STATE OF RHODE ISLAND

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: March 11, 2021)

JASON BOUDREAU	:	
	:	
v.	:	**C.A. No. PM-2016-5158**
	:	
STATE OF RHODE ISLAND	:	

DECISION

LANPHEAR, J. Before this Court is an application for postconviction relief from Jason Boudreau (Mr. Boudreau). Mr. Boudreau is asking this Court to vacate his plea to one count of possession of child pornography entered on January 2, 2014. Jurisdiction is pursuant to G.L. 1956 §§ 10-9.1-1 and 10-9.1-2.

I

Facts and Travel[1]

Beginning in September 2009, Mr. Boudreau was employed as a controller at Automatic Temperature Controls (ATC) in Cranston, which is co-owned by Steve and John Lussier. *Boudreau v. Lussier*, 901 F.3d 65, 68-69 (1st Cir. 2018); *Boudreau v. Lussier*, No. 13-388S, 2015 WL 13729855, at *2 (D.R.I. June 2, 2015). ATC provided two computers to Mr. Boudreau for work use: a desktop tower and a portable laptop. *Boudreau*, 2015 WL 13729855, at *2. The company, through Steve Sorel (Mr. Sorel), ATC's Information Technology Manager, maintained access to Mr. Boudreau's desktop by way of an administrator account. *Id.* at *7, n.10. Otherwise,

[1] The general facts herein are drawn from Mr. Boudreau's related civil cases. *See Boudreau v. Lussier*, 901 F.3d 65 (1st Cir. 2018); *Boudreau v. Lussier*, No. 13-388S, 2015 WL 13729855 (D.R.I. June 2, 2015), *modified*, No. 13-388S, 2015 WL 7720503 (D.R.I. Nov. 30, 2015).

according to Mr. Sorel, Mr. Boudreau had exclusive use of the desktop computer, which was password protected, and no one else had the username or password associated with it. *See* State's Req. Deny Post-Conv. Appl. (State's Req.), App. B, at 17 (Steve Sorel Witness Statement).

In June of 2011, Mr. Boudreau reformatted the drive on the desktop computer. *See* State's Req., App. B, at 16 (Steve Sorel Witness Statement). Afterward, he asked Mr. Sorel to assist him in recovering some of his files. *Boudreau*, 901 F.3d at 69. The recovery software created a list of recoverable files, and Mr. Sorel noticed that the list appeared to contain pornographic movies and photos. *Id.* After consulting with Steve Lussier, Mr. Sorel installed a screen-capture software program called System Surveillance Pro onto the computer on June 16, 2011 so that Mr. Boudreau's activity could be monitored without Mr. Boudreau's knowledge. *Id.* After the screenshots revealed what Mr. Sorel believed to be child pornography, he reported it to Steve Lussier, and ATC contacted the Warwick police with this information. *Id.* Detective Petit then asked ATC for a computer search. *Id.* On June 24, 2011, Mr. Sorel and John Lussier removed the desktop from Mr. Boudreau's office and took it to Detective Petit. *Id.* John Lussier gave the detective possession of the desktop and consented to a search of the contents. *Id.*

ATC terminated Mr. Boudreau's employment shortly thereafter, and he was asked to return the company laptop. *See* State's Req., App. B, at 8 (Boudreau Arrest Report). When Mr. Boudreau returned the laptop, the hard drive was missing.[2] *See id.* Detective Petit testified that he did not request a warrant to search either computer, as the business voluntarily provided both computers and consented to their search. The detective and the Rhode Island State Police examined the desktop computer. *See* State's Req., App. B, at 19-21 (Computer Forensics Preliminary Report);

[2] Mr. Boudreau disputes ATC's contention that the hard drive was missing from the laptop when he returned it. *See* Appl. Postconviction Relief attached to March 10, 2017 filing entitled Other Docs., Docs. in Supp. of Postconviction Pet., at 5.

State's Req., App. C, at 1-10 (Computer Forensics Examination Report). They discovered twelve images of child pornography on the desktop. State's Req., App. C, at 1 (Computer Forensics Examination Report).

More explicit information concerning the facts are set forth in this decision, in the transcripts and memoranda from various legal proceedings, and in the record in this case. However, the above recitation adequately describes the facts required for the questions before the Court. Moreover, none of the facts listed above are in dispute, except for Mr. Boudreau's claim that the laptop's hard drive was still installed when he returned it. *See* Appl. Postconviction Relief attached to March 10, 2017 filing entitled Other Docs., Docs. in Supp. of Postconviction Pet., at 5. Despite a universal agreement by all parties as to the relevant facts, Mr. Boudreau insisted that the posttrial case continue along until each of the witnesses testified before this Court.[3] Testimony is now complete.

II

Standards of Review

Postconviction Relief

Rhode Island's G.L. 1956 § 10-9.1-1 provides that "'the remedy of postconviction relief is available to any person who has been convicted of a crime and who thereafter alleges either that the conviction violated the applicant's constitutional rights or that the existence of newly discovered material facts requires vacation of the conviction in the interest of justice.'" *DeCiantis v. State*, 24 A.3d 557, 569 (R.I. 2011) (quoting *Page v. State*, 995 A.2d 934, 942 (R.I. 2010)). The

[3] This was no small task and, indeed, took years to accomplish. Although the testimony by the four witnesses was relatively brief, the retired detective had moved out of state. Mr. Boudreau had also filed several civil suits against the witnesses and ATC. *See* State's Req. at 12-18. This may have contributed to their lack of enthusiasm to testify before this Court.

action is civil in nature, with all rules and statutes applicable in civil proceedings governing. *See* § 10-9.1-7; *see also Ouimette v. Moran*, 541 A.2d 855, 856 (R.I. 1988). A petitioner for postconviction relief bears '"the burden of proving, by a preponderance of the evidence, that such relief is warranted."' *Motyka v. State*, 172 A.3d 1203, 1205 (R.I. 2017) (quoting *Anderson v. State*, 45 A.3d 594, 601 (R.I. 2012)). Should a petitioner challenge the constitutionality of his or her conviction, they have the heightened burden of demonstrating unconstitutionality beyond a reasonable doubt. *See State v. Beck*, 114 R.I. 74, 77, 329 A.2d 190, 193 (1974).

Ineffective Assistance of Counsel

Once a petitioner pleads guilty in open court knowingly, intelligently, and voluntarily, their avenues for appeal become more limited. Our Supreme Court has stated that although the petitioner may challenge the constitutionality of a statute on appeal, constitutional violations related to the crime itself are no longer relevant once a voluntary guilty plea has been entered. "That said, although the general rule is that 'a plea of [*nolo contendere*] waives all nonjurisdictional defects, . . . [it] does not bar appeal of claims that the applicable statute is unconstitutional[.]'" *Torres v. State*, 19 A.3d 71, 79 (R.I. 2011) (quoting *United States v. Broncheau*, 597 F.2d 1260, 1262 n.1 (9th Cir. 1979)); *see also Guerrero v. State*, 47 A.3d 289, 300 n.13 (R.I. 2012).

The primary means by which a petitioner may seek to overturn a plea of *nolo contendere* is by alleging ineffective assistance of counsel. "Generally, 'in the case of someone who has entered a plea of *nolo contendere*, [t]he sole focus of an application for post-conviction relief . . . is the nature of counsel's advice concerning the plea and the voluntariness of the plea.'" *State v. Gibson*, 182 A.3d 540, 552 (R.I. 2018) (quoting *Guerrero*, 47 A.3d at 300). An allegation of ineffective assistance of counsel is reviewed under the two-pronged approach set forth by the

United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). *See also Navarro v. State*, 187 A.3d 317, 325 (R.I. 2018); *Reyes v. State*, 141 A.3d 644, 654 (R.I. 2016). Initially, under the performance prong, "the applicant must establish that counsel's performance was constitutionally deficient; '[t]his requires [a] showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed . . . by the Sixth Amendment.'" *Linde v. State*, 78 A.3d 738, 745 (R.I. 2013) (quoting *Bido v. State*, 56 A.3d 104, 110-11 (R.I. 2012)). In making this determination, the Court conducts a review that is "highly deferential, and [it] afford[s] counsel 'a strong presumption that counsel's conduct falls within the permissible range of assistance.'" *Merida v. State*, 93 A.3d 545, 549 (R.I. 2014) (quoting *Linde*, 78 A.3d at 745).

Only if the assistance of counsel is deemed to have been constitutionally deficient will the Court proceed to the second prong of the analysis. *Id.*; *see also Hazard v. State*, 968 A.2d 886, 892 (R.I. 2009). An applicant for postconviction relief "must show that the 'deficient performance was so prejudicial to the defense and the errors were so serious as to amount to a deprivation of the applicant's right to a fair trial.'" *Linde*, 78 A.3d at 745-46 (quoting *Guerrero*, 47 A.3d at 300-01). Our Supreme Court has instructed that counsel's performance should be considered "in its entirety, and 'when that performance is deficient in a number of respects, then the possibility is greater that an accumulation of serious shortcomings prejudiced the defendant to a sufficient degree to meet the *Strickland* requirement.'" *Hazard v. State*, 64 A.3d 749, 756 (R.I. 2013) (quoting *Brown v. State*, 964 A.2d 516, 528 (R.I. 2009)). The prejudice prong of the *Strickland* test in the context of a negotiated plea requires a showing that, absent counsel's error, the petitioner "would have insisted on going to trial and that the outcome of that trial would have been different." *Neufville v. State*, 13 A.3d 607, 614 (R.I. 2011)

III

Analysis

Mr. Boudreau raised a remarkable forty-one issues in his original post-trial memorandum, Ver. Appl. Post-Conv. Relief (Oct. 20, 2016), which he later grouped into six specific claims. List Issues for Hr'g (Aug. 18, 2017). Although Mr. Boudreau makes substantive arguments for many of these issues, it is important to note that at this stage remedy may only be granted through the structure of a postconviction relief claim. Therefore, his substantive allegations must necessarily engage a claim that these deficiencies demonstrate that he was ineffectively assisted by counsel at the time of his plea and that had he been effectively assisted, he would not have pled guilty and the outcome of his case would have been different. *See Neufville*, 13 A.3d at 614. Mr. Boudreau additionally argues that he was not provided with full and complete discovery prior to the time he pled, discovery that amounts to newly discovered evidence.

These claims will be addressed in turn.

A

Ineffective Assistance of Counsel

Mr. Boudreau argues that his trial counsel, Attorney Schrock, was ineffective and deficient in the performance of his duties by failing to file motions to suppress key pieces of evidence. Mr. Boudreau argues that the fruits of all these searches should have been suppressed and would have been had his counsel filed the appropriate motions. Mr. Boudreau further argues that, despite the favorable plea deal offered to him, counsel had "an affirmative duty to thoroughly review the discovery in this case and to file all appropriate motions. . . ." Applicant's Post-Trial Mem. at 13. Under this umbrella, Mr. Boudreau raises several subsidiary allegations, including a violation by ATC of both state and federal wiretap laws and an illegal search and seizure of the desktop work computer.

The State argues in response that Mr. Boudreau has not demonstrated that Attorney Schrock's performance was below the standard set by *Strickland*. (State's Req. 6-21; State's Reply 2-4.) The State contends that Mr. Boudreau has conflated the performance prong and the prejudice prong of the *Strickland* test by implying that zealous advocacy does not allow an attorney to independently assess the merits of filing a motion or whether a plea would constitute a favorable disposition. (State's Reply 4.)

The State further contends that even if Mr. Boudreau passes the performance prong of *Strickland*, his burden on the prejudice prong is insurmountable because his negotiated sentence eliminated all jail time. (State's Req. 7-11.) The State argues that Mr. Boudreau has not demonstrated that he would have proceeded to trial or that the outcome would have been materially different had all relevant motions to suppress been filed and/or if he had had all the evidence available to him. *Id.* at 11-18. The State observes that Mr. Boudreau was aware of the existence of additional images as early as July 2014, but he only applied to overturn his conviction in October 2016, after he faced a sentencing enhancement on new charges in federal court as a result of his prior conviction. *Id.* at 10-11.

The Court is mindful that when considering the merits of an ineffective assistance of counsel claim, there is a strong presumption that an attorney's performance falls within a permissible range of acceptable behavior. *See Hazard*, 968 A.2d at 892 (citing *Heath v. Vose,* 747 A.2d 475, 478 (R.I. 2000)). In addition, when, as here, the defendant has voluntarily admitted his guilt in open court, the defendant must establish a reasonable probability not only that, but for counsel's errors, the defendant would not have pled guilty and would have gone to trial but also that the outcome would have been different. *State v. Figueroa*, 639 A.2d 495, 500 (R.I. 1994)

(citing *Hill v. Lockhart*, 474 U.S. 52, 57 (1985)). It is through the lens of this law that Mr. Boudreau's issues will be addressed in turn.

1

Wiretap Violations

Mr. Boudreau claims that the police and his employer, ATC, violated both the Rhode Island Wiretap Act (RIWA), G.L. 1956 § 12-5.1, and the federal Electronic Communications Privacy Act (ECPA) 18 U.S.C. 119 (collectively, Acts). *See* Applicant's Post-Trial Mem. 2, 15-17. He bases his argument on the capture of certain screenshots by the screen-capture program installed by ATC, which he classifies as "interception[s]" pursuant to the statutory language. *Id.* at 16. Rhode Island defines "intercept" in the RIWA as follows: '"Intercept' means aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device." Section 12-5.1-1(8). This definition is identical to the definition of intercept in the ECPA. *See* 18 U.S.C. 119 § 2510(4). Section 12-5.1-2 provides the mechanism for securing a wiretap authorization by requiring the state to secure permission prior to placing it. *See also* 18 U.S.C. 119 § 2516. Motions to suppress generally follow from a failure to secure this permission in advance. Section 12-5.1-12. *See also* 18 U.S.C. 119 § 2518(10)(a).

The State contends that a motion to suppress the screenshots would have required the submission of expert evidence to establish how the screen-capture program operated once it was installed on the desktop computer. Without expert testimony demonstrating how the screen-capture program falls within the scope of these Acts and their caselaw, such as how it functions and whether the interception is contemporaneous with transmission, a motion to suppress by Attorney Schrock was unlikely to have prevailed. (State's Req. 13-18.)

Mr. Boudreau relies upon *Williams v. Stoddard*, No. PC12-3664, 2015 WL 644200 (R.I. Super. Feb. 11, 2015), to make the argument that ATC's installation and use of a screen-capture program fell within the scope of the Acts. *See* Applicant's Post-Trial Mem. 16-17. *Williams* was a civil action between ex-spouses, more closely aligned with Mr. Boudreau's several actions against the owners of ATC and Detective Petit, than with an action seeking postconviction relief. The court in *Williams* ruled that the screen-capture program used by the wife to spy on her husband's online activities fell within the scope of the Acts and that the wife violated both Acts by installing and using it. *Williams,* 2015 WL 644200, at * 9-10. However, as noted by the State, Mr. Boudreau presented no evidence to establish how the screen-capture program installed by ATC operated or that it operated in a manner similar to the screen-capture program in *Williams*.[4]

More importantly, *Williams* was decided in 2015, over a year after Mr. Boudreau had entered his plea. For purposes of considering the merits of a claim of ineffective assistance of counsel, this timeline is significant. Given that the weight of the caselaw at the time of his plea favored the requirement that interception be contemporaneous with transmission,[5] the Court finds that Mr. Boudreau's argument on the success of a motion to suppress the images obtained by a

[4] There are other distinctions between these cases. For example, in *Williams*, the defendant allegedly used the screen-capture program to obtain private communications made by the husband on the husband's personal home computer. Here, ATC was merely reviewing and recovering what was being done with ATC's computer during work hours and whether pornography was being stored on that computer.

[5] *See Williams,* 2015 WL 644200, at * 6: "Despite the complete absence of either the word 'contemporaneous' or 'simultaneous' from the statute, most federal circuit courts which have considered the question have interpreted this definition as requiring that an interception must occur contemporaneously with the transmission of the electronic communication. *See United States v. Barrington*, 648 F.3d 1178, 1202 (11th Cir. 2011) (holding that 'to violate the Wiretap Act, an interception of electronic communications must occur contemporaneously with their transmission'); *see also Steiger*, 318 F.3d at 1047-48 (adopting the contemporaneity rule and citing cases); *Konop*, 302 F.3d at 876-79 (explaining history of contemporaneity rule and citing cases)."; See also *Boudreau*, 2015 WL 7720503.

screen-capture program based on a violation of either the RIWA or the ECPA is speculative at best. Therefore, this Court finds that Attorney Schrock's performance did not fall below the permissible range of acceptable behavior when he failed to file a motion to suppress the fruits of the screen-capture program.

Mr. Boudreau also claims that ATC's failure to give him notice regarding the installation of the screen-capture program onto the work computer violated his constitutional right to be protected against illegal searches. *See* Applicant's Post-Trial Mem. 2. He cites no authority for this claim nor any case that would stand for the proposition that the absence of such notification justifies a vacation of his plea and sentence. *See id*. This Court is aware that Mr. Boudreau has claimed that his employer(s) and Detective Petit violated his constitutional rights in multiple civil suits. *See, e.g., Boudreau v. Lussier*, 901 F.3d 65 (1st Cir. 2018); *Boudreau v. Automatic Temperature Controls, Inc.*, 212 A.3d 594 (R.I. 2019); *Boudreau v. Petit*, No. 17-301WES, 2019 WL 6117723 (D.R.I. 2019). As a postconviction relief claim is not the appropriate arena for this constitutional argument, in light of his *nolo contendere* plea, the Court presumes that Mr. Boudreau presented this argument merely to preserve his efforts in seeking civil remuneration.

2

Expectation of Privacy

Second, Mr. Boudreau claims that, although his employer owned the desktop computer he used at work, he maintained "a legally-protected expectation of privacy in his online password," office, and workplace computer. Applicant's Post-Trial Mem. at 13-14. He argues that his employer's "access and use of his work computer was not authorized by him, and it was therefore illegal [of] them to log on it in any way without his permission." *Id.* at 2. He specifically argues

that the seizure of his emails was unconstitutional, and the emails should have been suppressed. *Id.* at 8.

In support of his expectation of privacy in the contents of his emails, Mr. Boudreau cites *United States v. Warshak*, 631 F.3d 266 (6th Cir. 2010). Applicant's Post-Trial Mem. at 8. In *Warshak*, the Sixth Circuit considered the weighty issue of whether emails generated at work were protected by the Fourth Amendment. *Warshak*, 631 F.3d at 283. In the course of investigating Mr. Warshak for allegations of fraud, the government obtained approximately 27,000 emails written by him. *Id.* at 282. The court found that Mr. Warshak did retain an expectation of privacy in his work emails, which was violated when the government failed to obtain a warrant prior to seizing them. In reaching its conclusion, the Sixth Circuit conducted a thorough analysis of the Fourth Amendment, how common methods of communication have changed over time, and how, in some circumstances, those sending or receiving emails do have an expectation of privacy in their communication. *Id.* at 283-86.

The Sixth Circuit's ruling in *Warshak* does not assist Mr. Boudreau here because the evidence of his crime—the images of child pornography—was not found in Mr. Boudreau's emails but on the computer's actual hard drive. In other words, even if Attorney Schrock filed a motion to suppress Mr. Boudreau's emails, which he did not, the suppression of those emails would not have assisted Mr. Boudreau's case.

In order to bring a successful motion to suppress the images of child pornography, Attorney Schrock would have needed to claim that Mr. Boudreau had a privacy interest in the full contents of the desktop computer hard drive, not just the emails. "*Mancusi* [*v. DeForte*] compels us to recognize that in the private employer context, employees retain at least some expectation of privacy in their offices." *United States v. Ziegler*, 474 F.3d 1184, 1189 (9th Cir. 2007) (citing

Mancusi v. DeForte, 392 U.S. 364 (1968)). "Although it is often true that 'for most people, their computers are their most private spaces,' the validity of that expectation depends entirely on its context." *Id.* at 1189. (quoting *United States v. Gourde*, 440 F.3d 1065, 1077 (9th Cir. 2006)).

Without ever testifying, Mr. Boudreau suggests that because he had a separate office and password protection for the computer in that office, he had a heightened expectation of privacy in the entire contents of the desktop computer. *See* Applicant's Post-Trial Mem. 13-15. For support, he references *Leventhal v. Knapek*, 266 F.3d 64 (2d Cir. 2001), which suggested that a privacy interest may exist in a work computer. That decision, authored by Justice Sotomayor prior to her elevation to the Supreme Court, is slightly afield, as it was an administrative law appeal with a different set of factual circumstances, but its conclusions are instructive.

The court in *Leventhal* upheld a grant of summary judgment against Mr. Leventhal. *Id.* at 66. Although agreeing that Mr. Leventhal had a private office and password protection for some menu selections on his computer, the Second Circuit concluded that the initial inspection of the computer, as a result of an anonymous complaint, was appropriate under the circumstances, regardless of Mr. Leventhal's underlying expectation of privacy, because the complaint gave reasonable grounds to support the first, cursory search. *Id.* at 71. The Second Circuit then stated that the findings from the initial search justified the second, "more thorough" search of the computer. *Id.* at 76-77.

The facts presented here, in the police report, at trial, and at the post-trial hearings, all state that Mr. Boudreau invited Mr. Sorel, a fellow employee, to inspect his computer files when he could not successfully reformat his computer after Mr. Boudreau reformatted the computer on his own. State's Req., App. B, at 16 (Steve Sorel Witness Statement). In other words, it was as a result of Mr. Boudreau's own request for Mr. Sorel's assistance that Mr. Sorel initially and accidentally

discovered the pornography files on the computer. This led Mr. Sorel to inform ATC of his findings. *Id.* Thus, the actions undertaken by ATC (the installation of the screen-capture program and the subsequent delivery of the computer and its hard drive to the police) all sourced from Mr. Boudreau's invitation to Mr. Sorel to inspect the desktop computer and its files. No evidence has been provided to the contrary. As in *Leventhal*, this initial inspection led to the discovery of the materials in question, which justified the searches that followed. Mr. Boudreau has failed to present any evidence to allow this Court to conclude that he maintained a privacy interest in the computer throughout the inspection or that Mr. Sorel's inspection of the computer was in any way inappropriate.

Although it is true that the police later requested a warrant after the computer had been given to the police, Trial Tr. 14:34, Dec. 11, 2019, the government's later request for a warrant to run additional searches once the computer was under their care and control does not change the character of Mr. Sorel or ATC's earlier actions at the workplace or create a superseding expectation of privacy in the company-owned desktop computer that Mr. Boudreau was given to use and into which he invited intrusion by Mr. Sorel.

Mr. Boudreau's postconviction argument, that his counsel was ineffective in failing to file a motion to suppress based on the argument that Mr. Boudreau had a legitimate expectation of privacy in the desktop computer that was breached during Mr. Sorel and ATC's investigations, (*See* Applicant's Post-Trial Mem. 15), lacks evidentiary support and is, therefore, meritless. Mr. Boudreau failed to establish a reasonable likelihood of success that had Attorney Schrock filed a motion to suppress the contents of the desktop computer it would have been granted, and the Court finds that Attorney Schrock's performance was not constitutionally deficient.

3

Illegal Seizure of the Computer

Third, Mr. Boudreau contends that his constitutional rights were violated "when the police told the applicant's employer to seize his computer, without a warrant." Applicant's Post-Trial Mem. 2. Mr. Boudreau claims that the seizure of the desktop computer constituted "state action" by ATC and was, therefore, impermissible without a warrant. *Id.* at 5. He claims that by seizing the computer, his employers were acting as government agents, as defined by the test articulated in *United States v. Momoh*, 427 F.3d 137 (1st Cir. 2005), a case that he maintains is "virtually identical to the issue in this matter." *Id.* at 6-7. In framing the issue for postconviction relief, Mr. Boudreau claims that his counsel provided ineffective assistance in allowing him to enter into a plea agreement despite this clear violation and that his counsel should have moved instead to suppress the images discovered by the police as a result of the seizure and subsequent search. *See id.* at 8-10. Mr. Boudreau contends that had the evidence been suppressed, he would have proceeded to trial, and the State would have had to reassess their likelihood of success. *Id.* at 10-12.

For its part, the State contends that a motion to suppress based on a warrantless search claim would have been unavailing, given that ATC owned the computer in question and had at least apparent authority to consent to a search. (State's Req. 12-13.) The State argues that there is no proof that Mr. Boudreau would have prevailed on his state actor theory. *Id.* at 4-6. The State argues that the state actor question is irrelevant because ATC owned the computer and had the capacity to consent to its search. *Id.* at 5. The State further claims that even if Mr. Boudreau could prove that ATC did not have the actual authority to consent, ATC still had apparent authority, which would have defeated a motion to suppress the fruits of the search. *Id.* at 5-6.

"The Fourth Amendment exclusionary rule is 'based upon the deterrence of illegal police or prosecutorial actions, [and] it is not triggered by the actions of private persons however egregious they may be.'" *State v. Guido*, 698 A.2d 729, 733 (R.I. 1997) (quoting *State v. Pailon*, 590 A.2d 858, 861 (R.I. 1991)). "[Its] protection against unreasonable searches or seizures 'is wholly inapplicable to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official.'" *State v. Barkmeyer*, 949 A.2d 984, 996 (R.I. 2008) (quoting *United States v. Jacobsen*, 466 U.S. 109, 113–14 (1984)).

In *Momoh*, the case cited by Mr. Boudreau, the issue before the court was whether an employee at a shipping company was acting as a government agent when she opened and inspected a package after observing that the signatory was not registered with the FAA, pursuant to company policy and FAA regulations. *Momoh*, 427 F.3d at 139. After discovering that the contents had been tampered with, she informed her supervisor, who then informed the police. *Id.* Because the search had not been instigated by the police and because the employee had not been directed by the police when performing the search, the employee was found to have been a private actor, not a government agent, when she searched the package. *Id.* at 140.

As with *Momoh*, Mr. Sorel, an employee at ATC, discovered possible pornography files on the desktop computer and informed ATC's owners. ATC then placed screen-capture software on the computer, after which the owners found more images – all without police intervention. Then, the ATC principals informed the police of their discovery and brought the computer to the police to be searched.[6] Even though this trial was extended for a year and a half to provide time

[6] It should be noted here that the knowing possession of child pornography is a crime. G.L. 1956 § 11-9-1.3(4). It is, therefore, understandable why ATC would have been proactive in informing the police of pornographic material found on a company computer.

for Mr. Boudreau to secure and examine witnesses and to submit proof that the police had directed ATC to deliver the computer to them, he was unable to establish this fact. There is no evidence before the Court to suggest that Mr. Sorel or ATC were acting as government agents when they found the pornographic material on the computer and then delivered the computer to the police. To the contrary, after hearing the testimony of Steve and John Lussier and Detective Petit, this Court concludes that the company officials searched the computer independently, were proactive in questioning whether the child pornography had been placed on an ATC computer, and reporting their concerns to the authorities. After hearing the witnesses, this Court finds Detective Petit's concern was heightened when the computer was hand-delivered to him, recognizing his duty to follow through.

Further, the testimony offered to the Court also established that ATC owned the computer used by Mr. Boudreau at work and had the capacity to consent to its search. As stated by our Supreme Court, '"The [Fourth Amendment] prohibition does not apply, . . . 'to situations in which voluntary consent has been obtained, either from the individual whose property is searched . . . or from a third party who possesses common authority over the premises.'" *State v. Linde*, 876 A.2d 1115, 1125 (R.I. 2005) (quoting *Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990)). *See also Barkmeyer*, 949 A.2d at 996.

No proof has been offered that Mr. Boudreau ever had an ownership interest in the desktop computer. It belonged to ATC at all times. A mere expectation of privacy would not assist him, as discussed above (*see Leventhal*, 266 F.3d at 74). Even if authority was somehow shared between ATC and Mr. Boudreau by virtue of Mr. Boudreau's private login, ATC still retained apparent authority over the computer because they maintained administrator access to it. These facts are fatal to establishing that the police needed to procure a warrant in order to search the

computer, even though the search had been consented to by its owners. As the First Circuit stated in a private action brought by Mr. Boudreau, ATC had, at least, "apparent authority to consent to the search of Boudreau's computer." *Boudreau v. Lussier*, 901 F.3d at 75. Apparent authority is sufficient to ground the search and answer this claim. '"A third party's consent to search is valid if that person has either the actual authority or the apparent authority to consent to a search of that property."' *Linde*, 876 A.2d at 1125 (quoting *United States v. Kimoana*, 383 F.3d 1215, 1221 (10th Cir. 2004)) (internal quotations omitted).

Given that ATC was acting in a private capacity and had at least apparent authority to consent to the police's search of the desktop computer, it is highly unlikely that Attorney Schrock would have been successful had he brought a motion to suppress the images on the desktop computer.[7] Therefore, Attorney Schrock was not ineffective in his performance by not bringing a motion to suppress the images found on the desktop computer. This claim also fails.

Given that Mr. Boudreau failed to establish a reasonable likelihood of success had Attorney Schrock filed motions to suppress the screenshots or contents of the computer based on either a violation of the Rhode Island or federal wiretap laws or the search and seizure of the workplace computer by ATC, he has failed to pass the first, performance prong of *Strickland*, and this Court does not need to address the second, prejudice prong.

[7] While the Court does not rely on this for its Decision, it is compelled to add that Attorney Schrock in no means was missing the mark by not filing these motions. First, the Court knew him to be a dedicated, thoughtful, and caring advocate for his clients, Mr. Boudreau included. Second, the Court recalls Attorney Schrock's frustration with his inability to challenge this particular search, which he expressed at the many pretrial conferences held on this case. Instead, he felt compelled, logically, to change his focus to doing what he could to limit Mr. Boudreau's exposure to multiple counts and significant incarceration, which is what may have resulted after a protracted motion battle. This Court does not intend, in any way, to sully Attorney Schrock's fine reputation and tireless advocacy for his clients.

B

Newly Discovered Evidence

In addition to his allegations that he received ineffective assistance of counsel, Mr. Boudreau makes the following claims regarding newly discovered evidence: "that various discovery and/or 'Brady' violations were committed . . . at the Department of Attorney General, and the Warwick Police . . . who failed to turn over to defendant and his counsel discoverable material that would have had a material effect on [his] decision to enter into his plea of *nolo contendere*." Applicant's Post-Trial Mem., 1-2.

Both Rule 16 of the Superior Court Rules of Criminal Procedure and *Brady v. Maryland*, 373 U.S. 83 (1963) compel the state to provide *complete* discovery and even to disclose items that may support the defendant's arguments. The aim is "to ensure that both parties receive the fullest possible presentation of the facts prior to trial." *State v. Concannon*, 457 A.2d 1350, 1353 (R.I. 1983). '"The prosecution acts deliberately when it makes a considered decision to suppress . . . for the purpose of obstructing or where it fails to disclose evidence whose high value to the defense could not have escaped . . . [its] attention.'" *Tempest v. State*, 141 A.3d 677, 683 (R.I. 2016) (internal quotation omitted). Following a trial, the failure to provide complete discovery can result in a variety of remedies. Super. R. Crim. P. 16(i). "To determine the appropriate sanction, a trial justice will consider '(1) the reason for nondisclosure, (2) the extent of prejudice to the opposing party, (3) the feasibility of rectifying that prejudice by a continuance, and (4) any other relevant factors.'" *State v. McManus*, 941 A.2d 222, 229 (R.I. 2008) (quoting *State v. Brisson*, 619 A.2d 1099, 1102 (R.I. 1993)).

The two-pronged test for newly discovered evidence is found in *D'Alessio v. State*, 101 A.3d 1270, 1274 (R.I. 2014). Under the first prong, also known as the threshold prong, the

petitioner must establish the following: "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.* at 1275. Only if the evidence passes the threshold prong does the court continue to the second prong, the question of whether the evidence is credible enough to warrant relief. *See id.*

The test for newly discovered evidence applies both post-trial and post-plea, as the question of the sufficiency of the evidence may be upended by the discovery of additional evidence that could call into question the merit of the original plea. "When conducting the analysis of an application for postconviction relief based on newly discovered evidence, the hearing justice utilizes the same standard used for considering a motion for a new trial due to newly discovered evidence." *Reise v. State*, 913 A.2d 1052, 1056 (R.I. 2007). Where the applicant has entered a plea of *nolo contendere*, the ultimate question for the first prong remains whether the discovery of this evidence would have changed the outcome of the verdict at trial. *See id.* at 1057.

This Court finds, from a careful reading of both parties' memoranda and from the testimony of the witnesses, that the police obtained possession of a flash drive and a complete set of screenshots, which they failed to provide to Mr. Boudreau. Steve Lussier testimony, Mar. 3, 2018, *Boudreau v. State of Rhode Island.* Although Attorney Schrock asked for the disclosure of all relevant materials on July 6, 2012 (Mem. Law *Shatney* at 3), the only screenshots provided in response to his request were the screenshots included in Brittnee Morgan's Forensic Report (Forensic Report), which was provided to Mr. Boudreau. State's Resp. Invit. Submit Suppl. Mem. at 1. Additional screenshots were not provided to Mr. Boudreau until July 2014, in response to a motion to compel brought by Mr. Boudreau in his first civil suit against ATC. At that time, some

six months after his plea, two full days of screenshots were ordered to be provided to him. *See* Appl. Postconviction Relief attached to March 10, 2017 filing entitled Other Docs., Docs. in Supp. of Postconviction Pet., at 5. The flash drive was never provided.

The State attempts to elide this problem by arguing that the Forensic Report stated that "an evidence viewing can be scheduled at the Rhode Island State Police Computer Crimes Unit. (App. C at 1)." State's Resp. to Submit Suppl. Mem. at 1. However, the Forensic Report did not indicate that there were additional screenshots to the ones discussed in the Forensic Report or how many screenshots there were. *See* State's Resp. Suppl. Mem., App. C. Therefore, the State's argument is unavailing. The State further argues that defense "was appraised of the screenshots through Steve Sorel's witness statement, which was contained within the criminal information." State's Resp. to Submit Suppl. Mem. at 1. However, again, this argument avoids the question of why the State failed to fulfill its constitutional obligation when Attorney Schrock made his discovery request.

To quote Justice William O. Douglas, a prosecutor should not cast himself in the role of an architect of a proceeding of our court for it "does not comport with [our] standards of justice." *See Brady*, 373 U.S. at 88. Given that Attorney Schrock asked for discovery of all relevant materials on July 6, 2012, the State was obligated at that time to provide the flash drive and/or its contents, a full set of screenshots, not to wait for an additional request by Attorney Schrock. Therefore, the Court believes that Attorney Schrock acted with due diligence to acquire all discovery, and Mr. Boudreau's claim passes the second part of the first prong of *D'Alessio*.

However, it is on the third part where Mr. Boudreau's argument teeters and the fourth part where it falls. "When he determines the weight of newly discovered evidence, a hearing justice must decide whether the evidence is material and not simply cumulative or impeaching."

D'Allesio, 101 A3d at 1276 (citing *Brennan v. Vose*, 764 A.2d 168, 173 (R.I. 2001)). "In short, material evidence is that which creates a 'reasonable probability of a different result.'" *Id.* (quoting *Powers v. State*, 734 A.2d 508, 514 (R.I. 1999)).

The State argues that the reason a complete set of screenshots was not provided to Mr. Boudreau promptly was because they were duplicative of the screenshots in the Forensic Report. "The screenshots are nothing new. In fact, several are showcased in Analyst Morgan's forensic report" presented to counsel prior to Mr. Boudreau's plea. State's Req. at 21. Secondarily, they argue that the additional screenshots were cumulative to the ones provided in the Forensic Report. State's Req. at 22. These arguments are disingenuous, as they avoid recognizing that the State had a constitutional obligation to provide all material evidence to the defendant, *Brady*, 373 U.S. at 87, and the screenshots, given that they were taken by ATC for the very purpose of determining whether child pornography was being accessed by Mr. Boudreau on the desktop computer, were material to this case.

However, Mr. Boudreau failed to establish either that the additional screenshots were not cumulative or that they would have materially changed the result, leaving the Court to speculate as to their nature and value. Mr. Boudreau was provided with two additional days of screenshots in 2014, but he did not present any of this evidence to this Court in making his argument. This Court cannot base its conclusions on suppositions or conjecture. In the absence of any evidence showing that the additional screenshots would not have been cumulative to the ones previously disclosed in the Forensic Report, the Court is compelled to side with the State's position that the additional screenshots were cumulative to what had already been provided.

The Court reaches a similar conclusion regarding the missing flash drive, which also was never disclosed. As the flash drive contained the screenshots taken by the screen-capture program

ATC installed on the desktop computer, (Steve Lussier testimony, Mar. 3, 2018, *Boudreau v. State of Rhode Island*), no evidence has been presented that it contained anything other than images that were cumulative to the images provided to Mr. Boudreau in the Forensic Report. Indeed, although Mr. Boudreau himself acknowledged that the State might argue that the missing material was cumulative, he failed to respond to this issue or to provide any contrary evidence. Applicant's Post-Trial Mem. at 18.

Therefore, Mr. Boudreau is also unable to overcome the fourth part of the threshold prong for newly discovered evidence, that the timely provision of a complete set of the screenshots and/or the flash drive would have changed the outcome of his case. "In order to undermine the confidence in the verdict, there must exist a nexus between the new evidence and the outcome of the trial." *D'Alessio*, 101 A.3d at 1276. The question is '"whether the previously undisclosed [or newly discovered] favorable evidence puts the case in such a different light as to undermine confidence in the verdict."' *Bleau v. Wall*, 808 A.2d 637, 643 (R.I. 2002) (quoting *Broccoli v. Moran*, 698 A.2d 720, 726 (R.I. 1997). To succeed on this final part of the first prong, Mr. Boudreau needs to establish more than his subjective belief that he would not have pled guilty and would have gone to trial. He needs to establish that the newly discovered evidence was material and would have created "a reasonable probability of a different result" at trial. *D'Alessio*, 101 A.3d at 1276 (quoting *Bleau*, 808 A.2d at 643).

Unfortunately for Mr. Boudreau, although he was provided with a forum and an opportunity to make this argument, he failed to present this Court with any testimony or evidence supporting his contention. Instead, Mr. Boudreau argues speculatively in his post-trial memorandum that had he received the additional screenshots and the flash drive *and then also*

successfully argued for their suppression, "the State would have had to [re-assess] their likelihood of success at trial on the merits." Applicant's Post-Trial Mem. at 10.

Mr. Boudreau faces two insurmountable problems with his argument. First, for the reasons stated above, it is highly unlikely that Attorney Schrock would have prevailed on a motion to suppress these screenshots, given that they were sourced from the same workplace computer owned by ATC, which maintained at least apparent authority over that computer and could consent to its search. *See* Section III, A, 2, above. Second, the test for newly discovered evidence, as articulated in *D'Alessio, supra*, asks whether the missing evidence was material and would have created a reasonable *probability* of a different verdict had it been timely provided, not whether the State "would have had to [re-assess] their likelihood of success at trial." In *Tempest*, the suppression of key witness statements was found to have materially changed the outcome of the trial, and a new trial was ordered. *Tempest*, 141 A.3d 677. By contrast, the applicant's discovery that he had suffered from obstructive sleep apnea after his plea to two counts of driving while intoxicated, death resulting, was found to be insufficient to disturb the verdict because it did not affect the fundamental elements of the crime, to which the applicant had admitted when he pled guilty. *Reise*, 913 A.2d at 1058. Given the lack of any evidence presented to this Court that the missing screenshots contained exculpatory material, particularly when two full days of screenshots were provided to Mr. Boudreau in July 2014, this Court is compelled to agree with the State that the additional evidence would not have been exculpatory but would have only further confirmed Mr. Boudreau's guilt. State's Req. at 22.

While the Court does not condone the State's failure to provide Mr. Boudreau or his counsel with the complete set of screenshots and the flash drive initially provided to the police, pursuant to the State's constitutional obligation, the discovery of these additional materials would

not have placed the other evidence "in a different light," and the State's failure to provide them does not shake confidence in the verdict rendered in Mr. Boudreau's case.

IV

Conclusion

For the reasons stated in this opinion, the Court finds that Mr. Boudreau did not receive ineffective assistance of counsel and that the flash drive and additional screenshots do not pass the test for newly discovered evidence, as outlined in *D'Alessio*. After a full trial, Mr. Boudreau's petition for postconviction relief is hereby denied.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**Jason Boudreau v. State of Rhode Island**
CASE NO:	**PM-2016-5158**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**March 11, 2021**
JUSTICE/MAGISTRATE:	**Lanphear, J.**

ATTORNEYS:

For Plaintiff:	**Glenn Sparr, Esq.**
For Defendant:	**Owen Murphy, Esq.** **John E. Sullivan, III, Esq.**