 34:19-35:9, Mar. 31, 2015.) As such, "the [State] w[as] not exactly cooperative. [It] fully exercised [its] rights and then some, all of which uses time." Lee Way Motor, 625 F.2d at 935 (denying laches defense).

Finally, this Court must consider the overriding interests of justice. Despite the State's apparent wishes to the contrary, "[i]nvocation of the word 'laches' does not automatically lock the courthouse door." Matter of Henderson, 577 F.2d 997, 1002 (5th Cir. 1978). Ultimately, in order for laches to bar Mr. Tempest's claims, the State "must show [that] it would be inequitable to allow [him] to enforce his legal rights." Kipperman v. Onex Corp., 411 B.R. 805, 887 (N.D. Ga. 2009) (citing Angel Flight of Ga., Inc. v. Angel Flight Am., Inc., 522 F.3d 1200, 1207 (11th Cir. 2008)). Mr. Tempest has leveled serious charges against the Woonsocket Police Department and this state's Attorney General's Office. These allegations of a concerted effort, borne of ill will towards the Tempest family, to manipulate witness statements and physical evidence in order to paint a portrait of Mr. Tempest as a violent, wicked and remorseless killer must be closely scrutinized. "The doctrine of laches was never intended to protect a wrongdoer or to bring about an end which is inequitable and unjust." Messick v. Mohr, 10 N.E.2d 870, 873 (Ill. App. Ct. 1937). In light of Mr. Tempest's pointed accusations, this Court would be complicit in a gross miscarriage of justice if it were to simply slam the courthouse doors shut to such claims that strike at the heart of due process guarantees. See Moore v. Commonwealth, 357 S.W.3d 470, 495 (Ky. 2011), as modified on denial of reh'g (Nov. 23, 2011) (holding, in addressing whether laches bars postconviction relief in a particular case, that the alleged prejudice "is outweighed by the [state's] concomitant duty to pursue justice and serve the law, which is owed to everyone in this [state], including criminal defendants and convicted persons"); United States v. Mason, 497 F. Supp. 2d 328, 329 (D.R.I. 2007) ("[T]o deny the complainants in this case the opportunity to pursue their serious—and partially corroborated—allegations in a judicial forum, with its attendant guarantees of independence and impartiality, would be to render this Court nothing more than a shill of the government[.]").

The United States Supreme Court framed the issue best in Chessman v. Teets:

> "On many occasions this Court has found it necessary to say that the requirements of the Due Process Clause of the Fourteenth Amendment must be respected, no matter how heinous the crime in question and no matter how guilty an accused may ultimately be found to be after guilt has been established in accordance with the procedure demanded by the Constitution. Evidently it also needs to be repeated that the overriding responsibility of this Court is to the Constitution of the United States, no matter how late it may be that a violation of the Constitution is found to exist. . . . We must be deaf to all suggestions that a valid appeal to the Constitution, even by a guilty man, comes too late, because courts, including this Court, were not earlier able to enforce what the Constitution demands. The proponent before the Court is not the petitioner but the Constitution of the United States." 354 U.S. 156, 165 (1957) (emphasis added).

The Court concurs wholeheartedly with the immortal sentiments of the late Justice Harlan. It is imperative, for the sake of the inviolability of the Constitution of this great Nation, that "men incarcerated in flagrant violation of their constitutional rights have a remedy." Pa. ex rel. Herman v. Claudy, 350 U.S. 116, 123 (1956).

The Court finds—based upon the facts and circumstances presented—that the twenty-year period associated with the pursuit of this petition for postconviction relief was, without question, reasonable—not "inexcusable" nor "unexplained[.]" Raso, 884 A.2d at 396 (internal citations omitted). The cause of such delay was related to the evaluation and preparation of a series of exceptionally complicated claims requiring the substantial commitment of time and resources. The State has presented no evidence that the Public Defender's Officer or appointed counsel would have or could have brought such a petition on behalf of Mr. Tempest, never mind pursued such claims faster and more efficiently. Plainly, an evaluation of the totality of the circumstances reveals that Mr. Tempest evinced reasonable diligence in seeking postconviction relief.

Regardless of whether Mr. Tempest's accusations meet with success, any potential misconduct must be brought to light and conscientiously examined. The pinnacle importance of government transparency has been exalted by Justice Brandeis: "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman." L. Brandeis, Other People's Money and How the Bankers Use It, 89 (1914). Much "[l]ike a boil that . . . must be opened with all its pus-flowing ugliness to the natural medicines of air and light, injustice must likewise be exposed . . . to the light of human conscience and the air of national opinion[.]" Doe v. Marsalis, 202 F.R.D. 233, 239 (N.D. Ill. 2001) (quoting Martin Luther King, Jr.'s letter from the Birmingham County Jail, Apr. 1963). A thorough rummaging for truth ought not prejudice the State. Accordingly, the defense of laches fails.

B

Newly Discovered Evidence

In addressing a claim for postconviction relief on the grounds of newly discovered evidence, the Court applies a two-pronged test to determine whether such evidence necessitates the vacation of a petitioner's conviction. D'Alessio v. State, 101 A.3d 1270, 1275 (R.I. 2014). In order to satisfy the first prong, to wit, "the threshold prong[,] the evidence must be (1) newly discovered and not available at the time of trial; (2) it must not have been discoverable by due diligence; (3) it must be material, not simply cumulative or impeaching; and (4) it must be of the type that would likely change the verdict at trial." Id.

Under this threshold prong, the Court must determine whether the newly discovered evidence is either cumulative—in that it "tends to prove the same point as that of the other evidence offered"—or impeaching such that it is "not related to [the] defendant's guilt or

innocence and serves only to destroy the credibility of the [witness]." Id. at 1276 (internal citations omitted) (brackets in original). Relief '"is not required when the suppressed impeachment evidence merely furnishes an additional basis on which to impeach a witness whose credibility has already been shown to be questionable.'" United States v. James, 712 F.3d 79, 107 (2d Cir. 2013) (quoting United States v. Parkes, 497 F.3d 220, 233 (2d Cir. 2007)). Furthermore, in determining if a particular piece of evidence is material, it is well-settled that the "touchstone of materiality is a 'reasonable probability' of a different result[.]" Powers v. State, 734 A.2d 508, 514 (R.I. 1999) (quoting Kyles v. Whitley, 514 U.S. 419, 434 (1995)). A petitioner must show that the new evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Id. (quoting Kyles, 514 U.S. at 434)).

Upon satisfaction of this prong, the Court turns to examine whether the evidence is '"credible enough to warrant relief.'" D'Alessio, 101 A.3d at 1275 (quoting Ferrell v. Wall, 889 A.2d 177, 184 (R.I. 2005)). To make such a determination, the Court, in the exercise of its "independent judgment[,]" evaluates the information presented, making an "evidentiary determination" in light of "its experience with people and events in weighing the probabilities." Fontaine v. State, 602 A.2d 521, 524 (R.I. 1992) (internal citations omitted). Only upon satisfaction of both prongs is relief warranted. Id.

Mr. Tempest's postconviction relief petition refers to two distinct pieces of evidence that he asserts necessitate the vacation of his conviction: a deed casting doubt on the testimony of one of the prosecution's key witnesses, Ronald Vaz (Mr. Vaz), and DNA evidence proving that the hair found in the hand of Doreen Picard does not belong to him, but rather, as he claims, to some unknown assailant. The Court examines each claim in turn.

Mr. Tempest presents a deed from the land records of the Town of Burrillville, demonstrating that Mr. Vaz did not own his farm in Pascoag until approximately four months after the murder. This is of significance because Mr. Vaz testified at trial that:

a) Daniel Shaw (Mr. Shaw), alleged by the State at trial to be Mr. Tempest's accomplice, visited Mr. Vaz at his farm on the afternoon preceding the murder;

b) Mr. Shaw had visited Mr. Vaz at his farm on the day after the murder;[24]

c) Mr. Tempest spoke to Mr. Vaz the day after that, referencing what Mr. Shaw had told Mr. Vaz and saying he was in "some real bad trouble" and "[m]y father won't get me out of this one." (Trial Tr. 956:18-25.)

d) Mr. Tempest and Mr. Shaw had come to his farm the next weekend looking for a "throw-away gun" because Robert Monteiro (Mr. Monteiro), another alleged accomplice to the crime, "had said something to somebody about the murder[.]" Id. at 959:11, 960:19-20.

e) Mr. Tempest held similarly themed conversations with Mr. Vaz regarding his involvement in the murder when visiting the farm "probably every other weekend or every weekend at different times" over the span of "a year and a half." Id. at 963:16-19.

Obviously, if Mr. Vaz did not live on the farm until months after the murder,[25] such events could not have unfolded as he claimed.

[24] While Mr. Shaw's statements to Mr. Vaz during his visit were excluded from trial as hearsay, it was implicit in the testimony that Mr. Shaw had implicated Mr. Tempest in Doreen Picard's murder.

[25] At the postconviction relief hearing, Mr. Vaz conceded that he erred when testifying that he lived at the farm at the time of the murder:

> "Q: Is it fair to say that you occupied the farm prior to June of 1982?
>
> "A: No, I did not." (Tr. 21:16-18, Mar. 9, 2015.)

Despite this glaring inconsistency, evidence that "serves only to destroy the credibility of [a] witness" cannot provide grounds for postconviction relief. D'Alessio, 101 A.3d at 1276 (internal citation omitted). Here, "given the amount of impeachment evidence presented to the jury at trial regarding [Mr. Vaz's story], it would have been difficult to show that more information regarding [discrepancies in his claims] would shake any confidence in the verdict." State v. Drew, 79 A.3d 32, 39 (R.I. 2013). As it stood, Mr. Vaz's trial testimony was mortared with a hastily-made blend of inconsistencies and half-truths. Mr. Tempest's defense attorney, Mr. Dimitri, dutifully picked apart Mr. Vaz's testimonial house of cards during the course of cross-examination, thoroughly demolishing Mr. Vaz's credibility. In spite of this, a guilty verdict stuck. The suggestion that presenting the jury with yet another confounding discrepancy in Mr. Vaz's story would have caused the entire stack to come tumbling down is '"tantamount to our accepting a belief that if one were to paint one additional black stripe on a zebra, it would serve to disguise the zebra and conceal its identity as a zebra.'" State v. Evans, 725 A.2d 283, 290 (R.I. 1999) (quoting Mastracchio v. Moran, 698 A.2d 706, 714 (R.I. 1997)).

Further, such evidence is '"merely impeaching'" insofar as '"it is collateral in nature and does not have a direct bearing on the merits of the trial under review."' Larchick v. Diocese of Great Falls-Billings, 208 P.3d 836, 845 (Mont. 2009) (quoting State v. Clark, 197 P.3d 977 (Mont. 2008)). In determining if a matter is collateral, our Supreme Court utilizes a bright-line test of "whether the fact could have been shown in evidence 'for any purpose independently of the contradiction.'" State v. Souza, 708 A.2d 899, 904 (R.I. 1998) (quoting 3A Wigmore on Evidence, § 1003 (Chadbourn rev. 1970)) (emphasis in original). The precise date and location where Mr. Tempest confessed simply holds no bearing on his guilt or innocence. As a party "cannot introduce extrinsic evidence for impeachment purposes[,]" Mr. Tempest would have

found himself unable to use the land evidence records at trial. State v. Briggs, 886 A.2d 735, 753 (R.I. 2005); see State v. Price, 66 A.3d 406, 418 (R.I. 2013) (upholding denial of new trial where newly discovered "documents themselves could not be admitted but rather would go towards impeachment of the witness"). Accordingly, this deed serves only "to impeach a witness who was substantially impeached at trial and[,] even worse, this evidence was designed to impeach on a collateral matter." State v. Binns, 732 A.2d 114, 118 (R.I. 1999). As such, the deed to Mr. Vaz's farm—casting doubt on his testimony regarding his alleged meetings there with Mr. Tempest—does not require setting aside Mr. Tempest's conviction.

The second piece of evidence—which in actuality represents the sum of myriad pieces of physical evidence recovered from the crime scene—is the DNA test results that Mr. Tempest claims are irrefutable proof that someone else was the assailant. Here too, after a thorough examination of the facts presented, such "proof" falls short.

Doreen Picard was found with thirty-six hairs "clutched in the fingers" of her left hand. (Trial Tr. 1407:7, Apr. 8, 1992) (Testimony of Dr. Arthur C. Burns). During closing argument, Mr. Ryan argued that Doreen Picard "was protecting herself and she grabbed her scalp and her hair as any person would do suffering that unbelievable horror[.]" (Trial Tr. 2071:13-15, Apr. 20, 1992.)[26] In the course of Mr. Tempest's preparation of the instant petition, three of these hairs were found to contain sufficient DNA to be tested and compared to the DNA profiles of persons related to the case, including Mr. Tempest. All three hairs were subjected to mitochondrial DNA (mtDNA) testing. As Dr. Rick Staub (Dr. Staub) of Orchid Cellmark laboratories explained, mtDNA is found in the mitochondria, an "important part of [the] cell for

[26] It should be noted that the hairs found in Doreen Picard's right hand were determined through DNA testing to be her own hair and contained roots, connoting she had pulled her own hair out during the assault as Mr. Ryan had stated at closing argument. The hairs found in her left hand serve as the basis of this discussion.

energy purposes" that is found "in the outside part of the cell called the cytoplasm." (Tr. 9:20-22, Mar. 13, 2015.) mtDNA is unique insofar as "you get all of your mitochondrial DNA from your mother[.]" Id. at 9:22-23.

The first hair, labeled 5145-004-A1 (Hair 1), when subjected to such testing and compared to known samples, excluded "Doreen Picard [ ], Susan Laferte [ ], and Raymond Tempest [ ], as well as any of their maternal relatives" as donors. Ex. 78 (Orchid Cellmark Laboratory Report, Feb. 28, 2006). The other two hairs, labeled FR14-0329-01 (Hair 2) and FR14-0329-02 (Hair 3),[27] were similarly subjected to mtDNA testing. With regard to Hair 2, "Doreen Picard [ ], Susan Laferte [ ], Raymond Tempest [ ], . . . Lisa [Ladue] [ ], and Robert J. Monteiro [ ] [we]re excluded as contributors of the mtDNA obtained from this sample." Ex. 94 (Cellmark Forensics Report of Laboratory Examination, Jan. 30, 2015). The donor of Hair 1 was also excluded from being the donor of Hair 2. Id.

The results as to Hair 3 were less clear. Only Ms. Laferte and Ms. Ladue were ruled out as donors. In contrast, Doreen Picard and Mr. Monteiro could not be excluded. In fact, because of the partial nature of the mtDNA profile retrieved, only 68.18% of Caucasians could be excluded as contributors of the hair. With regard to Mr. Tempest, the results were inconclusive. The sample retrieved from Mr. Tempest matched the partial mtDNA profile retrieved from Hair 3 on all but a single base pair. As Dr. Staub explained, it is "a very likely possibility" that Mr. Tempest is excluded, but such a conclusion cannot be drawn to a reasonable degree of scientific certainty as this result "could mean that he is not excluded and there was a mutation in his DNA." (Tr. 108:18-19, Mar. 13, 2015.) Further, while Hair 2 and Hair 3 have inconsistent

[27] During the course of the postconviction relief hearing, such hairs were referred to as Hair 7 and Hair 14, respectively. For simplicity's sake, the Court will designate these as Hair 2 and Hair 3.

mtDNA profiles, id. at 148:6-9, the donor of Hair 1 could not be excluded as that of Hair 3. As such, the three hairs come from at least two, and perhaps three, distinct persons.

After thorough testing over the course of the last decade, the fact remains that not a shred of physical evidence ties Mr. Tempest to the scene. This paucity of proof, however, is not dispositive. "Many cases do not have physical evidence associated with them." Ariel W. Dutelle, An Introduction to Crime Scene Investigation, at 33 (Jones and Bartlett Publishers, LLC 2011). Indeed, the Court is mindful that "absence of evidence is not necessarily evidence of absence": Mr. Tempest could very well have been in the basement during the assault. Bailey v. TitleMax of Ga., Inc., 776 F.3d 797, 803 (11th Cir. 2015). As such, the question before this Court is whether this new testing—demonstrating that trace evidence recovered from the scene fails to match Mr. Tempest—is "of the type that would likely change the verdict at trial." D'Alessio, 101 A.3d at 1275. The corresponding answer is resoundingly clear: Mr. Tempest has failed to place these new test results within a coherent narrative undermining his conviction. See State v. Brown, 798 A.2d 942, 951 (R.I. 2002) (holding that a petitioner "bears the burden of satisfying" the test for newly discovered evidence).

From the facts presented at hearing, there is no indication that Ms. Picard pulled out the hair of any assailant—nor was any testimony to that effect adduced at Mr. Tempest's trial. First, the evidence reflects that the hairs found in Ms. Picard's left hand come from at least two different people. As such, in order to assert that these hairs belong to her assailants, Mr. Tempest must postulate that Doreen Picard pulled out the hair of one of her attackers, kept those hairs between her fingers, and then, with the same hand, proceeded to tear out the hair of the other—intermingling the two sets of hairs in the course of being beaten to death with a lead pipe. Perhaps more damningly, there is no indication that any of the hairs found in Doreen Picard's

left hand had been ripped out of *anyone's* scalp. Instead, the evidence adduced at hearing suggests the opposite. In the undisputed testimony of the hair-analysis expert presented by the State: "Certainly, with as many hairs as this, you would expect to see some roots" had the hairs actually been pulled. (Tr. 33:25-34:1, Mar. 23, 2015 (Testimony of Jason Beckert).) However, not a single hair found in the left hand of Doreen Picard had its root attached. (Tr. 128:1-3, Mar. 13, 2015 (Testimony of Dr. Staub); (Tr. 35:13-15, Mar. 23, 2015 (Testimony of Jason Beckert).) Rather, these hairs were all either cut or broken. (Tr. 35:16-22, Mar. 23, 2015.)

As noted by the Ninth Circuit, "[o]nly hairs with anagen roots can be used to identify an assailant because only they, as contrasted with a cut or broken hair, can indicate that the victim may have pulled the perpetrator's hair in a struggle." Cooper v. Brown, 510 F.3d 870, 881 (9th Cir. 2007). Indeed, Cooper provides an alternative explanation for why thirty-six hairs were found in Doreen Picard's left hand:

> "The hairs adhered to the victims' bodies, including their hands, because there was a large amount of blood on the victims and a large amount of hair on the debris-ridden carpet. . . . [T]he cut and shed human hairs adhered to the bloodied victims' hands because the victims came in contact with the carpet when they were dying on the floor." Id., App'x A at 930 (S.D. Cal. 2006) (Huff, J.) (Order Denying Successive Petition for Writ of Habeas Corpus).

As Doreen Picard was assaulted in a less-than-sterile basement—used as a laundry room by all residents of the building—it is certainly not inconceivable that her bloodied hand accumulated scraps of hair along the concrete floor near the washer and dryer while she was being beaten and lay dying.

Accordingly, with regard to such mtDNA assays of hair and the decidedly more peripheral forensic testing,[28] the newly discovered evidence proffered by Mr. Tempest does not import '"a 'reasonable probability' of a different result[.]'" Powers, 734 A.2d at 514 (quoting Kyles, 514 U.S. at 434). Indication that the hairs in Doreen Picard's left hand may have been collected from the cellar floor of 409 Providence Street instead of wrested from her own head (as asserted by the State at trial) certainly "is not of the type that would undermine the confidence in the verdict." D'Alessio, 101 A.3d at 1277. In order to establish the materiality of new evidence, "there must exist a nexus between the new evidence and the outcome of the trial." Id. at 1276 (citing Bleau v. Wall, 808 A.2d 637, 644 (R.I. 2002)). The focus of the State's case, as exemplified by Mr. Ryan's closing argument, related to Mr. Tempest's suspicious actions in the wake of the murder rather than any physical evidence retrieved from the scene. Plainly, it was not as if Mr. Ryan identified the hairs in Doreen Picard's hand as belonging to Mr. Tempest and hailed such a revelation as the crux upon which the prosecution would rest. Such a shift in the precise reason why her left hand contained hairs, without more, does little to cast doubt on the jury's verdict. Accordingly, Mr. Tempest's newly discovered evidence related to the "Vaz Farm" deed and the DNA analysis is found lacking in the materiality necessary to vacate his conviction.

C

Suppression of Evidence

"[T]he Due Process Clause of the United States Constitution, as interpreted by the United States Supreme Court in Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963),

[28] Mr. Tempest has put forth other evidence, similarly demonstrating a dearth of physical proof linking him to the scene, such as a semen stain on Doreen Picard's jeans determined to belong to her boyfriend, Raymond Beaulieu.

and its progeny, 'requires that the state provide a criminal defendant with certain information.'" DeCiantis v. State, 24 A.3d 557, 570 (R.I. 2011) (quoting State v. McManus, 941 A.2d 222, 229 (R.I. 2008)). This certain information "encompass[es] impeachment material as well as purely exculpatory evidence." Cronan ex rel. State v. Cronan, 774 A.2d 866, 880 (R.I. 2001) (citing United States v. Bagley, 473 U.S. 667, 676 (1985) and United States v. Agurs, 427 U.S. 97, 107 (1976)). The purpose of such a rule is "to ensure that a miscarriage of justice does not occur" by compelling a prosecutor to "disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial." Bagley, 473 U.S. at 675.

Mr. Tempest alleges three distinct Brady violations: (1) the failure by the police to disclose statements by Kevin McMann and John McMann to the effect that they had never allowed Mr. Monteiro to borrow their maroon car; (2) the prosecution's suppression of new statements made by Donna Carrier (Ms. Carrier) in the weeks preceding the trial; and (3) the failure to provide Mr. Tempest with information that Mr. Vaz discussed with police related to his knowledge regarding the commission of three unrelated murders.[29] The Court examines each in turn.

1

McManns' Statements Regarding Maroon Car

With regard to this first claim, the Court finds that John McMann told the police he did not loan his maroon car to Mr. Monteiro. (Tr. 73:21-22, Feb. 10, 2015 (Testimony of Sharon McMann-Morelli).) His son, Kevin McMann, who often borrowed the car, also informed law

[29] In Mr. Tempest's Second Amended Petition, he also attempts to resurrect the spectre of the deed for Mr. Vaz's farm, claiming that the State had the deed in its possession and failed to disclose it before trial. However, Mr. Tempest has declined to further press this issue. His reason for doing so is clear: there is simply no evidence in support of such a proposition. See Tr. 118:17-18, Mar. 17, 2015 (Testimony of James Ryan) (stating that he "didn't become aware that Vaz's deed was an issue until five or six years ago").

enforcement that he never loaned it out. (Tr. 110:6-9, Feb. 5, 2015 (Testimony of Kevin McMann).) These reports were made to the Woonsocket Police Department while the Tempest trial was ongoing. (Tr. 73:10-25, Feb. 10, 2015 (Testimony of Sharon McMann-Morelli)); (Tr. 103:12-13, Feb. 5, 2015 (Testimony of Kevin McMann).)

This revelation is of significance because the State's theory, as presented at trial, was that Mr. Monteiro borrowed the McMann car and drove Mr. Tempest to 409 Providence Street, where he would ultimately commit the murder of Doreen Picard. Ms. Ladue testified that upon coming home on the day of the murder, she saw a maroon car in the driveway of 409 Providence Street. Sherri Richards (Ms. Richards), who watched Mr. Tempest's children on the afternoon of February 19, 1982, attested at trial that she had seen Mr. Tempest standing outside a maroon car while talking to Mr. Monteiro that day. (Trial Tr. 757:5-10, Apr. 2, 1992.) Mr. Monteiro, she claimed, used to borrow this car from Kevin McMann. Id. at 757:13. The statements by the McManns to the police that they had never loaned the car to Mr. Monteiro are clearly exculpatory in that they suggest that Ms. Richards was mistaken—if Mr. Monteiro was not driving the McManns' car on the day of the murder, the maroon car spotted outside 409 Providence Street likely did not contain Mr. Tempest.

Nevertheless, there is no indication that Mr. Ryan ever learned of these statements, and, as such, this evidence was never disclosed to defense counsel. (Tr. 81:6-16, Mar. 24, 2015 (Testimony of William C. Dimitri).) Instead, Mr. Dimitri received a letter from John McMann establishing only the date of sale of the maroon car. Id. at 57:3-24.

Where the "prosecution . . . fails to disclose evidence whose high value to the defense could not have escaped its attention[,]" postconviction relief is mandatory. See Wyche, 518 A.2d at 910 (internal quotations omitted). However, here, there is no indication that the

prosecution ever learned of these interviews by police. Be that as it may, mere lack of awareness on the part of the Attorney General's Office does not exclude the possibility of a Brady violation. Due process "impose[s] a duty on the prosecutor to learn of any favorable evidence 'known to the others acting on the government's behalf,' whether or not requested by the defense." D'Alessio, 101 A.3d at 1278 (quoting Kyles, 514 U.S. at 437). While the duty to disclose falls squarely on the prosecutor himself, "law enforcement officers have a correlative duty to turn over to the prosecutor any material evidence that is favorable to a defendant[.]" Drumgold v. Callahan, 707 F.3d 28, 38 (1st Cir. 2013).

Although "a prosecutor's office cannot get around Brady by keeping itself in ignorance, or compartmentalizing information about different aspects of a case[,]" there is no indication that Mr. Ryan purposefully avoided learning about the McManns' statements in a tactical effort to skirt the need for disclosure. Carey v. Duckworth, 738 F.2d 875, 878 (7th Cir. 1984). Nevertheless, despite this apparent ignorance, Mr. Ryan was "responsible for learning of and disclosing all exculpatory evidence known to the police."[30] Newsome v. McCabe, 256 F.3d 747,

[30] The Court pauses to note that Mr. Ryan was dealing with a fractured and dysfunctional police department throughout his work on this case. Indeed, his frustration with this state of affairs was evident in his candid statements at the postconviction hearing:

> "Q: The environment and atmosphere in the Woonsocket Police Department, did that in any way inhibit your ability to investigate this case?
> "A: Absolutely
> [. . .]
> "Q: During the course of your involvement in this investigation, did you get resistance from members of the Woonsocket Police Department, you personally?
> "A: Yes.
> "Q: You and Sergeant Pennington together, did you get resistance from other members of the Woonsocket Police Department?
> A: Yes.

752 (7th Cir. 2001). Thus, although any nondisclosure by the State appears to be wholly inadvertent, it still failed to fulfill its duty to disclose.

In such scenarios "where a nondisclosure is not deliberate, [as here,] [an] applicant [is] required to make a showing of materiality[.]" DeCiantis, 24 A.3d at 571 (emphasis in original). In order to show that exculpatory evidence is material, a petitioner must demonstrate that "'there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" State v. Chalk, 816 A.2d 413, 419 (R.I. 2002) (quoting Strickler v. Greene, 527 U.S. 263, 280 (1999)). "'A reasonable probability of a different result is [ ] shown when the government's evidentiary suppression undermines confidence in the outcome of the trial.'" Evans, 725 A.2d at 290 (quoting Kyles, 514 U.S. at 434) (internal quotations omitted).

In making such a determination, the court must "'undertake a careful, balanced evaluation of the nature and strength of both the evidence the defense was prevented from presenting and the evidence each side presented at trial.'" Bailey v. Rae, 339 F.3d 1107, 1119 (9th Cir. 2003) (quoting Boss v. Pierce, 263 F.3d 734, 745 (7th Cir. 2001)). "What might be considered insignificant evidence in a strong case might suffice to disturb an already questionable verdict." United States v. Robinson, 39 F.3d 1115, 1119 (10th Cir. 1994). In applying this standard, the Court remains mindful that a petitioner need not go so far as to demonstrate that he "'would more likely than not have received a different verdict with the evidence[.]'" Strickler, 527 U.S. at 289 (quoting Kyles, 514 U.S. at 434).

"Q: Did you get support from the Chief of Police for your investigations?
"A: Very little." (Tr. 32:1-36:12, Mar. 18, 2015.)

Here, the assertion that Mr. Tempest was a passenger in a maroon car on February 19, 1982 was integral to the State's case—which, it bears noting once again, was based entirely on circumstantial evidence. The statement by Ms. Ladue that she saw a maroon car upon returning home the afternoon of the murder, and the corresponding testimony from Ms. Richards that she saw Mr. Tempest standing by a maroon car driven by Mr. Monteiro that same afternoon, constitute the only piece of evidence linking Mr. Tempest to the crime scene at the appropriate time. As such, evidence tending to suggest that Mr. Tempest was not in a maroon car that day is enough to '"undermine[] confidence in the outcome of the trial.'" Evans, 725 A.2d at 290 (quoting Kyles, 514 U.S. at 434).

While the evidence suggests that the McManns spoke to the police during the course of the trial, the tardiness of this revelation did not relieve the State of its duties under Brady, despite its argument to the contrary. "Although Brady claims typically arise from nondisclosure of facts that occurred before trial, they can be based on nondisclosure of favorable evidence . . . that is unavailable to the government until trial is underway." United States v. Headman, 594 F.3d 1179, 1183 (10th Cir. 2010); accord Leka v. Portuondo, 257 F.3d 89, 100 (2d Cir. 2001) ("Brady requires disclosure of information that the prosecution acquires during the trial itself, or even afterward." (citing Imbler v. Pachtman, 424 U.S. 409, 427 n.25 (1976))); see also Dist. Attorney's Office for Third Judicial Dist. v. Osborne, 557 U.S. 52, 68 (2009) (suggesting that disclosure obligations continue until conviction). As such, Mr. Ryan failed to learn of these statements to police and relay this information to Mr. Tempest's counsel despite his obligation to do so. See Kyles, 514 U.S. at 437 (holding that an "individual prosecutor has a duty to learn of any favorable evidence known to . . . the police" and the corresponding responsibility to disclose such evidence).

Also, it should be noted that while defense counsel had in its possession a letter from John McMann relating to the maroon car, this letter applied only to the car's date of sale. (Tr. 57:3-24, Mar. 24, 2015 (Testimony of William C. Dimitri).) As this letter in no way indicated whether the car had been loaned to Mr. Monteiro, there is nothing to suggest that Mr. Tempest "knew or should have known of the essential facts permitting him to take advantage of that [undisclosed exculpatory] evidence." McManus, 941 A.2d at 230. Accordingly, being satisfied that the State failed in its duty to disclose such material exculpatory evidence, the Court finds that vacation of Mr. Tempest's conviction is constitutionally required.

2

Carrier's Pre-Trial Statements to Prosecution

Turning to Mr. Tempest's second claim, the Court examines the alleged nondisclosure of statements made by Ms. Carrier to law enforcement shortly before trial. Ms. Carrier testified at trial that Mr. Tempest admitted to carrying out the murder, confessing to her that Doreen Picard "came down the stairs at the wrong time [and] saw him hitting [Ms. Laferte]. He couldn't let her get away and he had to do her, too." (Trial Tr. 1112:12-15, Apr. 6, 1992.) Part of this confession included statements by Mr. Tempest to the effect that his brother, Gordon Tempest, could not find out about his involvement. While the credibility of her story was brought into question upon cross-examination, her testimony regarding Mr. Tempest's statements that his brother was unaware of his involvement in the brutal slaying went undisputed. However, a note from the prosecutor's file reveals that shortly before Mr. Ryan delivered his opening statement, Ms. Carrier had told the State that "Gordon Tempest had put the pipe in the closet" in an effort to conceal the murder weapon. (Tr. 35:13-14, Mar. 17, 2015 (Testimony of James Ryan).) This was the first time in the five years she had spoken with police that she mentioned Gordon

Tempest's involvement in a cover-up. Id. at 46:15-17. She also made a second disclosure that Mr. Tempest's children were excited on the morning of the murder because they were going to get a puppy. Not only was this revelation inconsistent with the undisputed evidence that the dog to be picked up by Mr. Tempest from Ms. Laferte was intended for John Allard, not the Tempest family, her awareness of the children's excitement would have also been impossible—Ms. Carrier did not live near Mr. Tempest on the day of the murder as she claimed.[31] Such discrepancies reflect a suspicious malleability in her recollection undercutting the credibility of her testimony. Nevertheless, these statements related to motive and the concealment of evidence were not disclosed to defense counsel. Instead, Mr. Ryan directed Ms. Carrier not to include such accounts before the jury. After learning these new details to her latest statement, he wrote in his notes, "too late, don't volunteer new info, will cause big problems." Id. at 36:20-21.

With respect to disclosure of exculpatory or impeaching evidence, the Rhode Island constitution "provides even greater protection to criminal defendants than" its federal counterpart. Chalk, 816 A.2d at 419. To this effect, our Supreme Court has "adopt[ed] a sliding-scale analysis based on the blameworthiness of the prosecution in failing to disclose the evidence." State v. Brisson, 619 A.2d 1099, 1102 (R.I. 1993). In expanding a defendant's constitutional rights beyond the requirements set forth by the United States Supreme Court, our jurisprudence provides that "the reason for the nondisclosure can be dispositive concerning the likelihood of a new trial." Id. In finding a violation, "[t]he easy cases . . . are where the prosecutor's suppression is 'deliberate,' by which we include . . . a considered decision to

[31] In this statement, Ms. Carrier also mentioned that she saw Mr. Tempest on the day of the murder. However, this discrepancy was disclosed before trial. One focus of her cross-examination was that Ms. Carrier had mixed up when Mr. Tempest lived in the same apartment building as her; she had erroneously believed they were in the same building at the time of the murder when, in actuality, he moved in around a year later.

suppress[.]" Lerner v. Moran, 542 A.2d 1089, 1092 (R.I. 1988) (quoting United States v. Keogh, 391 F.2d 138, 146-47 (2d Cir. 1968)). Our Supreme Court has noted that "[w]hen the failure to disclose is deliberate, this court will not concern itself with the degree of harm caused to the defendant by the prosecution's misconduct; we shall simply grant the defendant a new trial." Wyche, 518 A.2d at 910. In such cases, the materiality of the evidence to the case is of no moment; rather, the purposeful act of nondisclosure necessitates "automatic reversal." Lerner, 542 A.2d at 1092.

Here, the willful nature of such suppression is readily apparent. While Mr. Ryan noted at hearing that he chose not to make such disclosures because he felt "it would lead to a continuance and to headaches[,]" such concerns did not relieve him of his prosecutorial duty. (Tr. 44:11-12, Mar. 17, 2015). Constitutional rights cannot be tossed aside whenever they present the smallest inconvenience. Okla. Natural Gas Co. v. Russell, 261 U.S. 290, 293 (1923) (stating that "convenience must give way to constitutional rights"); see also O'Clair v. United States, 470 F.2d 1199, 1204 (1st Cir. 1972) (holding that "administrative convenience cannot justify infringement of constitutional rights"); State v. Slockbower, 397 A.2d 1050, 1055 (N.J. 1979) (stating that "constitutional rights . . . cannot be subordinated to mere considerations of convenience"). Furthermore, the protean nature of Ms. Carrier's testimony was not only a "big problem[]" in the eyes of Mr. Ryan, it was necessarily harmful to the State's case. [32] (Tr. 44:8, Mar. 17, 2015.) By deciding not to disclose the newly arisen variations in her story, Mr. Ryan evidently sought to protect Ms. Carrier from additional impeachment. Such a "considered decision to suppress" automatically necessitates relief. DeCiantis, 24 A.3d at 570.

[32] See Sanborn v. Parker, 629 F.3d 554, 572 (6th Cir. 2010) ("Having heard of [witness'] constantly shifting stories, . . . a rational jury would surely have [ ] seriously doubted [his] credibility[.]").

3

Vaz's Statements Regarding Unrelated Crimes

Finally, Mr. Tempest claims that the State violated his due process rights by not disclosing statements by Mr. Vaz to Sergeant Pennington—in events entirely divorced from the Tempest case—implicating another friend in three different murders. This contention is meritless. There is no indication that these statements were impeaching or necessitated disclosure.

In exchange for providing such information, Mr. Vaz did not receive any remuneration or immunity. Further, Sergeant Pennington made no assurances that Mr. Vaz would not be prosecuted after providing such information—nor has there been the suggestion that any representative of the State made a similar promise. (Tr. 154:21-155:2, Mar. 12, 2015.) Additionally, the murders discussed by Mr. Vaz are still under investigation by law enforcement—there is nothing on the record to suggest that any of the leads provided by Mr. Vaz were false or manufactured in some way. Rather, Sergeant Pennington testified that Mr. Vaz was visibly upset when they spoke, relaying this information in an honest attempt to come clean.

Plainly, "Brady is not a discovery rule, but a rule of fairness and minimum prosecutorial obligation." United States v. Beasley, 576 F.2d 626, 630 (5th Cir. 1978)). Speaking candidly to the police of one's knowledge of unrelated criminal happenings does not somehow impugn one's credibility. See United States v. Acosta-Colon, 741 F.3d 179, 196 (1st Cir. 2013) (holding that witness statements "touch[ing] on a different conspiracy at a different time" in the absence of any showing "that [witness] had perjured himself" in making such statements did not constitute

impeachment evidence).[33] Rather, reporting crime is an important civic duty. Hayes v. Eateries, Inc., 905 P.2d 778, 786 (Okla. 1995) (stating that "the reporting of crimes to appropriate law enforcement officials should be lauded and encouraged"); Parr v. Triplett Corp., 727 F. Supp. 1163, 1166 (N.D. Ill. 1989) ("[P]ublic policy favors the exposure of crime, and the cooperation of citizens possessing knowledge thereof is essential to effective implementation of that policy."). Without any inkling that Mr. Vaz received some form of consideration for the information he provided, there is simply nothing that Mr. Tempest could derive from such actions that would have served to malign Mr. Vaz's trustworthiness as a witness.[34] Accordingly, this last claim falls short.

In conclusion, the record establishes two Brady violations, requiring vacation of Mr. Tempest's conviction—the failure to disclose the McManns' statements to police that they never loaned their maroon sedan to Mr. Monteiro as well as the deliberate suppression of changes in Ms. Carrier's statement by the prosecution.

D

Improper Police Practices

Mr. Tempest contends that members of the Woonsocket Police Department fed witnesses information in violation of proper police practice, ultimately leading to the presentation of false testimony at trial. He asserts that the police, in interviewing witnesses, suggested facts in an

[33] Accord United States v. Mangual-Garcia, 505 F.3d 1, 5 (1st Cir. 2007) (holding same where witnesses' past statements "involved a different conspiracy, to which the appellants were not parties").

[34] See Moore-El v. Luebbers, 446 F.3d 890, 900 (8th Cir. 2006) ("A witness's "nebulous expectation of help from the state is not Brady material[.]'" (quoting Hill v. Johnson, 210 F.3d 481, 486 n.1 (5th Cir. 2000))); Akrawi v. Booker, 572 F.3d 252, 263 (6th Cir. 2009) (holding that "the mere fact that a witness desires or expects favorable treatment in return for his testimony is insufficient; there must be some assurance or promise from the prosecution that gives rise to a mutual understanding or tacit agreement") (emphasis in original).

effort to shape and alter statements to conform to the State's theory of the case. Such a technique, Mr. Tempest claims, is considered improper under standard law enforcement practice as it creates the likelihood of injecting false information into a witness' narrative. Ultimately, Mr. Tempest asserts that this police suggestion served to violate his right to a fair and just verdict.

The State raises the doctrine of res judicata as a procedural bar to this claim, asserting that Mr. Tempest raised this argument unsuccessfully at trial and failed to press the issue on appeal. As codified in § 10-9.1-8, a petitioner typically may not bring a claim in postconviction relief that he or she has raised or could have raised prior:

> "Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds that in the interest of justice the applicant should be permitted to assert such a ground for relief." (Emphasis added.)

As "the term 'interest of justice' can be defined only upon a review of the facts in a particular case, [the Court must articulate a] sufficient finding, articulation, or explanation . . . that an issue barred by the doctrine of res judicata merits consideration in the interest of justice." Ferrell v. Wall, 971 A.2d 615, 621 (R.I. 2009). In the absence of such a finding, the renewed claim may not provide a basis for relief. Id.

Here, Sergeant Pennington conceded before this Court that in the course of his investigation, he would "suggest[] facts the witness had not raised to prod their memory." (Tr. 147:12-13, Feb. 10, 2015.) To explain precisely how such suggestion can interfere with the truth-seeking function of a police investigation, Mr. Tempest offered the expert testimony of Commissioner Edward F. Davis (Commissioner Davis), the former police commissioner of the

City of Boston. As established by Commissioner Davis, Sergeant Pennington's technique of suggesting facts when interviewing witnesses is "extremely problematic in any investigation" insofar as it can lead "a witness [to] craft a statement that is not true [but at the same time remain] very believable." (Tr. 57:11-18, Mar. 20, 2015.) Providing additional details not known to a witness creates "a danger of planting information in [his or her] mind that will eventually be regurgitated . . . as if the witness knows it." Id. at 37:2-5. Simply put, such actions do not constitute proper police practices. Id. at 35:10-11.

With Sergeant Pennington's forthright admission, Mr. Tempest's past conjecture regarding the possibility of such witness coaching has been confirmed; it is now apparent that the police fed witnesses information in an effort to move the case against Mr. Tempest forward. See Crutchfield v. Wainwright, 803 F.2d 1103, 1110 (11th Cir. 1986) ("Coaching has come to mean improperly directing a witness's testimony in such a way as to have it conform with, conflict with, or supplement the testimony of other witnesses."). As discussed infra, there is substantial evidence on the record establishing improper police practices,[35] particularly related to witnesses adopting different or completely new versions of events to match theories held by their police interviewers. The importance of Sergeant Pennington's admission is evident: these actions run directly counter to standard police practice and implicate due process concerns. Indeed, this Court cannot fathom a set of circumstances more compelling than the repeated and insistent prompting by law enforcement for witnesses to "remember" critical facts about events that had occurred many years prior. In light of this new evidence, the Court finds that justice requires a second look at Mr. Tempest's claims of police-tainted witness testimony. See Brown v. State,

[35] This Court is not the first Rhode Island court in recent history to note that "decrepit" and "shoddy" police practices can undermine the "fundamental integrity of [ ] investigations conducted by" law enforcement. Mason, 497 F. Supp. 2d at 329.

32 A.3d 901, 910 (R.I. 2011) (holding that "a claim of newly discovered evidence may certainly constitute the basis for an applicant's subsequent application for relief" despite the otherwise applicable bar of res judicata); People v. Patterson, 735 N.E.2d 616, 642 (Ill. 2000) (holding that "in the interests of fundamental fairness, the doctrine of res judicata can be relaxed if the defendant presents substantial new evidence").

Mr. Tempest offered substantial evidentiary support establishing Commissioner Davis' expertise in proper police practice and procedure. As adduced at hearing, Commissioner Davis' career in law enforcement began in 1978 as a police officer in the City of Lowell, Massachusetts.[36] (Tr. 3:2-3, Mar. 20, 2015.) Four years later, he was assigned to the Detective Division. Id. at 3:13-16. In 1984, he was promoted to Detective Sergeant and became responsible for a unit that conducted narcotics and organized crime investigations. Id. at 4:7-13. In 1986, Commissioner Davis was further promoted to Detective Lieutenant and seven years later rose to the rank of Captain, which entailed his oversight of a community policing program. Id. at 4:22-5:2. Not long after, in 1994, he became acting Chief of Police and, later that same year, Chief of Police—serving in that capacity until 2006. Id. at 5:2-11.

Upon leaving Lowell, Commissioner Davis worked as Commissioner of the Boston Police Department until 2013, managing police services for over 600,000 residents, supervising 2200 police officers and assuming overall responsibility for the direction and management of the department. Id. at 2:10-17. During Commissioner Davis' tenure as Chief of the Lowell Police Department and Commissioner of the Boston Police Department, both cities experienced a

[36] Commissioner Davis' pursuit of a career in law enforcement was the continuation of a long family tradition which included his father, father-in-law, and brother. Id. at 3:4-8.

significant decrease in crime rate.[37] Lowell, as Commissioner Davis testified, "is the same type of city" as Woonsocket, id. at 100:24, insofar as both are small mill cities where police must often deal with a similar criminal element. Id. at 101:14-16. He noted, however, that while budgetary restrictions limited the Lowell Police Department's ability to gain certification from the Commission on Accreditation for Law Enforcement Agencies (CALEA), the department still managed to ensure that its policies and procedures for policing were aligned with such national standards. Id. at 10:11-18.

Commissioner Davis' career has also included teaching courses related to policing and investigation such as Constitutional Law, Community Policing, and Criminal Investigation at the University of Massachusetts, Lowell, as well as advanced police training and management courses at the Massachusetts Police Leadership Institute. Id. at 8:3-12. He currently works as a consultant regarding police practices and procedures and has provided advice and input to police departments in New York City, Chicago and various New England cities. Id. at 8:21-9:5.

In the words of the State, Commissioner Davis is "phenomenally qualified" as an expert on proper police practice and procedure. Id. at 18:12. It agreed that "[h]e has done it all as both as a police officer and as a leader of . . . police officers." Id. at 20:14-16. At the postconviction hearing, the State put forth no expert of its own to rebut the opinions offered by Commissioner Davis. Furthermore, other than identifying Commissioner Davis' failure to personally interview members of the Woonsocket Police Department involved in this investigation, the State did little to call his expert opinions into question. In its cross-examination of the Commissioner, the State did not even attempt to demonstrate that the investigation of Doreen Picard's murder complied

[37] The City of Lowell saw a fifty percent reduction in Part I crimes, id. at 6:1-2, while Boston experienced an approximate five percent drop per year in such crimes. Id. at 2:18-22. Part I crimes, as defined by the Federal Bureau of Investigation, are the most serious of offenses, encompassing "murder, rape, robbery, [and] everything down to larcenies[.]" Id. at 6:7.

with any prescribed standard of police practice. In the end, Commissioner Davis' qualifications as an expert and his opinions went essentially unchallenged.

It is apparent that Commissioner Davis, who dedicated over thirty years to the police departments of Lowell and Boston, brought a perspective shaped by a lifetime's worth of experience in law enforcement to evaluating the detective work in Mr. Tempest's case. He was objective and measured in his assessment of the investigatory work performed and was forthright in describing the countless shortcomings of the investigation into the Doreen Picard murder by Sergeant Pennington and Commander Rodney Remblad[38] (Commander Remblad). Of the many blunders that occurred over the course of their ten-year investigation, only those implicating Mr. Tempest's claims of due process violations are discussed below.

While it is clear the practices of the Woonsocket Police Department certainly deviated from professional standards in many respects, the Court also recognizes that Sergeant Pennington was put in an extremely difficult situation when assigned to conduct the investigation. With only one year of experience as a detective, Sergeant Pennington was called in on an exceptionally complex case with limited resources. (Tr. 4:9-11, Feb. 10, 2015.) At the outset, he felt he was "too inexperienced" to be tasked with solving such a horrific crime. Id. at 4:17. Furthermore, due to factioning within the department,[39] he was wary about who had access

[38] Commander Remblad became involved in the investigation in late 1987. His participation in the case is discussed infra.

[39] One of the undercurrents of this case is the pro-Tempest and anti-Tempest factioning within the Woonsocket Police Department. Mr. Tempest's father, known as "Big Ray," was Chief Inspector of the department before retiring in the 1970s. (Tr. 4:19-5:3, Mar. 18, 2015 (Testimony of Raymond Tempest).) Gordon Tempest, Mr. Tempest's brother, was a detective there at the time of the Doreen Picard case, going so far as to question Mr. Tempest about his potential involvement in the murder. Id. at 51:6-10. Internally, police officers aligned with the Tempest family clashed with Commander Remblad and his anti-Tempest confederacy in conducting the investigation. (Tr. 51:12-52:5, Mar. 17, 2015 (Testimony of James Ryan).) Indeed, Mr. Ryan compared this feud to that between the Hatfields and the McCoys. Id. at

to his investigatory notes as well as distrustful of any information provided by other officers. (Tr. 571:20-573:21, Feb. 23, 2015.) Sergeant Pennington noted that out of the entire Woonsocket police force, there were only four detectives he felt he could trust in seeking assistance. (Tr. 835:15-24, Mar. 11, 2015.)

Against this backdrop, the Court now turns to determine whether the actions of the Woonsocket Police Department violated Mr. Tempest's right to a fair trial. "Involvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse—a fact borne out time and again throughout a history with which the Framers were keenly familiar." Crawford v. Washington, 541 U.S. 36, 56 n.7 (2004). Our Supreme Court has long recognized that "in the interviews with and examination of witnesses, out of court, and before the trial of the case, the examiner, whoever he may be, layman or lawyer, must exercise the utmost care and caution to extract and not to inject information, and by all means to resist the temptation to influence or bias the testimony of the witnesses." State v. Papa, 32 R.I. 453, 80 A. 12, 15 (1911). While the taint of such influence on witness testimony is typically exposed by the adversarial process and presented to the factfinder, id., the use of suggestive interview techniques by the State can "taint[ ] a witness to the extent that due process and the necessity for reliable evidence may justify the exclusion of that witness's testimony." State v. Earp, 571 A.2d 1227, 1234 (Md. 1990) (holding in the context of prosecutorial coaching of witnesses).

Legal commentators have long noted that "it is common knowledge that [ ] law enforcement officials . . . play a critical role in influencing the witness's testimony through interviewing and debriefing the witness during the early stages of an investigation." Bennett L.

51:20-25. It is evident that in the midst of this intradepartmental strife, Sergeant Pennington found himself caught in the crossfire.

Gershman, Witness Coaching by Prosecutors, 23 Cardozo L. Rev. 829, 863 n.19 (2002); accord Sandra Guerra Thompson, Judicial Gatekeeping of Police-Generated Witness Testimony, 102 J. Crim. L. & Criminology 329, 341 (2012) ("Police investigators who believe that they know the identity of the guilty person will . . . often us[e] suggestive or coercive means[ ] in order to obtain the desired evidence."). Such actions do not comport with proper police procedure. (Tr. 35:9-11, Mar. 20, 2015 (Testimony of Commissioner Davis).) "When defendants face possible sentences of up to mandatory life in prison, one would think that the quality of the police work would be better." Mason, 497 F. Supp. 2d at 335-36 (noting that "the majority of departments and jurisdictions continue to eschew specific procedures (in reality, reforms) that would help safeguard against the use of unreliable evidence").

As explained by Commissioner Davis, suggestive interview techniques are improper precisely because such actions tend to distort the facts of a case as presented to a jury. (Tr. 36:14-37:5, Mar. 20, 2015.) In light of its potential to undermine the truth-seeking function of the criminal justice system, the law does not allow such misconduct to go uncorrected. Simply put, police coaching and feeding facts to witnesses—if sufficiently prejudicial—constitute a violation of due process requiring vacation of a petitioner's conviction. United States v. Clayton, No. CR-13-3022-MWB, 2014 WL 3670137, at *5 (N.D. Iowa July 22, 2014), aff'd, No. 14-2887, 2015 WL 3449868 (8th Cir. June 1, 2015); United States v. Clayton, No. 14-2887, 2015 WL 3449868 (8th Cir. June 1, 2015).[40]

[40] In Clayton, the Eighth Circuit noted that "officers told [accomplice] that they were tired of 'spoon feeding' her details of the crime; that she needed to get on the 'same page' as [the other testifying accomplice]; and that she would get more 'bang for her buck' (meaning more credit against her own impending sentencing) if she testified against Clayton." 2015 WL 3449868, at *3. The appeals court, in its analysis, assumed that this conduct "amounted to improper coaching" but found no prejudice. Id. at *4. In making such a determination, the Eighth Circuit, in keeping with the district court below, "assume[d], without deciding, that the standard

Mr. Tempest's claim of the improper influence of police during interviews is analogous to the due process concerns surrounding impermissibly suggestive eyewitness identifications: plainly, there is a close similarity between the implicit suggestion by police that a certain suspect is the culprit and their prompting of witnesses to recall past events unfolding in a particular way. With regard to eyewitness identification, the United Supreme Court has held that "the Due Process Clause requires courts to assess, on a case-by-case basis, whether improper police conduct created a 'substantial likelihood of misidentification.'" Perry v. New Hampshire, 132 S. Ct. 716, 724 (2012). To find a violation in such cases, "the corrupting effect of the challenged identification" must outweigh the witness' "ability to make an accurate identification." Manson v. Brathwaite, 432 U.S. 98, 116 (1977) (internal quotations omitted). The sine qua non of this due process guarantee is the protection against "improper police action" that has the potential to interfere with a witness' memory. Perry, 132 S. Ct. at 719. As the Court explained, the "primary aim of excluding [ ] evidence obtained under unnecessarily suggestive circumstances . . . is to deter law enforcement[.]" Id. at 726; accord Colorado v. Connelly, 479 U.S. 157, 170 (1986) ("The sole concern of the Fifth Amendment . . . is governmental coercion."); Lisenba v. California, 314 U.S. 219, 236 (1941) ("The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence whether true or false.").

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applicable to allegations of prosecutorial misconduct should apply." Id. at *6 n.4. Interestingly, it noted that while "the parties d[id] not dispute the applicable standard of review . . . [,] it is questionable whether police misconduct that occurred prior to prosecutorial involvement may be grounds for a prosecutorial-misconduct claim." Id. Indeed, the district court itself failed to provide any explanation as to why it utilized such a test. Clayton, 2014 WL 3670137, at *2. As is readily apparent, the framework for evaluating prosecutorial misconduct, albeit similar in form to the test employed below, is an imprecise standard for analyzing such a witness coaching claim.

"Suggestion can be created intentionally or unintentionally in many subtle ways." United States v. Wade, 388 U.S. 218, 229 (1967). Improper police technique need not be purposefully obstructive in order to constitute a due process violation. Rather, "what triggers due process concerns is police use of an unnecessarily suggestive [ ] procedure, whether or not they intended the arranged procedure to be suggestive." Perry, 132 S. Ct. at 721 n.1 (emphasis added).[41] The thrust behind excluding improperly elicited statements lies in the police misconduct itself, not in any malintent behind such behavior. State v. Stringer, 372 S.E.2d 426, 428 (Ga. 1988) ("The primary reason for the exclusionary rule is to deter police misconduct, whether it be negligent or intentional."); see State v. Huy, 960 A.2d 550, 556 (R.I. 2008) ("The exclusionary rule . . . serves to deter unlawful police conduct[.]") (internal citations omitted).[42]

The Court sees no relevant distinction between police misconduct resulting in a suggestive environment for eyewitness identification of a potential suspect and that which results in a suggestive environment for a witness' recall of events surrounding the commission of a crime. While the taint of improper police practice may be most apparent in eyewitness identification, the logic behind the doctrine readily extends to any overly-suggestive interview.[43]

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[41] Accord United States v. Shavers, 693 F.3d 363, 387 (3d Cir. 2012), cert. granted, judgment vacated on other grounds, 133 S. Ct. 2877 (2013) (stating that the court "do[es] not interpret Perry as requiring that the improper police conduct be intentionally aimed at creating a suggestive situation"); Carter v. Commonwealth of Ky., No. 2011-SC-000060-MR, 2013 WL 658121, at *4 n.12 (Ky. Feb. 21, 2013) (holding that there is no requirement that "police intend[ed] to create suggestive circumstances" for due process concerns to arise); United States v. Lewis, 838 F. Supp. 2d 689, 700 (S.D. Ohio 2012), aff'd sub nom., United States v. Watson, 540 F. App'x 512 (6th Cir. 2013) (finding violation where "detectives used an unnecessarily suggestive [ ] procedure with regard to [witness], whether intentional or not").

[42] While "use of [the court's] supervisory power would not permit [it] . . . to create exclusionary rules not otherwise constitutionally authorized[,]" the Court does not invoke such authority here. State v. DiPrete, 710 A.2d 1266, 1276 (R.I. 1998). As discussed, due process requires exclusion of unreliable statements extracted by overbearing law enforcement.

[43] As an aside, the Court notes that any comparison between such suggestive interviews and the police leading a wrongdoer to confess is wholly unfounded. While "some degree of deception

"Unduly suggestive identification procedures represent [only] one example of those fundamentally unfair situations" triggering a breach of due process. United States v. Sanders, 708 F.3d 976, 983 (7th Cir.), cert. denied 134 S. Ct. 803 (2013). Plainly, "[t]he way in which eyewitnesses are questioned or converse about an event can alter their memory of the event." State v. Lawson, 291 P.3d 673, 709 (Or. 2012) (en banc). In the course of interviewing, "[w]itness memory [ ] can become contaminated by external information or assumptions embedded in questions or otherwise communicated to the witness." Id.; accord United States v. Greene, 704 F.3d 298, 306 (4th Cir. 2013), cert. denied, 134 S. Ct. 419 (2013) (noting that "the phrasing of a question may suggest a desired response" (citing Smith v. Paderick, 519 F.2d 70, 75 n.6 (4th Cir. 1975)). In such instances, the concern of "guard[ing] against unnecessarily suggestive procedures" by police remains paramount. Manson, 432 U.S. at 112.

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on [the part of law enforcement] during the questioning of a suspect is permissible[,]" such "chicanery" quickly becomes improper when witnesses, rather than investigatory targets, are coached with a particular narrative. United States v. Hughes, 640 F.3d 428, 439 (1st Cir. 2011). Plainly, the feeding of information to suspects is designed to coax out a confession, not to build a case against a third party. See Green v. State, 934 S.W.2d 92, 99 (Tex. Crim. App. 1996) (noting that "police deception employed during custodial interrogation [is] designed to elicit a confession from the accused"). Unlike the average uninterested witness, a suspect with skin in the game is far less likely to be tainted by police suggestion. See State v. Johnson, 576 A.2d 834, 846 (N.J. 1990) (noting a suspect's "natural disinclination to confess to wrongdoing"); Ashcraft v. State of Tenn., 322 U.S. 143, 160 (1944) (Jackson, J. dissenting) (describing "the normal instinct to deny and conceal any shameful or guilty act"). Indeed, courts have analogized the interrogation of an offender to armed conflict, stating that "[s]ociety and the criminal are at war, and capture by surprise, or ambush, or masked battery, is [ ] permissible[.]" Commonwealth v. Cressinger, 193 Pa. 326, 337, 44 A. 433 (1899). If an accused is the enemy, then a witness is the overeager recruit, keen to lend support at the behest of authority. While "[p]eople do not lightly admit a crime," United States v. Harris, 403 U.S. 573, 583 (1971), "witnesses naturally want to assist police" and may evince an over-willingness to aid law enforcement in tying together the loose ends of an investigation. Melissa B. Russano et al., "Why Don't You Take Another Look at Number Three?": Investigator Knowledge and Its Effects on Eyewitness Confidence and Identification Decisions, 4 Cardozo Pub. L. Pol'y & Ethics J. 355, 375 (2006).

Accordingly, with regard to the present claims of improper suggestion, the Court looks to our Supreme Court's jurisprudence with regard to eyewitness identification. Under this doctrine, a trial justice "must consider whether the procedure used . . . was unnecessarily suggestive." State v. Brown, 42 A.3d 1239, 1242 (R.I. 2012). If this consideration is answered affirmatively, a second inquiry is engaged, examining whether the "totality of the circumstances" indicate that—despite police misconduct—the elicited statement is "nonetheless reliable." State v. Gallop, 89 A.3d 795, 801 (R.I. 2014) (citations omitted).

Mr. Tempest asserts that by providing information to witnesses, the police in essence instructed witnesses on what their testimony ought to be. Such improper police procedure, he contends, tainted the evidence presented at trial and violated his right to due process of law. He claims the effects of witness coaching pervade much of the testimony presented against him. Rather than discuss each piece of allegedly tainted evidence, the Court turns instead to an examination of the more propitious of Mr. Tempest's claims.

Sergeant Pennington interviewed Ms. Richards[44] over ten times in the course of his investigation. (Tr. 487:16-17, Feb. 23, 2015.) During this time, her story shifted in lockstep with the State's theory of the case. When she first spoke to police, she didn't see Tempest arrive home on the day of the murder. (Grand Jury Tr. 41 ("I didn't see him come, how he got home[.]").) Then, as the State's case developed, Ms. Richards, in turn, seemingly developed hypermnesia—suddenly remembering Mr. Tempest's return and vividly recalling the sight of him standing by Mr. Monteiro's car on the day of the murder. (Richards Witness Statement at 3, Jun. 5, 1990.) When the police discovered Mr. Monteiro did not own the car at this time, her

[44] As mentioned earlier, Ms. Richards testified at trial that she watched Mr. Tempest's children on the afternoon of February 19, 1982 and saw him in a maroon car that same day.

narrative changed once again—the maroon car transmogrified into one that Mr. Monteiro "used to borrow[.]" (Trial Tr. 757:13, Apr. 2, 1992.)

As Commissioner Davis testified, "You do not want to interview a witness too much." (Tr. 35:15, Mar. 20, 2015.) Preferably, he stated, police ought to conduct "one long interview that is very thorough" as repeat meetings lead to the corruption of memory. Id. at 35:24-25. He explained that such distortion is often shaped by police efforts to align statements with a particular narrative. Id. at 37:1-5. With regard to the evolving statements by Ms. Richards, Commissioner Davis opined that she was "attempting to correct the record" in matching her account to police theorizing—"an indication of coaching by the detectives." Id. at 86:15-17. As such, it is clear that Ms. Richards, after being subjected to a barrage of recurrent suggestive questioning, was led to conform her statements to the prosecution's case theory. See Lawson, 291 P.3d at 698 (holding that "alterations in [witness'] statements over time are indicative of a memory altered by suggestion and confirming feedback").

A similar pattern can be seen in the testimony of Ms. Ladue.[45] In three interviews following the murder, she never mentions seeing an unfamiliar car in the driveway at the house. (LaDue Witness Statement, Feb. 19, 1982); (Police Report, Feb. 20, 1982); (Police Report, Feb. 24, 1982). Then, ten years later, Ms. Ladue has a revelation. Following a phone conversation with Sergeant Pennington, her memory is conveniently jogged. Just in time for trial, she miraculously recalls seeing a strange car parked outside 409 Providence Street on that fated day ten years prior. The color of this car? Maroon. After a decade-long amnesia, Ms. Ladue is now able to provide police with exactly what they want—eyewitness testimony linking Mr. Tempest to the scene.

[45] Ms. Ladue was living at 409 Providence Street and arrived home at approximately 3:20 p.m. on February 19, 1982.

Perhaps the most telling example of police coaching comes in the form of the so-called "GridIron Tape," the recording of a conversation between then-Commander Remblad of the Woonsocket Police Department and a very intoxicated Mr. Shaw.[46] During the course of this meeting, which took place outside the local GridIron bar at eleven o'clock at night, Mr. Shaw struggled to string together a coherent sentence. See GridIron Transcript at 26 ("As far as, as far as witnessing, witning, witness . . ."). Nevertheless, Commander Remblad pushed Mr. Shaw to implicate Mr. Tempest before the Grand Jury in his testimony on the coming Tuesday. He fed a motive to Mr. Shaw, telling him that Mr. Tempest and Ms. Laferte "had a beef about the animals[,]" to wit the sale of the dog, and that "[h]e and her had problems." Id. at 14. Commander Remblad also coached Shaw on how the murder took place, instructing that Mr. Tempest had "hit[] the God damn beams in the ceiling" during the assault—a fact Mr. Shaw would later revisit upon touring the crime scene with law enforcement. Id. at 43.

Plainly, the manipulation of Mr. Shaw by police is apparent from their conversation:

> "Shaw: Beaver didn't do it.
> "Remblad: Well who did it then?
> "Shaw: Beaver didn't do it man.
> "Remblad: Well who did it?
> "[. . .]
> "Shaw: I mean it, Beaver didn't do it. Beaver didn't do it.
> "Remblad: Well then who did Danny?
> "Shaw: You, you real, do you really think Beaver did it?
> "Remblad: I do. [. . .] They've got good evidence the police.
> "[. . .]
> "Shaw: Through all your professional fucking . . . I think he did it too." Id. at 11, 13, 20.

As Commissioner Davis testified, "a commander of the Police Department who is four ranks above a detective . . . just bump[ing] into . . . somebody at 11:00 at night outside of a barroom"

[46] As discussed supra, Mr. Shaw was alleged by the State to be Mr. Tempest's accomplice.

is "really problematic." (Tr. 48:22-49:2, Mar. 20, 2015.) He noted that Commander Remblad "crossed the line into coaching" in "offering a smorgasbord of facts that the witness c[ould] pick from[.]" Id. at 55:12-15. Additionally, he found that "planting reasons for motive in the case to the witness" that the witness can then adopt within his or her own narrative, as Commander Remblad did with Mr. Shaw, "is a huge problem." Id. at 56:12-14. The same holds true for Commander Remblad's provision of facts relative to the manner of attack—"The role is to find out what that . . . witness knows, not to tell them what happened at the crime scene." Id. at 57:9-11.

While the testimony of Mr. Shaw was not presented at trial—and, as such, his improper questioning cannot serve as a basis for a due process violation—such a tape-recorded conversation provides invaluable insight into the interrogation techniques of the Woonsocket Police Department at the time and how his statements were shaped prior to his testimony before the Grand Jury that would indict Mr. Tempest. Furthermore, even disregarding Mr. Shaw's interview, the dramatic shift in the statements of Ms. Richards and Ms. Ladue self-evidently would not have occurred without police prompting. With over a decade between the events and questioning and a virtually endless loop of suggestive interviews, police procedure in the Tempest case created a perfect storm for flawed witness statements. See In re Sodersten, 53 Cal. Rptr. 3d 572, 603 (Ct. App. 2007) (noting that "multiple interviews [ ] are a known factor in creating suggestibility"). Memories can become jumbled over time—witnesses are especially vulnerable to the power of suggestion when their recollection has become blurred by the relentless march of the clock. See United States v. Johnson, 461 F.2d 1165, 1169 (5th Cir. 1972) (noting that "[e]ven the best memory is likely to dim over [ ] a long period of time and be extremely susceptible to suggestive influences"); United States v. De Sisto, 329 F.2d 929, 933

(2d Cir. 1964) (finding "the greater the lapse of time between the event and the trial, the greater the chance of exposure of the witness to" such influences as "distorted memory" and "false suggestion").[47] Scientific evidence supports the conclusion that

> "accuracy of recollection decreases at a geometric rather than arithmetic rate (so passage of time has a highly distorting effect on recollection) . . . and memory is highly suggestible—people are easily 'reminded' of events that never happened, and having been 'reminded' may thereafter hold the false recollection as tenaciously as they would a true one." Krist v. Eli Lilly & Co., 897 F.2d 293, 297 (7th Cir. 1990) (emphasis in original).

Regardless of whether police intended to interfere with the witnesses' recollection of events here, the taint of improper police procedure so poisoned the well that Mr. Tempest's conviction cannot stand. Cf. Mesarosh v. United States, 352 U.S. 1, 9 (1956) ("The dignity of the United States Government will not permit the conviction of any person on tainted testimony.").

The practices of the Woonsocket Police Department created an environment for questioning that was "unnecessarily suggestive." Brown, 42 A.3d at 1242. Furthermore, the "totality of the circumstances" surrounding the statements by Ms. Richards and Ms. Ladue evince an inherent unreliability that undercuts any confidence in such testimony and the resultant verdict. Id. When interviews rise to the level of being impermissibly suggestive, information derived therefrom becomes "so defective as to make the [evidence] constitutionally inadmissible as a matter of law." State v. Porraro, 121 R.I. 882, 887, 404 A.2d 465, 469 (1979) (quoting

[47] See also United States v. Fitzpatrick, 437 F.2d 19, 23 (2d Cir. 1970) (noting the "fallibility and suggestibility of human memory"); State v. Hungerford, 697 A.2d 916, 929 (N.H. 1997) ("Memory is subject to the influence of innumerable external influences during the 'retention' stage of remembering, and thus a shorter period of time between the event and recall offers less opportunity for suggestion."); State v. Henderson, 27 A.3d 872, 878 (N.J. 2011) (describing memory as "malleable"); State v. Powell, 364 S.E.2d 332, 340 (N.C. 1988) (finding that where witness' "memory faded with the passage of time, the potential danger of suggestive pretrial [ ] procedures grew"); Commonwealth v. Marini, 378 N.E.2d 51, 56 (Mass. 1978) (noting that "reliability is negatively affected not only by the degree of suggestiveness of the conditions of the test but also by natural loss of memory over time").

Foster v. California, 394 U.S. 440, 442 n.2 (1969) (holding in the context of eyewitness identification); accord State v. Holland, 430 A.2d 1263, 1269 (R.I. 1981) ("A witness' out-of-court identification of an accused is not admissible at trial if the identification procedure used was so unnecessarily suggestive and conducive to a substantial likelihood of misidentification that the accused was denied due process of law."). As such, "convictions based on . . . [improper police questioning] will be set aside . . . if the [ ] procedure [used] was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable" misinformation. State v. Courteau, 461 A.2d 1358, 1361 (R.I. 1983) (quoting Simmons v. United States, 390 U.S. 377, 384 (1968)).

Here, as discussed supra, the testimony placing Mr. Tempest in a maroon car and in turn placing a maroon car at the scene served as the only link tying him to the basement of 409 Providence Street on the afternoon of the murder. The presentation of this faulty testimony at trial prejudiced Mr. Tempest.[48] Accordingly, confidence in the verdict rested on a faulty record; due process strictures necessitate vacation of Mr. Tempest's conviction.

E

Presentation of Perjured Testimony

"Where the prosecutor has deliberately caused false evidence to influence some part of the criminal trial, he has violated the most basic precepts of due process." In re Ouimette, 115 R.I. 169, 175, 342 A.2d 250, 253 (1975). As such, the law is well-settled that "a prosecutor cannot knowingly present perjured testimony [and] . . . bears responsibility for correcting what he or she knows to be false and eliciting the truth." State v. Gomes, 604 A.2d 1249, 1254 (R.I.

[48] Compare Clayton, 2015 WL 3449868, at 4* (8th Cir. June 1, 2015) (finding no due process violation as the result of witness coaching where petitioner failed to demonstrate prejudice).

1992) (internal citations omitted). Mr. Tempest asserts that in the case against him, the State did just that—presenting the testimony of Ms. Carrier and Mr. Guarino while knowing that aspects of their statements were untrue and then subsequently failing to correct such falsity on the record. Specifically, he contends, Mr. Ryan adduced perjured statements from Ms. Carrier and Mr. Guarino on how they came to change their memory concerning the date on which Mr. Tempest allegedly confessed.

In making such a claim, Mr. Tempest must satisfy the following three prongs to demonstrate this alleged violation of his due process rights: "(1) that the prosecution elicited false testimony; (2) that the prosecution knew or reasonably should have known that the testimony was false; and (3) that there is a 'reasonable likelihood that the false testimony could have affected the judgment of the jury.'" Bucci v. United States, 662 F.3d 18, 39-40 (1st Cir. 2011) (quoting Perkins v. Russo, 586 F.3d 115, 119 (1st Cir. 2009)). He alone bears the burden of "proof by a preponderance of the evidence [in demonstrating the presentation of such] perjury." Powers, 734 A.2d at 516; accord Coe v. Bell, 161 F.3d 320, 343 (6th Cir. 1998) (holding that "[t]he burden is on the [petitioner] to show that the testimony was actually perjured").[49] He has failed to carry such a burden here today.

As described by our Supreme Court, "[i]t is axiomatic that while there may exist inconsistencies in testimony given by a witness during trial, the mere presence of those

[49] The Court notes a split in the federal circuits—and a dearth of case law within this state's jurisprudence—as to whether the false testimony presented by a prosecutor must be actually perjured insofar as it must stem from a '"willful intent to provide false testimony, rather than [be the] result of confusion, mistake, or faulty memory.'" United States v. Espinoza, 684 F.3d 766, 780 (8th Cir. 2012) (quoting United States v. Collier, 527 F.3d 695, 702 (8th Cir. 2008)). The contrary stance—noting the United States Supreme Court's use of the term "'false' as a synonym for 'perjured'"—is that "[t]he wrong of knowing use by prosecutors of perjured testimony is . . . misnamed-it is [simply] knowing use of false testimony." United States v. Boyd, 55 F.3d 239, 243 (7th Cir. 1995) (Posner, J.) (emphasis in original). Such a distinction, while significant, is ultimately of no moment in the present case.

inconsistencies does not, standing alone, constitute perjury per se." State v. Anderson, 752 A.2d 946, 949 (R.I. 2000); accord Powers, 734 A.2d at 516 (holding that '"[i]nconsistent testimony by itself does not amount to perjury"' (quoting United States v. Tavares, 93 F.3d 10, 14 (1st Cir. 1996)). Indeed, "any supposed inconsistency . . . between [prior] testimony and [ ] trial testimony [i]s an appropriate subject for defense cross-examination"—grist for the jurors' mill rather than a toxic falsity serving to envenom a fair verdict. Anderson, 752 A.2d at 949.

Here, in their statements to police in the late 1980s, Mr. Guarino and Ms. Carrier stated that Mr. Tempest confessed to them in 1982. Integral to their story of Mr. Tempest's act of contrition was that he lived in the apartment beneath them at the time. When it became clear that Mr. Tempest moved into the building a year later, in 1983, their memory regarding the precise date of this declaration of guilt changed. At trial, Mr. Dimitri suggested that the police informed the pair that Mr. Tempest was not their neighbor in 1982, soliciting this shift in narrative.

Ms. Carrier's testimony was both precise and steadfast regarding her change in recollection. She stated that she remembered the issue with the date one month before trial during a conversation with Sergeant Pennington:

> "I was talking to Officer Pennington and he -- I was telling him about the people that live there and I had -- I just forgot about Anita Marquette that lived on the second floor and just going back over in my head in memory and my son's grades in school and things like that. It was 1982 that Anita Marquette lived there in 1983 then Beaver and Jane moved in." (Trial Tr. 1120:18-1121:1, Apr. 6, 1992.)

Mr. Guarino, in contrast, wavered under cross-examination as to whether law enforcement had informed him that Mr. Tempest did not reside in the same building as him until 1983. He initially agreed that the police had told him that it was impossible for Mr. Tempest to have confessed in the manner he described back in 1982:

> "Q: And you now remember that it wasn't 1982 in the spring, it was '83 because the police told you that; isn't that a fact?
> A: Yes." (Trial Tr. 846:13-17, Apr. 3, 1992.)

Just minutes later, however, he changed his tune:

> "Q: [W]as it during [your conversations with police] that you were told, "Mr. Guarino, your statement is not accurate because he wasn't living there, he was living on Phoebe Street in Woonsocket so you must be wrong"?
> "[. . .]
> "A: Nobody --
> "Q: Are you telling us now that nobody told you that?
> "A: Not that I recall." Id. at 848:2-10.

This ostensible contradiction, however, does not rise to the level of false testimony. See Bucci, 662 F.3d at 40 (holding that "'the fact that a witness contradicts herself or changes her story does not establish perjury' and 'do[es] not create an inference, let alone prove, that the prosecutor knowingly presented perjured testimony.'" (quoting United States v. Lebon, 4 F.3d 1, 1 (1st Cir. 1993)) (brackets in original).[50]

At the postconviction hearing, Sergeant Pennington specifically denied ever coaching Mr. Guarino. Tr. 148:3-4, Feb. 10, 2015 ("I most likely did not [suggest facts to] him. I remember him being a cooperative witness."). He also disclaimed ever feeding information to Ms. Carrier. See id. at 147:18-21 ("I would use that [coaching] technique sometimes with people who were being uncooperative or I felt were holding back information. But John Guarino and Donna were pretty much forthcoming."); id. at 155:3-4 (testifying that, before grand jury proceedings, he

[50] See also Knighton v. Mullin, 293 F.3d 1165, 1174 (10th Cir. 2002) (stating "'[c]ontradictions and changes in a witness's testimony alone do not constitute perjury and do not create an inference, let alone prove, that the prosecutor knowingly presented perjured testimony'" (quoting United States v. Wolny, 133 F.3d 758, 763 (10th Cir. 1998)); United States v. Verser, 916 F.2d 1268, 1271 (7th Cir. 1990) ('"Mere inconsistencies in testimony by government witnesses do not establish the government's knowing use of false testimony."' (quoting United States v. Griley, 814 F.2d 967, 971 (4th Cir. 1987)); Powers, 734 A.2d at 516 (holding that "[i]nconsistent testimony by itself does not amount to perjury" (quoting Tavares, 93 F.3d at 14)).

only "told her [ ] to make sure she tells the truth"). Similarly, Mr. Ryan denied any knowledge of or involvement in this purported coaching. See Tr. 16:21-24, Mar. 17, 2015 ("Certainly by the start of the trial we had moved from one position [concerning the dates] to the other. . . . I just can't explain exactly how we got from one place to the other."); id. at 22:8-9 ("I don't have at all any memory that we asked [Ms. Carrier] about [the discrepancy in dates.]"). Faced with a dearth of evidence that members of either the Woonsocket Police Department or the Attorney General's Office instructed the two to change their story, the Court cannot simply accept Mr. Tempest's say-so that the testimony offered was false, never mind find any cognizance of such alleged falsity on the part of the State. See United States v. Scarfo, 711 F. Supp. 1315, 1322 (E.D. Pa. 1989), aff'd sub nom., United States v. Pungitore, 910 F.2d 1084 (3d Cir. 1990) (holding that the "burden of establishing the perjury is on the [petitioner]"); State v. Iacona, 752 N.E.2d 937, 951 (Ohio 2001) (stating that "the burden is on the [petitioner] to show that [ ] the statement was actually false . . . and [that] the prosecution knew it was false") (internal citations omitted).

The only actual false statement appears in the testimony of Mr. Guarino, who suggested that his recollection of a later time period for Mr. Tempest's admission of guilt first surfaced during questioning at trial:

> "Q: So when you got on the stand this morning, you suddenly realized that it wasn't March of 1982 but 1983?
> A: [Witness nods yes]" (Trial Tr. 848:11-14, Apr. 3, 1992.)

Mr. Ryan certainly knew of Mr. Guarino's updated narrative before trial as he presented in opening statement that Mr. Guarino would testify to the confession occurring in 1983. (Trial Tr. 72:6-23, Mar. 23, 1992); (Tr. 16:17-24; 25:21-26:2, Mar. 17, 2015 (Testimony of James Ryan).) Nevertheless, whether Mr. Guarino's recall of the change of date occurred during trial or a

month prior clearly held no bearing on the jury's verdict. See State v. Towns, 432 A.2d 688, 691 (R.I. 1981) (requiring "a reasonable likelihood [ ] that [ ] false testimony could have affected the jury"); Acosta-Colon, 741 F.3d at 195 (holding that "evidence is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different") (internal citations omitted). Such testimony, as it stood, likely did little more than undermine his credibility. Accordingly, this Court finds that Mr. Tempest has not met his burden in establishing that the State undermined the guarantee of a fair verdict by knowingly presenting false testimony.

F

Ineffective Assistance of Counsel

Mr. Tempest claims that Mr. Dimitri's performance in defending him at trial was so exceedingly deficient that he was deprived of his Sixth Amendment right to counsel. While demonstrating such inefficacy is traditionally a "high bar" to surmount, here the task is made even more difficult by the fact that Mr. Tempest selected—and continued to retain—Mr. Dimitri as private counsel. Padilla v. Kentucky, 559 U.S. 356, 371, (2010).

Our Supreme Court has held that "the trial performance of a privately retained defense attorney cannot be said to have infringed a defendant's constitutional rights unless the attorney's representation was so lacking that the trial had become a farce and a mockery of justice." Larngar, 918 A.2d at 856 (internal citations omitted). As such, "when a person selects his or her own attorney, any alleged deficiencies seldom amount to an infringement of one's constitutional rights." Hassett v. State, 899 A.2d 430, 434 n.3 (R.I. 2006). Indeed, "rarely, if ever, following conviction has any federal or state court permitted a defendant who has been represented by private counsel to later question, in post-conviction proceedings, the ineffectiveness or

inefficiency of the trial counsel that the defendant chose and selected to represent him or her at trial." State v. Dunn, 726 A.2d 1142, 1146 n.4 (R.I. 1999). This case does not present the rare scenario that would prompt the Court to buck such a trend.

Here, while Mr. Tempest's trial may have had its shortcomings inextricably linked to the undermining of a fair trial, such failures were in no way owing to Mr. Dimitri's performance. Even the most cursory look at the record from trial demonstrates that Mr. Dimitri—later appointed a Justice of the Rhode Island Superior Court in 1996—was no farce. See Burger v. Kemp, 483 U.S. 776, 779-80 (1987) (noting counsel's impressive credentials in finding no deficiency). Blistering cross-examination and a thorough command of the facts marked Mr. Dimitri's counsel as anything but ineffective. See Matos v. Miles, 737 F. Supp. 220, 222 (S.D.N.Y. 1990) (finding no deficiency where "record reveal[ed] that counsel possessed a thorough command of the facts"); United States v. Pelullo, 961 F. Supp. 736, 761 (D.N.J. 1997) (same where counsel "exhibited total command of the facts"). With thirty years of experience trying criminal cases before tackling Mr. Tempest's case, Mr. Dimitri was a force with which to be reckoned. See Brennan v. Vose, 764 A.2d 168, 172 (R.I. 2001) (finding no deficiency in actions of "well-respected and seasoned trial attorney who has . . . participated in extensive pretrial arguments and relentlessly cross-examined the witnesses proffered by the state"); Spaziano v. Singletary, 36 F.3d 1028, 1040 (11th Cir. 1994) (holding, where attorney had thirty years of experience, that "[t]he more experienced an attorney is, the more likely it is that his decision to rely on his own experience and judgment in rejecting a defense without substantial investigation was reasonable under the circumstances.") (internal citations omitted); Provenzano v. Singletary, 148 F.3d 1327, 1332 (11th Cir. 1998) (reiterating that its "strong reluctance to second guess strategic decisions is even greater where those decisions were made by experienced

criminal defense counsel"). Indeed, not only did Mr. Tempest not complain of Mr. Dimitri's performance at trial, he also opted to hire Mr. Dimitri again to represent him on appeal. It is only now, twenty years later and with the benefit of over a decade's worth of case research, that Mr. Tempest dons his helmet as Monday morning quarterback. See Blake v. United States, 723 F.3d 870, 879 (7th Cir. 2013), cert. denied, 134 S. Ct. 2830 (2014) ("Courts are admonished not to become Monday morning quarterbacks in evaluating counsel's performance.") (internal citations omitted).

Mr. Tempest singles out four specific instances in which he alleges Mr. Dimitri failed in some material respect. First, he claims that Mr. Dimitri faltered when he did not take advantage of the testimony of the three-year-old eyewitness, young Nicole. Secondly, he asserts that Mr. Dimitri did not elucidate a handful of the discrepancies in Mr. Vaz's testimony. Thirdly, Mr. Tempest points to his attorney's failure to call Kevin McMann or his father to the stand to testify that the maroon car had not been lent out. Lastly, he identifies Mr. Dimitri's failure to discuss one inconsistency regarding the location of the pipe as constituting ineffective assistance of counsel.

Even examining Mr. Dimitri's conduct under the more stringent Strickland standard, to wit, whether "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment[,]" this Court finds no deficiency. Powers, 734 A.2d at 522 (quoting Strickland v. Washington, 466 U.S. 668, 687 (1984)); see Brown v. State, 964 A.2d 516, 527 n.15 (R.I. 2009) (finding it unnecessary to address "farce and [ ] mockery" standard upon finding no deficiency under less lenient Strickland test). While Strickland, as announced by the United States Supreme Court, holds counsel to a higher bar than that in the instant petition, the case law surrounding such a standard is instructive. It too is

'"very forgiving,"' United States v. Theodore, 468 F.3d 52, 57 (1st Cir. 2006) (quoting Delgado v. Lewis, 223 F.3d 976, 981 (9th Cir. 2000)), and counsel is only deemed deficient if "no competent attorney" would have taken such a course of action as he or she did. Premo v. Moore, 562 U.S. 115, 124 (2011).

Under Strickland, "strategic choices . . . are virtually unchallengeable." 466 U.S. at 690. An attorney's performance is "viewed as a whole," Atkins v. Zenk, 667 F.3d 939, 945 (7th Cir. 2012) (emphasis in original), and the court is instructed to "affirmatively entertain the range of possible reasons . . . counsel may have had for proceeding as they did." Cullen v. Pinholster, 131 S. Ct. 1388, 1407 (2011) (internal citations omitted). In conducting such post hoc review, the court is to remain mindful that "[n]o attorney has clairvoyant power and . . . retrospect examination [typically] indicate[s] . . . that some action taken at the trial would have been better had another course of action been chosen." Blackmon v. State, 623 S.W.2d 184, 185 (Ark. 1981). It bears repeating that "[c]ounsel is not required to raise every issue or pursue every avenue of inquiry." Haislip v. Roberts, 788 F. Supp. 482, 484 (D. Kan. 1992), aff'd sub nom., Haislip v. Attorney Gen. of Kan., 992 F.2d 1085 (10th Cir. 1993); accord Harrington v. Richter, 562 U.S. 86, 110 (2011) (holding that "[t]he Court of Appeals erred in suggesting counsel had to be prepared for any contingency"). Rather, "there is room . . . for mistakes, which are almost inevitable in a trial setting[.]" Arroyo v. United States, 195 F.3d 54, 55 (1st Cir. 1999). As such, the issue presented is whether Mr. Dimitri failed to present issues "so obvious and promising that no competent lawyer could have failed to pursue" them. Id.

Unfortunately, Mr. Dimitri passed away in 2006 and was thus unavailable to speak to his strategies in representing Mr. Tempest. However, as his son who sat second chair at Mr. Tempest's trial explained, Mr. Dimitri's stratagem was threefold: he aimed to discredit the

State's witnesses, finger an alternative perpetrator, and disprove the State's theory of a cover-up exacted by Tempest-aligned members of the Woonsocket Police Department. While this plan was ultimately unsuccessful, its execution certainly did not fall outside "the wide range of reasonable professional assistance and sound trial strategy that passes legal muster[.]" Toole v. State, 748 A.2d 806, 809 (R.I. 2000) (internal citations omitted); see Blackmon, 623 S.W.2d at 185 (reiterating that "effective assistance of counsel . . . does not guarantee any degree of success by such counsel").

Even brief examination of Mr. Tempest's four specific claims reveals that each falls short. Firstly, Mr. Dimitri reasonably chose not to call young Nicole as a witness because he "couldn't refresh her recollection" on the events of the murder before trial a decade later. (Tr. 183:7-8, Mar. 23, 2015.)[51] Secondly, an attorney need not impeach a witness on every available facet of his or her story—a thorough discrediting is sufficient.[52] As discussed supra, any specific failure to impeach Mr. Vaz's testimony would have been merely cumulative and thus does not mark Mr. Dimitri's counsel as deficient.[53] This proposition also holds true with regard to statements regarding the location of the pipe—Mr. Dimitri fiercely attacked the State's contention that Mr. Tempest's brother cleaned the murder weapon. Simply because he opted to take a different approach in cross-examining Officer Sweeney does not mean he acted outside the "wide range" of effective counsel. See Yarborough v. Gentry, 540 U.S. 1, 8 (2003) ("When

[51] See Evans v. State, 995 So. 2d 933, 943 (Fla. 2008) (finding no deficiency where counsel opted not to call witness with "memory lapse"); Williams v. Armontrout, 912 F.2d 924, 934 (8th Cir. 1990) ("Decisions relating to witness selection are normally left to counsel's judgment, and this judgment will not be second-guessed by hindsight.") (internal citations omitted).

[52] See Commonwealth v. Fisher, 742 N.E.2d 61, 75 (Mass. 2001) ("That defense counsel did not pursue additional avenues of impeachment does not constitute ineffective assistance.").

[53] See Love v. McCray, 165 F. App'x 48, 50 (2d Cir. 2006) ("Counsel's performance cannot be deemed objectively unreasonable because he failed to pursue cumulative impeachment . . . regardless of whether that omission was a product of calculated strategy or negligent oversight.").

counsel focuses on some issues to the exclusion of others, there is a strong presumption that he did so for tactical reasons rather than through sheer neglect.").

Lastly, counsel is not ineffective simply because he or she failed to sniff out every possible avenue for exculpatory evidence. See Rompilla v. Beard, 545 U.S. 374, 383 (2005) (holding that "the duty to investigate does not force defense lawyers to scour the globe on the off chance something will turn up"); Dugas v. Coplan, 428 F.3d 317, 328 (1st Cir. 2005) (holding that "'reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste'" (quoting Rompilla, 545 U.S. 374, 383)). Here, Mr. Dimitri conducted a more than apt investigation, which included hiring a private investigator "to look into witnesses and other issues in this case prior to going to trial" and reviewing the investigator's resulting "40-page report[.]" Tr. 149:20-24, Mar. 23, 2015; see Strickland, 466 U.S. at 691 (holding that counsel's duty extends only to "mak[ing] reasonable investigations . . . [and that the Court should] apply[] a heavy measure of deference to counsel's judgments") (emphasis added). There is no indication that there was any basis for calling Kevin McMann or his father, John McMann, to the stand. Mr. Dimitri had already presented the evidence suggesting that Mr. Monteiro did not own the getaway car at the time of the murder at trial. He had no reason to suspect after thorough investigation that the car had ever been loaned out. See Bragg v. Galaza, 242 F.3d 1082, 1088 (9th Cir. 2001), opinion amended on denial of reh'g, 253 F.3d 1150 (9th Cir. 2001) (holding counsel's duty "does not necessarily require that every conceivable witness be interviewed.") (internal citations omitted). Accordingly, "consider[ing] counsel's performance in its entirety," the Court finds that Mr. Tempest's ineffective assistance of counsel claim fails. Hazard v. State, 64 A.3d 749, 756 (R.I. 2013).

G

Actual Innocence

Mr. Tempest comes before this Court proclaiming his innocence of the crime of which he was convicted. He asserts that—in the wake of his postconviction hearing—the State's theory now lies thoroughly dismantled, as key pieces of inculpatory evidence presented at trial have been discredited. With those linchpins removed, he argues, the case against him falls apart and, in turn, the Court must find him "actually innocent." However, despite Mr. Tempest's bold assertions to the contrary, there has been no grand repudiation of the prosecution's case. With little evidence in hand, he asks this Court to overlook the deliberation of a jury of his peers in weighing his guilt twenty-three years ago and now find him blameless. After a thorough, fastidious examination of the facts presented, the Court declines such an invitation.

The first hurdle which Mr. Tempest must clear is whether such a claim of actual innocence may be entertained at all. Our Supreme Court has not squarely addressed the issue of whether the statutory mechanism for postconviction relief contains a freestanding device by which a petitioner may obtain release by proof of factual innocence. See Miguel v. State, 924 A.2d 3, 5 (R.I. 2007) (noting that it was "not confronted with a case of actual innocence"); see also Higham v. State, 45 A.3d 1180, 1187 (R.I. 2012) (finding "actual-innocence claim [ ] barred by the doctrine of res judicata" where, although "cloaked in a different title, applicant assert[ed] the same argument" he made earlier); Lyons v. State, 43 A.3d 62, 65 (R.I. 2012) (holding same).

Moreover, the United States Supreme Court has yet to provide such an independent path in habeas petitions. Herrera v. Collins, 506 U.S. 390, 400 (1993) ("Claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal

proceeding."); see also House v. Bell, 547 U.S. 518, 555 (2006) (discussing only "a hypothetical freestanding innocence claim"). Circuit courts have interpreted Herrera to hold that the federal judiciary need not afford such protection under the Constitution as "state clemency proceedings provide the proper forum to pursue claims of actual innocence[.]" Royal v. Taylor, 188 F.3d 239, 243 (4th Cir. 1999).[54]

While the Federal Constitution establishes only a baseline level of protection, Pimental v. Dep't of Transp., 561 A.2d 1348, 1350 (R.I. 1989) (citing Oregon v. Hass, 420 U.S. 714, 719 (1975)), our Supreme Court "ha[s] provided greater protections to a criminal defendant under our [state] constitution than would exist under the United States Constitution." State v. Taylor, 621 A.2d 1252, 1254 (R.I. 1993); see, e.g., Advisory Op. to the Governor, 666 A.2d 813, 820 (R.I. 1995) (finding that "the Rhode Island Constitution provides a broader right to counsel than that provided under the Federal Constitution"); State v. Maloof, 114 R.I. 380, 390, 333 A.2d 676, 681 (1975) ("giv[ing] added meaning to the state's constitutional guarantee of privacy" beyond the federal standard). Although "[t]he decision to depart from minimum standards and to increase the level of protection should be made guardedly and should be supported by a principled rationale" State v. Benoit, 417 A.2d 895, 899 (R.I. 1980), "under our system of justice it is far better to have many guilty persons go free than to have one innocent person be wrongly convicted." State v. Paster, 524 A.2d 587, 591 (R.I. 1987) (citing 3 Legal Papers of John Adams, 242 (1965) (Adams' Argument for the Defense, Rex v. Wemms, Dec. 3-4, 1770)). "The founders of this colony, and later this state, valued freedom and liberty above all other

[54] Accord Pettit v. Addison, 150 F. App'x 923, 926 (10th Cir. 2005) (holding that "Herrera indicates that a freestanding actual innocence claim is not cognizable at all in habeas when a state avenue for relief is open, such as executive clemency"); Otey v. Hopkins, 5 F.3d 1125, 1133 (8th Cir. 1993) ("'The appropriate 'forum' in which to raise such actual innocence claims is that of executive clemency, which acts as a 'fail safe' against executing innocent people." (quoting Herrera, 506 U.S. at 415)).

interests of society. It is in that tradition of freedom and liberty that [the Court] decline[s] to dilute the guarantees of the Rhode Island Constitution." Pimental, 561 A.2d at 1353.

Simply put, "denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice." Lisenba, 314 U.S. 219, 236.

> "[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points . . . . It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints[.]" Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting).[55]

The incarceration of the innocent is, by definition, a "purposeless restraint" and a most grave one at that. See Herrera, 506 U.S. at 437 (Blackmun, J. dissenting) (stating that the "[e]xecution of an innocent person is the ultimate arbitrary imposition") (internal citation omitted). Sentencing a blameless man to confinement for the remainder of his natural life is both utterly intolerable in civilized society and repugnant to the constitution of this great state.

While the Governor of Rhode Island is granted the power to pardon, R.I. Const. art. IX, § 13, such a failsafe is insufficient. Reliance on executive clemency serves as anemic protection against the potential violation of such a sacrosanct right—the right to not be imprisoned for a crime one did not commit. See Hugo Adam Bedau & Michael L. Radelet, Miscarriages of Justice in Potentially Capital Cases, 40 Stan. L. Rev. 21 (1987) (demonstrating the inefficacy of, and in turn, the unjustifiable reliance on, the clemency process).[56] To successfully navigate clemency

[55] Accord Lassiter v. Dep't of Soc. Servs. of Durham Cnty., N. C., 452 U.S. 18, 24 (1981) (stating that "due process 'is not a technical conception with a fixed content unrelated to time, place and circumstances'" (quoting Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961))).

[56] It also bears noting that here in Rhode Island each and every pardon requires the advice and consent of the state Senate, making it even more difficult for clemency to take place. R.I. Const. art. IX, § 13

proceedings, one must rely on the fickle winds of political favor to propel his or her release.[57] In contrast, our state's judiciary is specifically designed to be immune from external pressure—to wit, the hot air of public opinion that can, by threat of electoral mutiny, serve to missteer even the most resolute of executively-captained vessels. "The very purpose of a Bill of Rights [i]s to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life [and] liberty . . . may not be submitted to vote; they depend on the outcome of no elections." W. Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

Even setting aside this threat of tyranny by majority, it is readily apparent that this unreviewable discretionary power is a weak bulwark against such a formidable invasion. "If the exercise of a legal right turns on 'an act of grace,' then we no longer live under a government of laws." Herrera, 506 U.S. at 440 (Blackmun, J. dissenting). The underpinning of such a hallowed right—the right of an innocent man to remain free—cannot be based solely on the whims and caprices of the executive branch. "If the laws furnish no remedy for the violation of a vested legal right[,]" civil liberty is no more. Marbury v. Madison, 5 U.S. 137, 163 (1803); see also Taylor v. Place, 4 R.I. 324, 343 (1856) ("An independent, responsible judiciary is the only safeguard of our [ ] lives[] and liberties."). Plainly, there must exist an independent path within the schema for postconviction relief to act as a final safety net for the innocent—a neutral

[57] See Nash v. Israel, 533 F. Supp. 1378, 1382 (E.D. Wis. 1982), aff'd, 707 F.2d 298 (7th Cir. 1983) (noting that a grant of clemency "often depend[s] on which way the political winds are blowing"); State ex rel. Maurer v. Sheward, 644 N.E.2d 369, 374 (Ohio 1994) (stating that "the Governor . . . might be too easily influenced by political factors to grant or deny clemency for reasons other than the merits of an inmate's claim"); Graham v. Tex. Bd. of Pardons & Paroles, 913 S.W.2d 745, 750 (Tex. App. 1996) (noting that "the clemency process is still greatly affected by public opinion and political pressures"): Wiley v. State, 691 So. 2d 959, 977 (Miss. 1997) (Sullivan, P.J., dissenting) ("The consideration of executive clemency is especially arbitrary since it is usually based on popular opinion [and] political aspirations[.]")

failsafe, rarely invoked, that can spare the inculpable from harsh imprisonment and societal condemnation. See Sec. 10-9.1-1(a) (requiring postconviction relief upon violation of Rhode Island Constitution).

The Court notes the host of other state courts that have discerned such a freestanding claim stemming from their own constitutions. See, e.g., People v. Washington, 665 N.E.2d 1330, 1336–37 (Ill. 1996) ("We believe that no person convicted of a crime should be deprived of life or liberty given compelling evidence of actual innocence."); Montoya v. Ulibarri, 163 P.3d 476, 484 (N.M. 2007) ("We believe that to ignore a claim of actual innocence would be fundamentally unfair."); People v. Cole, 765 N.Y.S.2d 477, 485 (N.Y. Crim. Ct. 2003) ("This court holds that the conviction or incarceration of a guiltless person violates elemental fairness, deprives that person of freedom of movement and freedom from punishment and thus runs afoul of the due process clause of the State Constitution."). While there remains some nuanced variation in the tests employed by these states in evaluating such a claim, one standard consistently reappears—proof by clear and convincing evidence. See e.g. Miller v. Comm'r of Corr., 242 Conn. 745, 747, 700 A.2d 1108, 1110 (1997) (holding that "petitioner must establish by clear and convincing evidence that . . . he is actually innocent of the crime of which he stands convicted"); State ex rel. Amrine v. Roper, 102 S.W.3d 541, 548 (Mo. 2003) (requiring petitioner "make a clear and convincing showing of actual innocence that undermines confidence in the correctness of the judgment"); Ex parte Franklin, 72 S.W.3d 671, 678 (Tex. Crim. App. 2002) (finding that petitioner "must establish his innocence of the crime by clear and convincing evidence and not merely that he would be found not guilty by a subsequent jury"). To sustain a showing that is both clear and convincing, a party "must produce in the mind of the factfinder a firm belief or conviction that the allegations in question are true[;] [it] does not require that the

evidence negate all reasonable doubt or that the evidence must be uncontroverted." Cahill v. Morrow, 11 A.3d 82, 88 n.7 (R.I. 2011) (quoting 29 Am. Jur. 2d Evidence § 173 at 188–89 (2008)).

"Actual innocence is not demonstrated merely by showing that there was insufficient evidence to prove guilt beyond a reasonable doubt." Gould v. Comm'r of Corr., 22 A.3d 1196, 1206 (Conn. 2011). Instead, such a claim requires the presentation of factual evidence, "demonstrat[ing] by affirmative proof that the petitioner did not commit the crime." Id. Admittedly, the difficulty of proving a negative is apparent. See Elkins v. United States, 364 U.S. 206, 218 (1960) (noting that "as a practical matter it is never easy to prove a negative"); United States v. Wilgus, 638 F.3d 1274, 1288–89 (10th Cir. 2011) (describing such proof of a negative as "inherently difficult"). Nevertheless, "[a] criminal defendant proved guilty after a fair trial does not have the same liberty interests as a free man." Osborne, 557 U.S. at 68; accord Herrera, 506 U.S. at 399 (stating that once a defendant is convicted, "the presumption of innocence disappears"). The weighty deliberations of a jury should not be brushed aside as mere pretense. See Bouley v. Gibney, 113 R.I. 522, 525, 324 A.2d 318, 320 (1974) (holding that "the jury has the primary right to exercise the factfinding power, and for that reason the trial justice should refrain from usurping that priority"); Tatom v. Ga.-Pac. Corp., 228 F.3d 926, 932 (8th Cir. 2000) (remarking that a "jury verdict should not lightly be set aside"); Ferrell v. Wall, 889 A.2d 177, 186 (R.I. 2005) (noting "society's strong interest in the finality of convictions"). Indeed, "any person who has once been finally convicted in a fair trial should not be permitted to wage . . . a collateral attack on that conviction without making an exceedingly persuasive case that he is actually innocent." Ex parte Elizondo, 947 S.W.2d 202, 206 (Tex. Crim. App. 1996); accord Herrera, 506 U.S. at 443 (Blackmun, J., dissenting) ("The government bears the burden of

proving the defendant's guilt beyond a reasonable doubt, but once the government has done so, the burden of proving innocence must shift to the convicted defendant.") (internal citations omitted). Imposing such a "guilty until proven innocent" standard for a claim of factual innocence, and requiring clear and convincing proof thereof, is proper precisely because a petitioner has already been adjudicated as guilty.

Here, the case has already been tried and presented to a jury: the Court does not purport to reweigh Mr. Tempest's heart against a feather.[58] Rather—if this state's jurisprudence were to recognize such a freestanding claim—the issue would be whether he has instilled within this Court a conviction of his innocence. Despite Mr. Tempest's proclamations to the contrary, he would fail to produce sufficient evidence to meet this burden. Much of the evidence presented in support of his guilt still stands despite the challenges brought in the instant petition, including perhaps the crux of the State's case–Terry Gelinas' testimony regarding Mr. Tempest's incriminatory actions after the murder. (Trial Tr. 2089:18-21, Apr. 20, 1992 (Mr. Ryan's Closing Argument) ("[W]hat [Gelinas] does more vividly than any other witness is describe [Mr. Tempest's] behavior in a way which is totally inconsistent with an innocent man.")). Moreover, his newly discovered evidence, as discussed supra, does little to change the picture presented before the jury in 1992. This Court would not simply set aside a twenty-three year old verdict without sufficient proof. Accordingly, Mr. Tempest's claim of actual innocence would fail.

[58] In the mythology of ancient Egypt, a tribunal of the gods would weigh the heart of the recently deceased against a feather. If the heart was heavy with sin, the soul of the dead would be devoured by a beast. But if the scale tipped in favor of the feather, as symbolic of truth and justice, the departed would find salvation.

IV

Conclusion

This Court finds two independent bases—the suppression of favorable evidence and the unduly suggestive interviewing of witnesses—that establish Mr. Tempest's due process rights were violated before and during his trial in 1992. Irrespective of the petitioner's guilt or innocence, justice demands the setting aside of his conviction.[59] While Mr. Tempest has failed to provide any newly discovered evidence supportive of his claim of innocence, it is clear that he was deprived of a fair trial when he was found guilty.

The path to justice is not always the most direct or accessible.[60] Indeed, though it may be long and arduous, in the end it is the only road that takes us—as a state, as a nation, and, most importantly, as a people—where we need to go.[61] Protection of the Constitution requires a constant and unerring vigilance; the Court—as the last bastion of liberty—may not sit idle in the face of injustice. The power of the state and the authority of law enforcement must be checked by judicial intervention.[62]

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[59] See Curran v. Del, 259 F.2d 707, 713-14 (3d Cir. 1958) (noting that "in a proceeding such as that before us [finding a due process violation,] [the court] do[es] not and cannot pass on the guilt or innocence of the defendants.").

[60] See United States v. Booker, 543 U.S. 220, 289 (2005) (Stevens, J. dissenting) (stating that "the Constitution does not permit efficiency to be our primary concern"); North Mariana Islands v. Bowie, 243 F.3d 1109, 1124 (9th Cir. 2001) ("The ends in our system do not justify the means.") (emphasis in original).

[61] See Mapp v. Ohio, 367 U.S. 643, 659 (1961) ("Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence."); Miller v. United States, 357 U.S. 301, 313 (1958) (noting that while "insistence upon such [constitutional] rules may appear as a technicality that inures to the benefit of a guilty person, the history of the criminal law proves that tolerance of shortcut methods in law enforcement impairs its enduring effectiveness"); Olmstead v. United States, 277 U.S. 438, 470 (1928) (Holmes, J., dissenting) (noting that it is "a less evil that some criminals should escape than that the government should play an ignoble part").

[62] See Miller, 357 U.S. 301, 313 ("We are duly mindful of the reliance that society must place for achieving law and order upon the enforcing agencies of the criminal law. But insistence on

Harkening back to the declaration of Chessman,

> "We must be deaf to all suggestions that a valid appeal to the Constitution, even by a guilty man, comes too late, because courts, including this Court, were not earlier able to enforce what the Constitution demands. The proponent before the Court is not the petitioner but the Constitution of the United States." 354 U.S. at 165.

The Court concludes its discussion where it began—with the simple eloquence of Martin Luther King, Jr.: "The arc of the moral universe is long but it bends towards justice." Today, after over twenty years, the arc bends. Accordingly, Mr. Tempest's petition to set aside his conviction is GRANTED.

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observance by law officers of traditional fair procedural requirements is, from the long point of view, best calculated to contribute to that end."); Weeks v. United States, 232 U.S. 383, 392, overruled by Mapp, 367 U.S. 643 ("The tendency of those who execute the criminal laws of the country to obtain conviction by means . . . destructive of rights secured by the Federal Constitution[ ] should find no sanction in the judgments of the courts, which are charged at all times with the support of the Constitution, and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights."); Marbury, 5 U.S. at 177 ("It is emphatically the province and duty of the judicial department to say what the law is.").

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**Tempest v. State of Rhode Island**
CASE NO:	**PM 04-1896**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**July 13, 2015**
JUSTICE/MAGISTRATE:	**Procaccini, J.**

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