

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

SUPERIOR COURT

(FILED: July 3, 2015)

HENRY HIGGINS

V.

STATE OF RHODE ISLAND

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C.A. No. PM-13-3637

**DECISION**

**MCGUIRL, J.** Before this Court is the application of Henry Higgins (Mr. Higgins or Petitioner) for postconviction relief. Mr. Higgins contends that his convictions must be overturned, asserting that: (1) the newly-discovered recantation by Ms. Murphy, if known before the plea, would have prompted him to seek a successful acquittal at trial; (2) the Attorney General’s Office failed to provide all exculpatory evidence as required by Brady and its progeny; and (3) his counsel was constitutionally deficient in failing to inform him of all relevant information before his plea. Jurisdiction is pursuant to G.L. 1956 §§10-9.1-1 et seq.

**I**

**Facts and Travel**

Following a hearing for postconviction relief, “[t]he court shall make specific findings of fact[.]” Sec. 10-9.1-7. Hence, the Court makes the following findings as to the circumstances surrounding the instant petition.

Mr. Higgins met Ms. Debra Murphy (Ms. Murphy) approximately seven years ago through the social networking website MySpace. (Tr. 8:6-9, Jan. 7, 2014.) They soon met in person at Ms. Murphy’s home, whereupon they began a sexual relationship. Id. at 8:24-9:3. Not long after, such intimate contact turned abusive and violent with Mr. Higgins slapping and

hitting Ms. Murphy, id. at 25:14-17, burning her with a cigarette, id. at 9:22-23, and forcing her to prostitute herself to strangers under the threat of further violence. Id. at 12:19-23; Tr. 111:17, Mar. 18, 2014.) Mr. Higgins also persuaded Ms. Murphy to surreptitiously place a video camera in her thirteen-year-old daughter R.'s<sup>1</sup> bedroom to capture footage of the girl undressing for his sexual pleasure.

Upon investigation by police, Mr. Higgins was found to be in possession of three films depicting R. entering her bedroom “in a towel and then capture her nude in the process of getting dressed.” (Computer Forensics Examination Report at 1, Apr. 15, 2010.) He also had still shots derived from these videos, individually labeled with titles such as “She’s amazing”<sup>2</sup> (Tr. 82:9, Feb. 11, 2014) and “[R.]nkd1” (Computer Forensics Examination Report at 7, Apr. 15, 2010.) Such images were located in a file folder titled “[R.]” Tr. 82:8, Feb. 11, 2014. Additionally, Mr. Higgins had five images depicting child pornography on his computer. These images included a “[n]ude juvenile female being vaginally penetrated by an adult male[,]” the “[g]raphical exhibition of the genitals of a nude prepubescent female laying in a bed with a nude juvenile female[,]” and three photographs displaying the “[g]raphic exhibition of a nude juvenile female’s genitals[.]” (Computer Forensics Examination Report at 7, Apr. 13, 2010.)

In the wake of such incidents, Ms. Murphy—in her statements to her family, police, and counsel—repeatedly vacillated between identifying Mr. Higgins as abusive and violent and retracting such assertions. The first report by Ms. Murphy of her abuse at the hands of Mr. Higgins occurred when she was having drinks one night with her sister, Kathy. During the course of their conversation, Ms. Murphy informed Kathy that Mr. Higgins was forcing her to

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<sup>1</sup> For the purposes of this Decision, this Court will refer to Ms. Murphy’s minor daughter as “R.”

<sup>2</sup> The file name is spelled “Sh3SZ UhhMaZinG.” (Computer Forensics Examination Report at 7, Apr. 15, 2010.)

exchange sexual favors for money with various unfamiliar men. (Tr. 11:11-12:1, Jan. 7, 2014.) Subsequently, Ms. Murphy was confronted by her two sisters and mother, who expressed concern over her relationship with Mr. Higgins. Id. at 12:4-22. Ms. Murphy proceeded to inform her family that what she had said earlier was not true and that these acts were consensual rather than the result of Mr. Higgins compelling her in any way. Id. at 12:22-24. Her family did not believe this retraction, insisting that she file charges against him. Id. at 13:2-5.

Later, Ms. Murphy arrived home after walking her dog to find an officer and detective from the Pawtucket Police Department waiting for her. Id. at 13:7-11. She reiterated her story that the various sexual acts performed were indeed of her own volition. Id. at 13:20-21. The policemen left a business card, requesting Ms. Murphy contact them if she changed her mind. Id. at 13:23-25. Subsequently, Ms. Murphy's mother told Ms. Murphy that she did not believe that Ms. Murphy's daughter was in a safe environment and that she would try to have R. taken away if such conditions persisted. Id. at 14:2-4. Ms. Murphy then spoke with the police, informing them that Mr. Higgins "forced [her] to have sex with other men[,] . . . threatened [her] to have sex with other men for money[,] . . . hit[] [her] . . . [and] burned [her]." Id. at 14:19-22. She further informed the police that Mr. Higgins directed her to surreptitiously film her minor daughter undressing. Id. at 15:6-16:9. With this information, the police proceeded to search Mr. Higgins' home and happened upon the aforementioned child pornography as well as the videos and images of R. in various stages of undress. (Tr. 21:15-23:3, Feb. 11, 2014.) Another image—found by police on the same hard drive as the pornographic images—was labeled "me" and depicted Mr. Higgins. (Computer Forensics Examination Report at 5, Apr. 15, 2010.)

Subsequently, Ms. Murphy was charged with video voyeurism and conspiracy to commit video voyeurism under G.L. 1956 §§ 11-64-2<sup>3</sup> and 11-1-6<sup>4</sup>. The Attorney General's Office filed similar charges against Mr. Higgins, also including one count of possession of child pornography under § 11-9-1.3<sup>5</sup> and felonious domestic assault.

With charges filed against her, Ms. Murphy was appointed counsel from the Public Defender's Office. One of her attorneys, Assistant Public Defender Kara Hoopis (Ms. Hoopis), noted:

“From my very first meeting with Ms. Murphy, it was clear that she had three goals with regard to this case: the first was to avoid going to jail; the second was to avoid losing custody of her daughter [R.]; and the third was to try to help Henry Higgins as much as possible.” (Tr. 158:11-16, Apr. 16, 2014.)

In March of 2011, Ms. Murphy composed a letter recanting her allegations against Mr. Higgins and presented it to Ms. Hoopis. In response, Ms. Hoopis told Ms. Murphy that:

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<sup>3</sup> Sec. 11-64-2 states, in relevant part,

“(1) A person is guilty of video voyeurism when, for the purpose of sexual arousal, gratification or stimulation, such person:

“(a) [u]ses, installs or permits the use or installation of an imaging device to capture, record, store or transmit visual images of the intimate areas of another person without that other person's knowledge and consent, and under circumstances in which that other person would have a reasonable expectation of privacy.

“(b) [i]ntentionally, and with knowledge that the image was obtained in violation of subsection (a), disseminates, publishes, or sells such image of the captured representation of another person or persons depicted in the representation or reproduction, and who did not consent to the dissemination, publication or sale.”

<sup>4</sup> Sec. 11-1-6 states, in relevant part, that “every person who shall conspire with another to commit an offense punishable under the laws of this state shall be subject to the same fine and imprisonment as pertain to the offense which the person shall have conspired to commit[.]”

<sup>5</sup> Sec. 11-9-1.3 states, “It is a violation of this section for any person to . . . [k]nowingly possess any book, magazine, periodical, film, videotape, computer disk, computer file or any other material that contains an image of child pornography.”

“it was not believable that Mr. Higgins didn’t know there was a tape in his camera, that he was, in fact, found to be in possession of not only the tape, but also still images that had been created from the tape, had been found in his computer after a forensic audit with her daughter’s name. Each of the individual still frames had been given new titles, specifically, sexually referenced names assigned to these photographs, that, for me, to go to a prosecutor or to a jury eventually and say he had nothing to do with that was probably not believable, and ultimately may not be in her best interest to present as she would not be a credible witness in that regard.” (Tr. 159:2-14, Apr. 16, 2014.)

After hearing this, Ms. Murphy “broke down crying.” Id. at 159:18.

In the summer of 2011, Ms. Hoopis was assigned to work in Newport, and Assistant Public Defender Michelle Alves (Ms. Alves) proceeded to represent Ms. Murphy in Providence. (Tr. 130:12-17, Mar. 18, 2014.) Ms. Murphy occasionally recanted her statements to Ms. Alves regarding Mr. Higgins’ involvement in the video voyeurism, “at times giv[ing] [Ms. Alves] information saying he wasn’t involved, but then again she would.” Id. at 139:8-10. Ms. Alves observed Ms. Murphy’s position “fluctuate . . . depending on her mental status at the time [they] were having a conversation.” Id. at 139:12-13. Additionally, Ms. Alves found that “almost all of [her] conversations [with Ms. Murphy] were through tears” and that it was rare to have a discussion with her “that wasn’t driven by emotion.” Id. at 119:8-10. She noted the influence that Mr. Higgins had over Ms. Murphy, where, although it was unclear whether “it was just an outside influence or something internal between her[,] she was hanging onto him . . . [and this force was] driving her to say certain things at certain times.” Id. at 120:25-121:4. She explained that whenever Ms. Murphy tried to say that Mr. Higgins “wasn’t involved would be a very emotional cry, [with her saying things such as] ‘He’s not involved. He didn’t do it. I shouldn’t have said he did it.’” Id. at 144:10-12. Ms. Alves and Ms. Murphy would then proceed to:

“talk about the facts as would be presented by the State, which included . . . that she had never been to his house, that there was, obviously, these assaultive behaviors that the State was alleging,

that he had other images on his computer, that this specific image with her face on it was on his computer as well. By the end of the conversation the tide was somewhat turned.” Id. at 144:12-19.<sup>6</sup>

While Ms. Alves was representing Ms. Murphy on the video voyeurism charges brought against her, Ms. Murphy reached out to Assistant Attorney General Daniel Guglielmo (Mr. Guglielmo). On January 13, 2012, Ms. Murphy telephoned Mr. Guglielmo and told him that “whatever the assault was, it was consensual with regard to the cigarette.” (Tr. 91:17-18, Feb. 11, 2014.) Mr. Guglielmo discussed these statements with Ms. Alves and the possibility of reducing the charge from felony domestic assault to nondomestic simple assault. Id. at 93:17-24. Ms. Alves informed him that Ms. Murphy would be amenable to that. Id. at 93:18-19.

Subsequently, Mr. Guglielmo discussed this recantation and reduction in charge with Mr. Higgins’ attorney, John MacDonald (Mr. MacDonald), who, in response, asked Mr. Guglielmo to drop the assault charge altogether. Id. at 94:8-25. Mr. Guglielmo denied this request, explaining that he didn’t “believe her recantation, number one, and, secondly, she didn’t recant everything.” Id. at 95:1-2. Additionally, he recorded in his notes that he conveyed the recantation to Mr. Higgins’ defense counsel. Id. at 95:9-15. At this time, Ms. Murphy did not contest her statement to the police that Mr. Higgins would slap and hit her. Id. at 103:14-20. Mr. Guglielmo, in refusing to drop the assault charge, was mindful of Ms. Alves’s comments to him that “she felt [Ms. Murphy] was being manipulated by [Petitioner].”<sup>7</sup> Id. at 95:4-5.

Mr. MacDonald stated at the postconviction hearing that although he remembered his discussion with Mr. Guglielmo regarding the charge reduction, he failed to recall learning of Ms. Murphy’s partial recantation of the assault claim. Id. at 13:14-20. He testified that if Mr.

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<sup>6</sup> At the postconviction relief hearing, Ms. Alves failed to recall whether Ms. Murphy provided her with any explanation as to why Mr. Higgins had the film and nude images of R. on his computer. Id. at 145:2.

<sup>7</sup> Ms. Alves corroborated at the hearing that she informed Mr. Guglielmo of the influence Mr. Higgins held over Ms. Murphy. (Tr. 118:2-3, Mar. 18, 2014.)

Guglielmo had informed him of any recantation, he would have relayed that information to Mr. Higgins. Id. at 15:23-24. Nevertheless, he agreed that “obviously” he must have had a conversation with Mr. Guglielmo to this effect as they ultimately agreed to reduce the charge to “a simple assault nondomestic.” Id. at 14:24-25. Additionally, Mr. MacDonald stated that this—or any recantation by Ms. Murphy—would not have likely affected his advice to Mr. Higgins regarding the decision to plea. Id. at 37:19-22. He noted that his main concern stemmed from “the evidence [that] was seized from [Mr. Higgins’] own computer” rather than Ms. Murphy’s testimony. Id. at 38:6-18. Mr. MacDonald also noted, with regard to the child pornography, that “where the images were found, and what the images were of were a concern[.]” Id. at 38:2-5. John Grasso (Mr. Grasso), Mr. MacDonald’s co-counsel in representing Mr. Higgins, testified that he never learned of the recantation. Id. at 44:7-23. Nevertheless, Mr. Higgins stated that he had in fact learned of Ms. Murphy’s recantation on the assault claim before entering his plea. Id. at 73:7-11. In weighing the credibility of the testimony presented, this Court finds that—despite Mr. MacDonald’s lapse in recall—Mr. Guglielmo did inform him of Ms. Murphy’s recantation as to the assault claim. See Fontaine v. State, 602 A.2d 521, 524 (R.I. 1992) (holding, in the context of a hearing for postconviction relief, that “[i]t is the trial court’s function to weigh the evidence and assess the credibility of the witnesses”).

While the Attorney General’s Office was informed of Ms. Murphy’s recantation of the assault claim, Assistant Attorney General Ronald Gendron (Mr. Gendron), the sole prosecutor in the video voyeurism case against Mr. Higgins, never learned of Ms. Murphy’s occasional recantations as to Mr. Higgins’ involvement in the video voyeurism. (Tr. 5:8-12, 100:8-13, Feb. 11, 2014.) Indeed, there is no indication that anyone at the Attorney General’s Office had the

opportunity to learn of such statements. Accordingly, the State did not relay this information to Mr. Higgins.

On March 20, 2012, Mr. Higgins, under oath, pled nolo contendere to four counts: video voyeurism, conspiracy to commit video voyeurism, child pornography, and assault. (Plea Hearing, Mar. 20, 2012.) He stated that he “talked to [his] attorneys about the case . . . [and] about the evidence the State had to present against [him] in each one of the[] charges[.]” Id. at 4:8-13. He affirmed that, after a discussion with his attorneys about the elements of the charges against him, any possible defenses, and his options of going to trial or entering a plea, he wished to plea nolo contendere to the charges brought by the State. Id. at 4:10-5:6. Further, Mr. Higgins expressed satisfaction with his counsel. Id. at 7:3-8. Specifically, after waiving the panoply of procedural rights afforded to criminal defendants under the Constitution, he listened closely to the prosecutor recite that he was charged with having conspired with Ms. Murphy to “store visual images of the intimate areas of a [thirteen-year-old] girl, without her knowledge or consent, . . . for the purposes of his own sexual gratification[.]” Id. at 13:14-18. He told the trial justice that he heard the facts that the prosecutor recited and “agree[d] the facts he related are true[.]” Id. at 14:3-4. Mr. Higgins then admitted his guilt to video voyeurism and conspiracy to commit video voyeurism and agreed that the above-outlined facts, if presented by the Attorney General’s Office to a jury, would be sufficient to convict him. Id. at 14:6-12. Mr. Higgins also conceded that the police had found images of child pornography on his computer on March 26, 2010. Id. at 14:23-15:2. He agreed that his computer did contain such images, admitted guilt to possession of child pornography and conceded that the facts, if presented to a jury, would have sustained a conviction on such a charge. Id. at 15:8-16. Further, he conceded that he had assaulted Ms. Murphy. Id. at 15:24-16:6. Upon entering his plea, Mr. Higgins affirmed that he



had “[no] questions at all about anything being done” during the plea hearing. Id. at 27:15-16. Accordingly, the trial justice found on the record that “Mr. Higgins knowingly, voluntarily and intelligently changed his plea from not guilty to nolo contendere in each of these three informations, understanding the nature of the plea and the consequences thereof.” Id. at 28:14-18.

Similarly, on March 22, 2012, after being duly sworn, Ms. Murphy pled nolo contendere to charges of video voyeurism and conspiracy to commit video voyeurism as well as admitted to the facts presented by the State. (Plea Hearing, Mar. 22, 2012.) She stated that she “talked about this case with Ms. Alves . . . [and] about the evidence that the State had to present against [her.]” Id. at 2:14-19. She affirmed that, after a discussion with Ms. Alves about the elements of the charges against her and all legal issues in the case, she wished to plea nolo contendere to the charges brought by the State. Id. at 2:20-3:23. She then proceeded to waive her constitutional rights afforded to all criminal defendants, noting that Ms. Alves “answer[ed] all [her] questions” and that she was “[v]ery satisfied” with Ms. Alves’ representation. Id. at 5:9-10, 14. She conceded that, working “in conjunction with Mr. Henry Higgins,” she filmed “the intimate areas of a [thirteen-year-old] girl . . . for the purposes of sexual gratification, stimulation or arousal of Henry Higgins.” Id. at 11:10-19. She admitted her guilt to the charges of video voyeurism and conspiracy to commit video voyeurism as well as recognized that the facts would be sufficient for a jury to convict. Id. at 12:3-11. Additionally, she attested that she entered her plea voluntarily. Id. at 9:11-12. While noting that she was taking antidepressants, Ms. Murphy asserted that such medication did not affect her reasoning ability. Id. at 9:20-10:12. Ms. Alves

agreed that Ms. Murphy's cognition was not impaired. Id. at 10:13-17.<sup>8</sup> Furthermore, Ms. Murphy made a detailed apology on the record, stating that she was "deeply sorry for [her] actions . . . [and] that it never should have happened." Id. at 17:12-13. She continued that "[i]f [she] could go back and change [her] actions, [she] would do it in a heartbeat." Id. at 17:21-22. After such a colloquy, the Court found that Ms. Murphy "knowingly, voluntarily and intelligently changed her plea . . . to nolo contendere, understanding the nature of the plea and the consequences thereof." Id. at 18:17-20.

In the wake of sentencing and the imposition of a no-contact order prohibiting Mr. Higgins from contacting Ms. Murphy, Ms. Murphy came before Judge Gallo on April 9, 2012 and August 14, 2012 seeking to vacate this order. On both occasions, Ms. Murphy claimed to have lied about Mr. Higgins' assaulting her. Similarly, on both occasions, Judge Gallo denied her motion, stating in the second hearing that the information "contained in the police report[] g[a]ve[] [him] some pause . . . and some question as to whether or not . . . [he] should vacate the No Contract Order." (Tr. 5:1-4, Aug. 14, 2012.)

This Court held hearings regarding the instant petition on January 7, February 11, March 18, and April 16 of 2014. During that time, the Court heard from Ms. Murphy, Assistant Attorney General Ronald Gendron, Mr. MacDonald, Mr. Grasso, Assistant Attorney General Daniel Guglielmo, Ms. Alves, Ms. Hoopis, and Mr. Higgins. The background narrative as recited above reflects the facts as gleaned from the testimony of these witnesses.

At the postconviction hearing, Mr. Higgins claimed he lied under oath at his plea hearing when he agreed to the facts supporting his guilt on the assault, video voyeurism and child

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<sup>8</sup> Ms. Alves stated at the postconviction relief hearing that during her plea, Ms. Murphy's "mental status was actually above normal on that day[.]" (Tr. 140:3, Mar. 18, 2014.) despite typically plagued by "mental illnesses[.]" Id. at 119:17.

pornography charges. He asserted that he pled nolo contendere in March of 2012 because his live-in girlfriend at the time had fallen quite ill, as her immune system was rejecting kidney transplants, and he needed to take her to the doctor for dialysis. (Tr. 49:25-50:15, Feb. 11, 2014.) Mr. Higgins stated that he lied under oath during his plea because he “got caught with [his] bad behavior[.]” to wit, cheating on his ailing girlfriend with Ms. Murphy, and “wanted to try to move on[.]” Id. at 76:6, 8-9. He denied any involvement in the charges to which he pled. Nevertheless, he stated on cross-examination that, at the time of his plea, he knew of Ms. Murphy’s limited recantation to Mr. Guglielmo; namely, that she had told the State that she consented to him burning her with cigarettes. Id. at 72:13-73:9. He noted that, despite awareness of this fact, he still chose to enter his plea. Id. at 73:10-11.

Additionally, Mr. Higgins attempted to explain why the video and still images of Ms. Murphy’s thirteen-year-old daughter, R. were found on his computer. He stated that he gave Ms. Murphy a camera she could use for still images and video recording. Id. at 64:22-65:1. He explained that Ms. Murphy’s computer was old and incapable of recognizing the memory card for the camera. Id. at 55:25-56:8. As such, Ms. Murphy would provide him with a memory card and ask him to record the files on a CD for her. Id. at 57:13-16. To burn these files onto a CD, he would first download them onto his hard drive. Id. at 77:11-19. He claimed that Ms. Murphy provided him with videos of her daughter undressing so that he could burn such a disk for her. Id. at 57:13-21. When confronted with the nude images of R. on his computer in a folder named “[R.],” id. at 78:13-18, Mr. Higgins responded that such images “could have come from an image that was sent to me via e-mail from Ms. Murphy.” Id. at 79:21-22. He also claimed that it was “[p]robably [R.]” that labeled a nude photograph of herself as “She’s amazing[.]” Id. at 80:8-11.

At the postconviction hearing, Ms. Murphy provided no explanation as to why the video of her thirteen-year-old daughter undressing and still images of her nude daughter captured from the video were found on Mr. Higgins' computer despite her contention that he was not at all involved with the video voyeurism. She did not state that she had emailed Mr. Higgins such photographs. She also did not state that either herself or R. individually labeled the photographs. Rather, she stated her belief that the videos only depicted R. "in a towel." (Tr. 15:10, Jan. 7, 2014.)

Nevertheless, Ms. Murphy did claim to have lied during her plea when she admitted to conspiring with Mr. Higgins to film her daughter undressing. She also disputed her claim that Mr. Higgins assaulted her without her consent, id. at 10:2-4, and asserts that she never exchanged sex for money. Id. at 11:1-3. At the hearing, Ms. Murphy suggested to the Court that she framed the tales of her sexual relationship with Mr. Higgins such that he was abusing her only because she "didn't want [her] family to think" that she was willingly involved in such "very bizarre things." Id. at 12:5, 25:24.

Mr. Higgins requests that—in light of Ms. Murphy's newly-discovered recantation as to the video voyeurism—this Court vacate all of his convictions stemming from this matter, including the child pornography charge which bears no relation to Ms. Murphy's testimony. He further maintains that his plea of nolo contendere was entered in violation of his due process rights under Brady as well as his Sixth Amendment right to effective assistance of counsel. To support such claims, he argues that the Attorney General's Office failed to provide his defense counsel with information regarding Ms. Murphy's partial recantation, and, alternatively, that his counsel was constitutionally deficient insofar as they knew of Ms. Murphy's recantation but failed to relay this information to him.

## II

### Standard of Review

“Once a defendant has entered a plea of guilty or of nolo contendere and sentence has been imposed, any issue relating to the validity of the plea must be raised by way of postconviction relief.” State v. Vashey, 912 A.2d 416, 418 (R.I. 2006) (quoting State v. Desir, 766 A.2d 374, 375 (R.I. 2001)) (superseded by statute on other grounds). 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[.]” Sec. 10-9.1-1(a).

Under the statute, an application can be filed at any time. Sec. 10-9.1-3.

“A plea of nolo contendere is the substantive equivalent of a guilty plea in Rhode Island.” State v. Figueroa, 639 A.2d 495, 498 (R.I. 1994) (citing State v. Feng, 421 A.2d 1258, 1266 (R.I. 1980)). A defendant, in entering such a plea, “waives several federal constitutional rights and consents to judgment of the court.” Feng, 421 A.2d at 1266 (citing Johnson v. Mullen, 120 R.I. 701, 390 A.2d 909 (1978)). As such, the plea is only considered valid if “voluntarily and intelligently entered[.]” Figueroa, 639 A.2d at 498 (citing Boykin v. Alabama, 395 U.S. 238, 242 (1969)).

In pursuing postconviction relief, a petitioner “bears the burden of proving, by a preponderance of the evidence, that he is entitled to [such] relief.” Burke v. State, 925 A.2d 890, 893 (R.I. 2007) (citing Larngar v. Wall, 918 A.2d 850, 855 (R.I. 2007)). As such, a petitioner must prove that the plea was “obtained from a defendant unaware and uninformed as to its nature and its effect as a waiver of his fundamental rights.” Figueroa, 639 A.2d at 498 (citing Cole v.

Langlois, 99 R.I. 138, 142-43, 206 A.2d 216, 218-19 (1965)). The proceedings for postconviction relief are “civil in nature.” Quimette v. Moran, 541 A.2d 855, 856 (R.I. 1988) (citing State v. Tassone, 417 A.2d 323 (R.I. 1980)). As a result, the rules and statutes that are applicable in civil proceedings also apply in the postconviction relief context. See § 10-9.1-7 (“All rules and statutes applicable in civil proceedings shall apply[.]”). In accordance with the postconviction relief 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

#### **Newly Discovered Evidence as to Video Voyeurism Charge**

Petitioner asserts he is entitled to the reversal of his convictions in light of newly-discovered material facts; namely, Ms. Murphy’s recantation as to the video voyeurism. Mr. Higgins contends that this newly-discovered evidence is credible and of the kind that would change the verdict at trial. He asserts that his reason for originally entering a plea of nolo contendere was that he believed proceeding to trial would have been futile due to Ms. Murphy’s expected testimony.

“The issue of the recanted testimony centers not on whether the witness[] actually recanted but on whether the recantation[] [is] credible, true in fact, and therefore sufficient and reliable evidence upon which to grant applicant’s requested postconviction relief.” Fontaine, 602 A.2d at 527. This Court “applies a two-pronged test to determine whether to grant postconviction relief based upon newly discovered evidence[.]” Ferrell v. Wall, 889 A.2d 177, 184 (R.I. 2005). The first prong of the test contains four criteria:

“[T]he evidence be (1) newly discovered since trial, (2) not discoverable prior to trial with the exercise of due diligence, (3) not merely cumulative or impeaching but rather material to the issue upon which it is admissible, [and] (4) of the type which would probably change the verdict at trial.” State v. Luanglath, 863 A.2d 631, 639 (R.I. 2005) (quoting State v. Firth, 708 A.2d 526, 532 (R.I. 1998)).

If this threshold inquiry is satisfied, “the second prong requires that the trial justice ‘determine whether the evidence presented is credible enough to warrant relief, a determination made by his [or her] accepting or rejecting conflicting testimony by exercising his or her independent judgment.’” Ferrell, 889 A.2d at 184 (quoting Fontaine, 602 A.2d at 524). “[W]hether the evidence is circumstantial or testimonial the factfinder must weigh the evidence and must use its experience with people and events in weighing the probabilities.” Fontaine, 602 A.2d at 524 (R.I. 1992) (quoting State v. Collazo, 446 A.2d 1006, 1011-12 n.4 (R.I. 1982)).

The State concedes that Mr. Higgins satisfies the threshold inquiry and raises its objection only to the credibility of the newly-discovered evidence at hand. As such, the Court turns to examine this evidence; to wit, the testimony of Ms. Murphy.

**i.**

**Credibility of Recantation**

It is well settled in the law that a factfinder may “‘refuse to accept the uncontroverted testimony of proffered witnesses’ under certain circumstances.” Pelletier v. Laureanno, 46 A.3d 28, 39 (R.I. 2012) (quoting Paradis v. Heritage Loan and Inv. Co., 701 A.2d 812, 813 (R.I. 1997) (mem.)). Indeed, this Court “may . . . reject testimony containing ‘inherent improbabilities or contradictions which, alone or in conjunction with other circumstances in evidence . . .’ satisfy [it] that the testimony is false.” Fontaine, 602 A.2d at 525 (quoting State v. Duggan, 414 A.2d 788, 792 (R.I. 1980)); see Pelletier, 46 A.3d at 39 (internal citations omitted) (holding that

“positive uncontroverted testimony may be rejected if it contains inherent improbabilities or contradictions”). Although a defendant’s plea of nolo contendere is not a bar to seeking postconviction relief for newly-discovered evidence, State v. Fontaine, 559 A.2d 622, 624-25 (R.I. 1989), this Court may properly “consider the recanted accusation of the complaining witness and weigh it against the defendant’s earlier admissions concerning the factual basis for his plea.” State v. Perry, 667 A.2d 784, 785 (R.I. 1995).

Courts have long commented that “[r]ecantation testimony is properly viewed with great suspicion.” Dobbert v. Wainwright, 468 U.S. 1231, 1233 (1984) (mem.) (Brennan, J., dissenting); see also Newman v. United States, 238 F.2d 861, 863 (5th Cir. 1956) (quoting Harrison v. United States, 7 F.2d 259, 262 (2d Cir. 1925)) (“Recantation is ‘looked upon with the utmost suspicion[.]’”); 58 Am. Jur., New Trial § 345 (2009) (stating that “recantation testimony is generally considered exceedingly unreliable”). Indeed, such testimony is highly disfavored because it serves to “upset ‘society’s interest in the finality of convictions,’ and [is] ‘very often . . . given for suspect motives.’” Ferrell, 889 A.2d at 184 (quoting Dobbert, 468 U.S. 1231, 1233-34).

This “strong presumption against recanting testimony,” is especially apropos in the context of domestic abuse. Dobbert, 468 U.S. at 1234. It is well documented that “victims of domestic violence are uncooperative in approximately eighty to ninety percent of cases.” Lisa Marie De Sanctis, Bridging the Gap Between the Rules of Evidence and Justice for Victims of Domestic Violence, 8 Yale J.L. & Feminism 359, 367 (1996). As the Rhode Island Supreme Court has noted, “an individual subjected to battered woman’s syndrome is incapable of freeing herself from the influence of the batterer.” McMaugh v. State, 612 A.2d 725, 732 (R.I. 1992). In contrast to other complainants, a victim of domestic abuse may “recant and attempt to have



charges against her abuser dropped.” State v. Stringer, 271 Mont. 367, 376, 897 P.2d 1063, 1068 (1995); see State v. Grecinger, 569 N.W.2d 189, 197 (Minn. 1997) (upholding admission of expert testimony on battered woman syndrome regarding a “victim’s inconsistent statements”); Cynthia Lynn Barnes, Admissibility of Expert Testimony Concerning Domestic-Violence Syndromes to Assist Jury in Evaluating Victim’s Testimony or Behavior, 57 A.L.R. 5th 315, at § 2[a] (originally published in 1998) (“The behavior of victims of domestic abuse which may affect prosecution of the batterer includes . . . recantation of testimony[.]”).

While this Court does not purport to attribute to Ms. Murphy any particular disorder, it is readily apparent that Ms. Murphy is unduly influenced by Mr. Higgins in the wake of an abusive relationship. Although Ms. Murphy states that she was embarrassed about her alleged proclivities towards masochistic sexual acts, she also testified that she filled her sister in on all the lurid details of her relationship with Mr. Higgins without any apparent prompting. She claims now that she did so falsely out of shame, narrating her various escapades under the pretext that Mr. Higgins was abusive and forced her to perform such acts only as a means to disguise her deviant sexual nature. However, it is clear that—if these acts were indeed of her own volition and if she believed the salacious particulars of her sex life an inappropriate conversation to hold with her sister—she would have refrained from such a discussion altogether instead of framing the talk as a cry for help and later relaying that same plea to the police.

Ms. Murphy has gone through seemingly limitless iterations of her story chronicling her relationship with Mr. Higgins. Indeed, the consistency of her claims lies only in her endless vacillation. Multiple witnesses at the postconviction hearing—namely, Mr. Guglielmo, Ms. Hoopis, and Ms. Alves—testified to Ms. Murphy’s emotional fragility in dealing with mental

illness as well as her lack of credibility as a witness. Their reason for doing so is clear—Ms. Murphy’s story simply doesn’t comport with reason.

Ms. Murphy’s bald assertions that Mr. Higgins had no involvement with the video voyeurism must be examined in light of the fact that Mr. Higgins was found in possession of three films of Ms. Murphy’s daughter undressing, as well as nude still shots derived from said videos. Ms. Murphy in no way claimed responsibility for labeling the nude photographs of her daughter as “She’s amazing”<sup>9</sup> (Tr. 82:9, Feb. 11, 2014) and “[R.]nkd1” (Computer Forensics Examination Report at 7, Apr. 15, 2010.) Rather, she stated her erroneous belief that the videos she captured only depicted her daughter covered by a towel. (Tr. 15:10, Jan. 7, 2014.) Ms. Murphy also failed to provide any explanation for a) how such images were derived from the DVD that Mr. Higgins allegedly burned for her and b) how she sent such images to Mr. Higgins as he claimed. She averred that she made the videos to feel “a rush of getting caught” as opposed to anything sexual. *Id.* at 15:13. However, it strains credulity to believe that Ms. Murphy captured still shots from the video depicting her daughter nude, labeled said images with explicit titles, and sent those images to Mr. Higgins all for, not a sexual rush, but the thrill of being caught. Rather, the far more likely story is the one she told the Pawtucket Police Department and this Court upon taking her plea: that she set up the camera in her daughter’s bedroom at the behest of Mr. Higgins for his sexual gratification. *See Allen v. Woodford*, 395 F.3d 979, 994 (9th Cir. 2005) (finding “recantation testimony . . . even more unreliable [where the] trial testimony implicating [petitioner] is consistent with the other evidence, while [the] recantation is not”). For the aforementioned reasons, this Court finds the newly-discovered evidence presented by Mr. Higgins not to be credible and thus denies his petition with respect to

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<sup>9</sup> The file name is spelled “Sh3SZ UhhMaZinG.” (Computer Forensics Examination Report at 7, Apr. 15, 2010.)

this claim. See Fontaine, 602 A.2d at 527 (upholding a trial judge’s finding that recantation testimony was unreliable and subsequent rejection of postconviction relief).

## **B**

### **Alleged Brady Violation**

Mr. Higgins asserts that the State failed to provide all exculpatory evidence as required by the due process clause. Specifically, Petitioner points to the Attorney General’s Office’s failure to provide him with information regarding Ms. Murphy’s recantation on the assault claim and to further investigate the scope of her withdrawn accusations as comprising a violation under Brady.

“[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), 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)). A defendant’s rights are violated when “a prosecutor has suppressed evidence that would be favorable to the accused and the evidence is material to guilt or punishment[.]” McManus, 941 A.2d at 229-30. It is axiomatic, however, that the State is not “responsible for delivery of information outside [its] custody and control.” State v. Wyche, 518 A.2d 907, 909 (R.I. 1986).

Here, the State fulfilled its duty under Brady by informing defense counsel of Ms. Murphy’s partial recantation. While neither Ms. Hoopis nor Ms. Alves relayed this information to Mr. Higgins’ counsel, as representatives of Ms. Murphy, they were under no compulsion to do so. Nevertheless, Mr. Guglielmo of the Attorney General’s Office testified that he in fact discussed her recantation with Mr. Higgins’ attorney, Mr. MacDonald, and commemorated such

a conversation in his notes. (Tr. 94:8-95:17, Feb. 11, 2014.) Although Mr. MacDonald and Mr. Grasso failed to recall this conversation, id. at 13:14-20, 44:7-23, Mr. MacDonald readily agreed that “obviously” he must have had some conversation with Mr. Guglielmo that prompted the reduction in charge to “a simple assault nondomestic.” Id. at 14:24-25. Moreover, Petitioner conceded at his postconviction hearing that he knew Ms. Murphy recanted some of her domestic assault claims to Mr. Guglielmo prior to entering his plea.<sup>10</sup> This admission wholly undermines Mr. Higgins’ claim of a Brady violation. See Parker v. Allen, 565 F.3d 1258, 1277 (11th Cir. 2009) (holding that “there is no suppression if the defendant knew of the information”). Further, the fact that the assault charge was reduced from a felony to a misdemeanor lends even greater support for the contention that the State told Mr. Higgins’ counsel of the recantation. Indeed, if the State had made no such disclosure, nothing would have prompted such a charge reduction.

The Court notes that while at this time there is no requirement for Brady disclosures to be made in writing, it is clear that the better practice is to provide defense counsel with a written record of any exculpatory evidence. See United States v. Hernandez-Muniz, 170 F.3d 1007, 1011 (10th Cir. 1999) (holding that “due process does not necessarily require disclosure in a specific form or manner”). This is especially true in the context of domestic abuse cases, where a victim’s story sometimes changes. See State v. Sanders, 168 Vt. 60, 63, 716 A.2d 11, 13 (1998) (“Victims of domestic abuse are likely to change their stories out of fear of retribution, or even out of misguided affection.”); see also C. Klein & L. Orloff, Providing Legal Protection for

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<sup>10</sup> Under cross-examination at the postconviction hearing, Mr. Higgins conceded under questioning:

“Q: So, you understood that when you pled, that [Ms. Murphy] had made these statements [telling Mr. Guglielmo that she consented to some of his assaults] prior to your pleading, right?”

“A: Yes.

“Q: And knowing that she had done this, you pled anyways?”

“A: I did.” (Tr. 73:7-11, Feb. 11, 2014.)

Battered Women: An Analysis of State Statutes and Case Law, 21 Hofstra L. Rev. 801, 1187 (1993). Though this suggestion holds no bearing on the instant Decision, moving forward, unsubstantiated claims of disclosure may lead to an adverse finding in the absence of proper documentation, the passage of time and the change of attorneys.<sup>11</sup>

As Mr. Gendron testified, the Attorney General’s Office never learned of Ms. Murphy’s recantation of Mr. Higgins’ involvement in the video voyeurism before his plea. (Tr. 5:8-12, 100:8-13, Feb. 11, 2014.) Axiomatically, the State could not have provided information to Mr. Higgins that it did not have. See Wyche, 518 A.2d at 909 (holding that a prosecutor need not provide the defense with “information outside his [or her] custody and control”); United States v. Rivera-Rodriguez, 617 F.3d 581, 595 (1st Cir. 2010) (holding that a prosecutor’s “duty does not extend to information possessed by government agents not working with the prosecution”). Additionally, the State was not required to investigate further to gain insight as to any other recantations by Ms. Murphy. See United States v. Celestin, 612 F.3d 14, 22 (1st Cir. 2010) (“Brady . . . [does not] require[ ] a prosecutor to seek out and disclose exculpatory or impeaching material not in the government’s possession.”) (internal citations omitted); United States v. Graham, 484 F.3d 413, 417 (6th Cir. 2007) (quoting United States v. Beaver, 524 F.2d 963, 966 (5th Cir. 1975)) (holding that “Brady clearly does not impose an affirmative duty upon the government to take action to discover information which it does not possess”). As such, Mr. Higgins’ petition for postconviction relief is rejected with respect to his claim under Brady.

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<sup>11</sup> This Court has presided over the Domestic Violence Calendar in Providence County for almost three years. At the initial pretrial conference of such cases, after the allegation is discussed, there is a question about the complaining witness’ willingness to assist in the prosecution, *i.e.* whether they are cooperative, uncooperative, willing to appear in court, or are recanting previous allegations. Based on the nature of these cases, such a discussion is common practice at the pretrial phase. In fact, both defense attorneys and prosecutors are cooperative and routinely exchange their own knowledge of a witness’ attitude toward the case.

## C

### **Ineffective Assistance of Counsel**

Mr. Higgins also alleges in his petition that he received ineffective assistance of counsel in violation of the Sixth Amendment. He claims that his counsel was constitutionally deficient insofar as his attorneys knew that Ms. Murphy was recanting as to part of the domestic assault claim and failed to inform him of this recantation. Although Mr. Higgins carries the burden of proving that the counsel he received was constitutionally inadequate, Larngar, 918 A.2d at 855, he has failed to brief this Court with respect to such an assertion. See Wilkinson v. State Crime Lab. Comm'n, 788 A.2d 1129, 1132 n.1 (R.I. 2002) (“Simply stating an issue for appellate review, without a meaningful discussion thereof or legal briefing of the issues, does not assist the Court in focusing on the legal questions raised, and therefore constitutes a waiver of that issue.”). The Court will nonetheless examine this claim.

In appraising claims of ineffective assistance of counsel, Rhode Island follows the standard established by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984). See Hazard v. State, 968 A.2d 886, 891-92 (R.I. 2009); Bustamante v. Wall, 866 A.2d 516, 522 (R.I. 2005). Under the two-pronged test of Strickland, a petitioner must show: (1) “that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment” and (2) “that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” 466 U.S. at 687. With respect to this second prong, “‘in a plea situation, the defendant must demonstrate a reasonable probability that but for counsel’s errors, he or she would not have pleaded guilty and would have insisted on going to trial’ and, importantly, that the outcome of the trial would have been

different.” Neufville v. State, 13 A.3d 607, 610-11 (R.I. 2011) (quoting Figueroa, 639 A.2d at 500) (emphasis added).

First, here, Mr. Higgins’ argument fails to align with his testimony at the postconviction relief hearing. He stated on the record that he knew before he pled that Ms. Murphy told Mr. Guglielmo that her claims of Mr. Higgins burning her with cigarettes were not true. (Tr. 73:7-11, Feb. 11, 2014). As Mr. Guglielmo only recalls having spoken to Mr. MacDonald about this recantation, Mr. MacDonald—despite failing to remember such a conversation—must have relayed this information to Mr. Higgins. Indeed, Mr. MacDonald testified that he would have counseled Mr. Higgins on any recantation. Id. at 15:23-24. This apparent advice to Mr. Higgins undermines the basis of his ineffective assistance claim.

Furthermore, even if his counsel were constitutionally deficient in some way, there has been no prejudice. Mr. MacDonald noted that any recantation by Ms. Murphy would not have likely affected his advice to Mr. Higgins regarding the decision to plead in light of the physical evidence against him. Id. at 37:19-22. Additionally, possession of child pornography—with which Mr. Higgins would have been charged in spite of any persuasive recantation from Ms. Murphy—carries with it a prison sentence of up to fifteen years. Sec. 11-9-1.3(b)(1). Due to Mr. MacDonald’s and Mr. John Grasso’s representations, Mr. Higgins received only a suspended sentence pending a five-year probation for all charges brought against him. Perkins v. State, 78 A.3d 764, 769 (R.I. 2013) (holding that demonstrating prejudice is “almost insurmountable when the sentence received after a plea is shorter than the sentence that an applicant could have received had he proceeded to trial”).

## IV

### Conclusion

Mr. Higgins has failed to prove by a preponderance of the evidence that he is entitled to postconviction relief. After reviewing the record, this Court finds that the newly-discovered evidence presented by Mr. Higgins is not sufficiently credible to warrant vacating his conviction. Furthermore, this Court holds that Petitioner's plea of nolo contendere was not entered in violation of his due process rights under Brady or his Sixth Amendment right to effective assistance of counsel. Mr. Higgins' motion for postconviction relief is hereby denied. Accordingly, Counsel shall submit an appropriate order for entry.





**RHODE ISLAND SUPERIOR COURT**

*Decision Addendum Sheet*

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**TITLE OF CASE:** Higgins v. State of Rhode Island

**CASE NO:** PM-13-3637

**COURT:** Providence County Superior Court

**DATE DECISION FILED:** July 3, 2015

**JUSTICE/MAGISTRATE:** McGuirl, J.

**ATTORNEYS:**

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                          George G. West, Esq.

**For Defendant:** Jeanine McConaghy, Esq.