

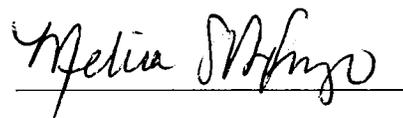
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**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
SUPREME COURT**

RAYMOND D. TEMPEST JR.	:	
	:	
v.	:	SU-15-0257
	:	
STATE OF RHODE ISLAND	:	

***STATE OF RHODE ISLAND’S MEMORANDUM IN SUPPORT OF
PETITION FOR REARGUMENT***

While this Honorable Court grants a “[p]etition for reargument of causes heard and decided”¹ only “rarely,”² it has certainly done so on a number of occasions,³ and should do so in this, most important case,⁴ because the majority opinion, for the reasons explained below, misapprehended the force of the State’s contention that the Superior Court clearly erred with respect to its non-disclosure-of-prosecutor-notes determination.

Ms. Carrier’s excitement-about-puppy statement

- *Considered Decision to Suppress for the Purpose of Obstruction*

“Seventeen days before trial, [Donna] Carrier provided the state’s former prosecutor with [the] novel statement[] . . . that, on the day of the murder, Tempest’s children were ‘excited’ about getting a puppy.” (*Tempest v. State*, No. SU-15-0257, slip. op. at 7 (R.I. July 14, 2016)). A

¹ Rule 25 of this Court’s Rules of Appellate Procedure.

² David A. Wollin, *Rules of Appellate Procedure With Commentaries* § 25:10, at Rule 25-2 (December 2006 Supplement).

³ See, e.g., *State v. Golembewski*, 739 A.2d 1042 (R.I. 2002) (*mem.*); *Marques v. Napolitano*, 714 A.2d 1185 (R.I. 1998); *Seitz v. L&R Industries, Inc.*, 433 A.2d 680 (R.I. 1981) (*mem.*); *America Condominium Ass’n, Inc. v. IDC*, 870 A.2d 434 (R.I. 2005).

⁴ A case that “has consumed the collective consciousness of northern Rhode Island – especially the City of Woonsocket – for the past thirty-three years.” *Tempest v. State*, 2015 WL 4389908, at *1 (R.I. Super. Ct. July 13, 2015).

majority of this Honorable Court, *id.* at 8-9, affirmed the Superior Court’s determination that the former prosecutor made a considered decision to suppress this statement *for the purpose of obstructing* Tempest from “additional[ly] impeach[ing]” (*Tempest v. State*, 2015 WL 4389908, at * 20 (R.I. Super. Ct. July 13, 2015)) Carrier, presumably, on the fact that, since she and Tempest did not share the same Winter Street address at the time of Ms. Picard’s murder, she could not have seen Tempest’s children on the morning of the murder” (*Tempest*, No. SU-15-0257, slip. op. at 9). It did so on the basis of two rationales – (1) that “the former prosecutor’s own words – ‘don’t volunteer’ – indicate a considered decision not to offer the new information to the defense” (*id.* at 8), and (2) that the Superior Court “clearly rejected the former prosecutor’s [trial-continuance] proffered reason for failing to disclose the information” (*id.* at 8-9 n.12). Neither of these reasons, respectfully, supports the conclusion that the Superior Court justice did not commit “clear error in his finding” (*id.* at 9) that the former prosecutor had obstructive intent.

While the former’s prosecutor’s own “don’t volunteer” words *written on March 10, 1992* certainly do “indicate” *that on March 10, 1992*, the former prosecutor “made a considered decision not to offer the new information to the defense” (*id.* at 8), such words obviously *do not indicate* that, some weeks later, “[a]t some point just before trial, [when] the former prosecutor definitively found out that Carrier was in fact mistaken as to where Tempest lived at the time of the murder” (*id.* at 9) (emphasis added), the prosecutor again made a “considered decision” (*id.*) to withhold that information. Indeed, because there was absolutely *no* evidence presented at the post-conviction relief hearing that when, “[a]t some point just before trial” (*id.* at 9) (emphasis added), the prosecutor for the first time “definitively found out that Carrier was in fact mistaken as to where Tempest lived at the time of the murder” (*id.* at 9), the former prosecutor made any considered decision with respect to the at-issue evidence, the prosecutor’s March 10, 1992 “don’t

volunteer” notation evidently is *not* indicative of a considered decision by him – “[a]t some point just before trial” (*id.* at 9) (emphasis added) – not “to offer the new information to the defense[.]”⁵ Moreover, even if there were any record evidence that the former prosecutor, at the some-point-just-before-trial time when the Tempest-address error was first determined, had made “a considered decision not to offer the new information to the defense” (*id.* at 8), the “don’t volunteer” notation, while indicative of an intent not to disclose, is, just as obviously, *not evidence*, or even indicative, that such intent was “for the purpose of obstructing” (*id.* at 8 (quoting *State v. Wyche*, 518 A.2d 907, 910 (R.I. 1986) (emphasis added))). Respectfully, then, it is simply incorrect that “the former prosecutor’s own [March 10, 1992] words . . . ‘don’t volunteer’” (*Tempest*, No. SU-15-0257, slip. op. at 8) are indicative of a considered decision by the former prosecutor to suppress for the purpose of obstructing.

Though utterly mystifying and dismaying as to how, in the absence of any contrary testimony or evidence, the lower court could have rejected the sworn testimony of the former prosecutor (an officer of the court and the former chief of the Attorney General’s criminal division) as to the discovery-related reason for his nondisclosure decision,⁶ even recognizing and accepting

⁵ And because – as was seemingly recognized even by Tempest in the below proceedings (PCRT 2574, 2542; *Petitioner Raymond Tempest’s [May 8, 2015] Proposed Findings of Fact and Argument*, at 86) and reflected in the Superior Court’s decision (*Tempest v. State*, 2015 WL 4389908, at *19 n. 31) – on March 10, 1992, the former prosecutor had *as yet* to “definitively *ff[in]d out* that Carrier was in fact mistaken as to where Tempest lived at the time of the murder” (*Tempest*, No. SU-15-0257, slip. op. at 9) (emphasis added) – that would not happen until, some weeks later, “[a]t some point just before trial” (*id.*) – the March 10, 1992 “don’t volunteer” notation was self-evidently *not* indicative of the former prosecutor’s *March 10, 1992* determination to suppress the statement *for the purpose of obstructing* Tempest from cross-examining Carrier on the fact that, since she and Tempest did not share the same Winter Street address at the time of Ms. Picard’s murder, “it was unlikely, if not altogether impossible, that Carrier could have seen Tempest’s children . . . on the morning of the murder” (*id.* at 13).

⁶ The former prosecutor testified that his notation “too late – don’t volunteer new info[rmation] – will cause big problems” (PCR Ex. # 113, p.3) merely reflected his concern that it was too late in

that the Superior Court “clearly rejected the former prosecutor’s [trial-continuance] proffered reason for failing to disclose the information” (*Tempest*, No. SU-15-0257, slip. op. at 8-9 n.12), any such determination – *respecting the former prosecutor’s March 10, 1992 deliberations* – is evidently not reflective of the former prosecutor’s deliberative process, some weeks later (“[a]t some point just before trial” (*id.* at 9)), when he first learned of the *Tempest* address error. That is, because even recognizing that the Superior Court did not believe that the former prosecutor’s March 10, 1992 notation was reflective of a trial-continuance dilemma, because the former prosecutor – *on that March 10, 1992 date* – *had not yet determined* that Carrier’s statements regarding *Tempest’s* on-the-day-of-the-murder activities could not be true, the lower court committed clear error by reasoning that, because it disbelieved “the former prosecutor’s proffered reason for failing to disclose the information” (*id.* at 8-9 n.12), the former prosecutor must have withheld the information for the purpose of obstructing.

The opinion for the majority of this Court, then, erred in discerning no clear error in the Superior Court’s “for the purpose of obstruction” determination.

- *Inescapably High Value Evidence*

The majority opinion of this Honorable Court went on to itself determine that the “high value” of Carrier’s puppy-excitement statement “could not have escaped the former prosecutor’s attention” (*Tempest*, No. SU-15-0257, slip. op. at 9-13). Pursuant to this jurisdiction’s *Brady* case

the discovery process to supplement the State’s discovery with non-exculpatory information that the State had no intention of presenting at trial and which, as it was the “eve of trial” (trial, in fact, began, some over two weeks later, on March 27, 1992), might only lead to a continuance of the case. (PCRT 2571-72, 2574, 2668-69.) That is, as the former prosecutor took pains to explain, it was the “*supplementing discovery* at that point [which] I thought would cause a big problem, *not the information itself, . . . but the act of doing it[,]*” (PCRT 2574) (emphasis added), and that the former prosecutor would never have withheld exculpatory information from *Tempest* (PCRT 2668-71).

law – that evidence whose “high value to the defense could not have escaped the prosecutor’s attention” is “almost *by definition*” “*highly material*” evidence (*Lerner v. Moran*, 542 A.2d 1089, 1092 (R.I. 1988) (quoting *United States Keogh*, 391 F.2d 138, 146-47 (2d Cir. 1968) (emphasis added)) – the majority’s determination of the former prosecutor’s deliberate non-disclosure of Carrier’s puppy-excitement statement based on a failure to recognize its high value could be correct *only if* such statement indeed *was* highly material evidence.⁷

But, respectfully, the puppy-excitement statement was not, by any measure, highly material in view of the fact that Tempest knew before trial, and in fact, cross-examined Carrier on the following:

- Since Carrier and Tempest did not share the same address at the time of the murder, it was altogether impossible that Carrier could have overheard Tempest confess to Ms. Picard’s murder in March of 1982 (as she wrongly told police in a statement and testified to under oath before the grand jury) (TT 1120-32);

⁷ In *Brady* non-disclosure of evidence cases (defined as those cases in which the prosecutor either (1) made a considered decision to suppress for the purpose of obstructing, or (2) failed to disclose evidence whose high value to the defense could not have escaped his or her attention (*State v. Wyche*, 518 A.2d at 910)), this Court determined to afford criminal defendants greater protection than required by federal law, and so took “as [its] guidepost the oft-cited and well-reasoned discussion by Judge Friendly in *United States v. Keogh*, 391 F.2d 138 (2d Cir. 1968),” *In re Ouimette*, 342 A.2d 250, 254 (R.I. 1975), which decision taught that cases of deliberate non-disclosure are “almost by definition [those in which] the evidence is *highly material*” (*id.* at 147) (emphasis added). And for good reason, since, while there may be persuasive public policy grounds justifying vacating a jury’s trial verdict and ordering a new trial where the prosecutor’s *Brady* violation was deliberate, such an “automatic reversal” rule (*Lerner*, 542 A.2d at 1092) makes sense only where the *Brady*-suppressed evidence may be said to have at least possessed enough significance to infer that the prosecutor *had* “act[ed] deliberately” (*Wyche*, 518 A.2d at 910). In the over forty years since this Court adopted, for deliberate non-disclosure of evidence cases, the *Brady* standard articulated in *Keogh*, this Court has, to the State’s knowledge, only *twice* determined, in *Wyche* and *Lerner*, that a prosecutor had deliberately withheld *Brady* material, and in both of those cases the “high[] materiality” of the withheld evidence was plain: In *Wyche*, it was evidence of the sexual assault complainant’s extremely high blood-alcohol content just after the time of the alleged sexual assault (*Wyche*, 518 A.2d at 910); and, in *Lerner*, it was evidence that the State’s chief witness had perjured himself with respect to promises that were made to him by law enforcement in exchange for his testimony against the defendant (*Lerner*, 542 A.2d at 1091-92).

- Since Carrier and Tempest did not share the same address at the time of the murder, it was altogether impossible that Carrier could have (as she wrongly told police and testified to under oath in the grand jury) seen Tempest on the morning of the murder (TT 1132);
- Since Carrier and Tempest did not share the same address at the time of the murder, it was altogether impossible that Carrier could have (as she wrongly testified to under oath in the grand jury) observed Tempest with John Allard on the afternoon of the murder (TT 1132-33), or could have, earlier that day, at “[a]bout lunchtime, maybe a little bit after lunch . . . maybe about one, maybe a little later[,]” heard the two men discussing, in “the kitchen” of Tempest’s apartment, picking “up their puppy” (TT 1141-44);
- Since Carrier and Tempest did not share the same address at that time, it was altogether impossible that Carrier could have (as she wrongly testified to under oath in the grand jury) seen Tempest and Allard leave for and return from a puppy-related visit to the Laferte/Picard address (TT 1133-34);⁸
- Since Carrier and Tempest did not share the same address at the relevant time, it was altogether impossible that Carrier could have (as she wrongly testified to under oath in the grand jury) witnessed (1) Tempest and Allard return to the Winter Street address at approximately 4:30-5:00 p.m, (2) her son playing outside in the backyard, (3) Tempest and Allard remaining in “Beaver’s truck,” parked in the garage “located underneath the windows at 448 Winter Street,” (4) both Tempest and Allard wearing “painter’s hats” (though “Beaver normally worked for General Motors . . . he was [on the day of the murder] on layoff [and] . . . was painting houses with Johnny Allard, [who] . . . was [in] . . . [the house painting] business at the time”), and (5) Tempest coming “upstairs” wearing different clothing than he had worn when he had earlier set out from the house (she claimed that while Tempest had left wearing “jeans . . . and [a] T shirt[]”, he returned wearing “a flannel shirt and a pair of jeans and sneakers with a painter’s cap [] and a lumber jacket”) (TT 1135-36);⁹ and

⁸ In so inquiring of Carrier on cross-examination, Tempest asked whether Carrier remembered having testified before the grand jury:

Johnny Allard was with Beaver that afternoon. They came home. They were supposed to pick up a pit pull, puppy, either from Doreen Picard or Sue Laferte, one or the other because they had a pit bull dog that mated with their dog and they were going to get the pick of the litter. Well, this was the afternoon supposedly that they went over to pick up the dog and a puppy from these people. This was his excuse for going over there. And the puppy wasn’t shown until about a week later. (TT 1133-34.)

⁹ In so inquiring of Carrier on cross-examination, Tempest asked whether Carrier remembered having testified before the grand jury:

- Since Carrier and Tempest did not share the same address at the time of the murder, it was altogether impossible that Carrier could have (as she wrongly testified to under oath in the grand jury) been in Tempest's Winter Street apartment on the evening of the murder and could have witnessed Tempest and Allard return from "a job . . . to have dinner," at which point Carrier exited the Tempest apartment (TT 1143-44).

Thus, while it is undoubtedly true that, had the children's-excitement-over-puppy statement been produced prior to trial, Mr. Tempest might have cross-examined Carrier on the fact that, since Carrier and Tempest did *not* share the same address on February 19, 1982, it was not possible (as she had wrongly told the former prosecutor seventeen days before trial) to have witnessed the Tempests' children's puppy-excitement on the day of Ms. Picard's murder, such "additional impeachment" evidence (*Tempest*, 2015 WL 4389908, at *20 (R.I. Super. Ct. July 13, 2015) (emphasis added)) on a *single* observation – in the context of the myriad other day-of-the-murder observations that Carrier could similarly not have witnessed and which were thoroughly

Because the afternoon of the murder I had come out into the hallway and where we lived, I came out my front door. It wasn't the front door, it was a little hallway. And at the end of the hallway was a window and in it and through the window you used to be able to hang clothes out there. And there was a garage and Beaver used to park his car underneath the windows at 448 Winter Street because you could come in the side onto the porch into the apartments. I was looking out the window. I was . . . My son was playing outside in the back yard and John and Beaver were together in Beaver's truck and they pulled up and they, both of them, had painter's hats on and Beaver had a habit of wearing his painter's hat on backwards. Johnny Allard also either wore it to the side or backwards and they were – Beaver normally worked for General Motors but he was on layoff at that time and he was painting houses with Johnny Allard, that was his business at the time. And they got out of the car and it was like four o'clock in the afternoon, 4:30, five o'clock, somewhere around that area and they had gotten out of the car and came upstairs. And I know – I didn't think the clothes were the same as they were when he went out because he went out and wore his jeans all the time and T shirts and when he came back he had on a flannel shirt and a pair of jeans and sneakers with a painter's cap on and a lumber jacket, it I remember exactly. (TT 1135-36.)

aired to the jury (TT 1130-44) – cannot rightly be deemed of such “high” materiality as to support a conclusion that the former prosecutor should have recognized its high value to the defense. And, while the State recognizes the possibility that Tempest might have used the children’s-excitement-over-puppy statement to demonstrate that “mere *days* before trial [*viz.*, on March 10, 1992], Carrier *still* continued to assert that she saw Tempest and his family on th[e day of the murder]” (*Tempest*, No. SU-15-0257, slip op. at 13) (emphasis added), the plethora of other evidence that the State had provided Tempest prior to trial on Carrier’s alleged observations in fact did allow defense counsel to establish that it was only some *days* before trial that Carrier first recognized that the Tempest family did not reside on Winter Street when Ms. Picard was murdered. (TT 1121 (April 6, 1992 cross-examination testimony of Carrier that it was only “a little over a month ago” that she first correctly “remembered” when the Tempest family moved to Winter Street).)

Respectfully, then, because a *single additional* observation of Tempest’s day-of-murder-activities that could not have been witnessed by Carrier cannot, in the context of multiple and much more highly significant observations that Carrier could also not have witnessed and that were disclosed to the defense before trial and used, to devastating effect, by Tempest’s counsel at trial to cross-examine Carrier (TT 1120-44), properly or fairly be classified as inescapably “high value” defense evidence, the majority opinion erred in determining “that the ‘high value’ of Carrier’s new statement[] could not have escaped the former prosecutor’s attention” (*Tempest*, No. SU-15-0257, slip op. at 9).

- *Materiality*

Because, then, the State respectfully suggests, the majority of this Honorable Court erred in affirming the Superior Court’s deliberate non-disclosure determination, consideration of whether Carrier’s undisclosed statement was “material” to Tempest’s guilt is necessary. And,

again, with all due respect to the Court's majority opinion, it could not be. As related in this Court's direct-appeal affirmance of Tempest's conviction, the evidence implicating Tempest in Ms. Picard's murder and upon which he was convicted consisted of not only testimony from the four "confession" witnesses (Ronald Vaz, John Guarino, Loretta Rivard, and Donna Carrier), but also, and very importantly, Tempest's sister-in-law's (Sherri Richards's) testimony that, on the day following the murder, she, John Allard, and Tempest "sat around [her] kitchen table" to discuss an alibi for Tempest (*State v. Tempest*, 651 A.2d at 1204), and that, sometime shortly after Ms. Picard's murder, she saw Tempest standing beside a maroon car (*id.*) – and a maroon car had been seen by another witness (Lisa LaDue) outside of Ms. Picard's residence at the time of the murder (*id.* at 1203) – and not only observing that her brother-in-law had changed his boots since she had last seen him earlier in the day, but also that "he had *a bite or scratch mark on his wrist that had not been there earlier*" (*id.* at 1204) (emphasis added).¹⁰ Also of high import to Tempest's conviction, and independent of the four witnesses to whom Tempest confessed, was the guilty-conscience evidence testified to by Terrence Gelinas, which established that Tempest was highly agitated and concerned with what Mr. Gelinas, who arrived at the crime scene "when police and rescue vehicle appeared," might have earlier observed (*id.* at 1215), testimony which the late Justice Bourcier, who presided over, and had a front row seat, at Tempest's trial, found, in denying Tempest's new-trial motion, to be particularly inculpatory of Tempest's guilt, inasmuch as it established that Tempest, after the commission of the murder, "was *terrified* about the offense" (MNTT 37-38) (emphasis added). So even putting aside the four witnesses to whom Tempest confessed, there was very strong evidence inculcating Tempest in Ms. Picard's murder: That

¹⁰ Tempest's trial counsel characterized Ms. Richards as "one of the *key* witnesses that the State presented" (MNTT 3) (emphasis added).

Tempest was terrified of what Gelinas might have seen at the crime scene; that, following the murder, Tempest had changed his boots and was sporting a not-previously-observed bite or scratch mark while standing outside of a car the same color of which was just earlier observed at the crime scene; and that Tempest, the day after the murder, sat around his sister-in-law's kitchen table to devise, with Allard and his sister-in-law, an alibi for the time of the murder.¹¹

And then there are the four witnesses to whom Tempest confessed. While recognizing that credibility and trial-centrality are not necessarily synonymous, Tempest's counsel, far from contending that Carrier was, of the four witnesses, "arguably the *most credible*" (*Tempest*, No. SU-15-0257, slip op. at 14) (emphasis added), thought that a "review of the trial transcript demonstrate[d] that *Vaz* was the State's star witness[, as . . .] only *Vaz* gave details about the events surrounding the crime and the alleged cover up, and only *Vaz* testified to Tempest's alleged motives for the crime," whereas "Carrier, Guarino, and Rivard testified *only to admissions with very few details concerning the crime.*" (*Petitioner Raymond Tempest's Proposed Findings of Fact and Argument* at 29) (emphasis added).¹² And, since, of the four confessed-to witnesses, *only Carrier* was impeached with the fact that she had previously testified to having observed impossible-to-have-been-observed Tempest family and household activities, there would appear

¹¹ Indeed, Tempest's direct-appeal counsel, who had tried the case and was in an excellent position to assess the strength of the State's witnesses, recognized at the outset of his Brief to this Court that "the State's case was premised on the testimony of *six* witnesses, Ronald Vaz, Sherri Richards, John Guarino, Loretta Rivard, Terrence Gelinas, and Donna Carrier" (page 2 of Tempest's direct-appeal brief to this Court) (emphasis added). *See also id.* at 36 ("The State's case was functionally based upon the testimony of *six* witnesses[.]") (emphasis added).

¹² *Vaz's centrality to the State's case was similarly not lost on this Honorable Court in its consideration of Tempest's direct appeal, see State v. Tempest, 651 A.2d at 1205 ("On numerous other occasions defendant also admitted his culpability to Ronald Vaz") (emphasis added); id. ("On still another occasion defendant told Vaz [details of culpability in Ms. Picard's murder]") (emphasis added).*

to be no basis for the majority of this Honorable Court’s statement that Carrier was “arguably the *most credible* of the four” (*Tempest*, No. SU-15-0257, slip op. at 14) (emphasis added) confessed-to witnesses. That is, while Vaz may have been subject to intense cross-examination concerning his criminal history (TT 1004-07), Guarino examined about precisely when and where Tempest’s admissions had been made to him (TT 841-44), and Rivard queried as to why a stranger would make admissions to her (TT 1510-17),¹³ *only Carrier* was demonstrated to have described – in detail – events *that could not have happened*.¹⁴ Respectfully, then, nothing in the trial or post-conviction record of this case is supportive of the declaration that Carrier was “arguably the most credible of the four” (*Tempest*, No. SU-15-0257, slip op. at 14) confessed-to witnesses.¹⁵ Any suggestion, then, that if Carrier’s testimony had been “*further* undermined” (*id.* at 14) (emphasis added) – by the fact that, some days before trial, there was yet *another* observation (Tempest’s children’s excitement over the puppy) that she claimed to have made but could not have – it is

¹³ Justice Bourcier provided his own answer to this question:

Well there’s something about a guilty conscience that makes one do strange things. And perhaps the jury could conclude, I can, that sometimes when a guilty conscience is bothering you for a good many years over something such as this, you have a tendency to blurt it out, especially if you’re not in full control of your faculties after you have been snorting something or drinking something. There’s something about booze and drugs that loosens the tongue and eases the conscience. That certainly would seem to be the case here. That’s really what it all appears to be. (MNTT 39).

¹⁴ For this reason, Tempest’s trial counsel argued at the motion for new trial hearing that “[h]er testimony, your Honor, I don’t believe *should even be considered* by this Court based upon the impeachment of that testimony. *Totally incredible.*” (MNTT 11-12) (emphasis added). And he argued before this Court on direct appeal that it was “clear that her testimony is rife with major inconsistencies and outright lies, her credibility is nil. The ends of justice demand that her testimony should have been completely discounted as unworthy of any belief” (Tempest’s Direct Appeal Brief at 45).

¹⁵ Indeed, the Superior Court justice who had presided at and had a front-row seat at Tempest’s trial, made no comparative analysis of the State’s witnesses’ credibility. (MNTT 30-50.)

reasonably probable that the jury would have acquitted Tempest, is not a determination fairly grounded in the record of this case.

While the State recognizes the existence of cases in which courts held that undisclosed impeachment evidence does meet the reasonable-probability-of-acquittal standard,¹⁶ the general rule, as expounded by the foremost criminal law treatise writers in the nation, is that “[t]he nondisclosure cases finding materiality in impeachment material generally have dealt with *obviously significant impeachment material* otherwise known to the prosecutor (such as the promise to compensate involved in *Bagley*), *not statements furnished by the witnesses themselves*” (Wayne LaFave, Jerold Israel, Nancy King, *Criminal Procedure* § 24.3(b), at 357 (2007)) (emphasis added). Mr. Tempest’s inability, then, to have cross-examined Carrier with further impossible-to-have-observed, in Mr. Tempest’s own words, “*details*” (*Petitioner Raymond Tempest’s Proposed Findings of Fact and Argument* at 62) (emphasis added), a matter of almost utter immateriality to the overall evidence inculcating Tempest for his brutal murder of Ms. Picard, plainly should not have entitled Tempest to a new trial.

Ms. Carrier’s Gordon-put-pipe-in-closet statement

- *Considered Decision to Suppress for the Purpose of Obstruction*

Respectfully, the majority of this Honorable Court erred in affirming the Superior Court’s determination that Carrier’s March 10, 1992 statement – that Tempest’s brother Gordon had secreted the murder weapon in the closet – was deliberately suppressed by the former prosecutor (*Tempest*, No. SU-15-0257, slip op. at 8-9, 11). In determining that the Superior Court committed

¹⁶ One such recent case issued by the High Court is *Wearry v. Cain*, 136 S.Ct. 1002 (2016), wherein the Court held that the prosecution’s failure to disclose evidence that included an inmate’s statement that the police had told the State’s star witness who was seeking a deal to reduce his existing sentence that they would “talk to the D.A. if he told the truth” was a violation of *Brady*. *Id.* at 1006-07.

no clear error in finding that the former prosecutor made a considered decision to suppress such statement *for the purpose of obstructing* defense counsel's use of it at trial, a majority of this Honorable Court offered two rationales – that “the former prosecutor's own words – ‘don't volunteer’ – indicate a considered decision not to offer the new information to the defense” (*id.* at 8), and that the Superior Court “clearly rejected the former prosecutor's [trial-continuance] proffered reason for failing to disclose the information” (*id.* at 8-9 n.12). Neither of these reasons, respectfully, come close to establishing the former prosecutor's obstructive intent. The first rationale is, with due respect, obviously not a rationale for whether the former prosecutor – who *admittedly did make* “a considered decision not to offer the new information to the defense” (*id.* at 8) – did so “*for the purpose of obstructing*” (*State v. Wyche*, 518 A.2d at 910) (emphasis added) Tempest's defense. And, while the State recognizes, though is utterly mystified and dismayed by, “the hearing justice's . . . reject[ion of] the former prosecutor's proffered reason for failing to disclose the information” (*Tempest*, No. SU-15-0257, slip op. at 8-9 n.12), such rejection, alone, is hardly sufficient to support a determination that the former prosecutor withheld the inculpatory Gordon-hid-the-pipe information *for the purpose of obstructing*: Since evidence of Gordon's participation in the cover-up was a central inculpatory-to-Tempest trial issue that the prosecution – over the repeated objections and protestations of Tempest's counsel – introduced evidence of (*see, e.g.* TT 747, 870-71, 884-85, 889-90, 956-67, 974, 997-99, 1203-04, 1289, 2025-26), it, respectfully, defies reason and trial-reality to posit that the former prosecutor would believe that it was more critical to prevent Carrier from being impeached with her favorable-to-Tempest former statements (that Gordon had no knowledge of his brother's culpability) than to have the jury hear further highly inculpatory evidence of Gordon's complicity in covering-up his brother's crime. If there was ever a case in which “the inculpatory value of the information exceeds any . . .

impeachment value” (*Henry v. Ryan*, 2009 WL 692356, at *12 (D. Ariz., Mar. 17, 2009)), this would be it. Any such notion is also, of course, belied by the fact that the prosecution did turn over to the defense a Carrier statement (of August 26, 1991) that impeached Carrier’s other pre-trial statements suggesting that Gordon was ignorant of his brother’s culpability.¹⁷ Respectfully, then, to say that the former prosecutor – who tenaciously litigated at trial for the admission of the highly-inculpatory evidence of Gordon’s central participation in the cover-up of his brother’s crime – would have tried to obstruct Tempest’s counsel from impeaching Carrier by demonstrating that she was wrong when she earlier said that Gordon was in fact unaware that his brother was the murderer, not only misapprehends an important aspect of what transpired at Tempest’s 1992 trial,

¹⁷ The majority opinion of this Court appears to question (*Tempest*, No. SU-15-0257, slip op. at 11) whether Carrier’s August 26, 1991 statement in which she overheard Tempest say, after admitting his culpability in the murder, “I won’t get caught, my father and brother won’t let me get caught. The [murder] weapon’s been all taken care of,” did actually contradict Carrier’s earlier statements that Gordon was unaware of Tempest’s culpability (indeed, that if he had been aware, he would have turned in his brother). (*id.* at 11 (“Carrier’s witness statement on August 26, 1991 . . . did not specifically indicate that Gordon knew about Tempest’s involvement in the murder[.]”). If by “specifically,” the Honorable members of this Court’s majority opinion meant that the August 26, 1991 statement did not read “Gordon *did know* about Tempest’s involvement in the murder,” that is, of course, true; but just as the opinion for this Court’s majority apparently reads Carrier’s November 30, 1990 grand jury statement that “my father is an important man . . . it cost a lot of money for my father to make sure my name didn’t get brought up in this” to be a direct statement that Tempest’s father *was* aware of his son’s murder-culpability, the State cannot see how Tempest’s statement, made in the context of admitting his murder culpability, that he “wo[uld]n’t get caught” because neither his father *nor his brother* would “let him get caught,” and that the murder weapon had “*been* all taken care of” (Carrier’s August 26, 1991 statement) (emphasis added), did not similarly contradict Carrier’s statements that Gordon was unaware of Tempest’s culpability (indeed, that if he had been aware, he would have turned in his brother). Indeed, because the statement “Gordon Tempest putting pipe in closet” (*Tempest*, No. SU-15-0257, slip op. at 7) (brackets omitted) does no more to contradict Gordon’s ignorance of his brother’s culpability than the statement that the reason Tempest wouldn’t “get caught” was because Gordon “wo[uld]n’t let [him] get caught”, and that the murder weapon had “*been* all taken care of” (August 26, 1991 statement) (emphasis added), *both* statements clearly contradicted the claim of Gordon’s ignorance of his brother’s culpability – and almost surely explains why Tempest’s counsel, though having the August 26, 1991 statement in his possession before and during trial, chose not use it to contradict Carrier’s prior favorable-to-Tempest statements (and trial testimony) of Gordon’s unawareness of Tempest’s murder-culpability.

but is also rebutted by the fact that the former prosecutor did turn over another statement (Carrier's August 26, 1991 statement) that similarly impeached Carrier on Gordon's alleged ignorance of his brother's crime. Respectfully, then, the opinion for the majority of this Court erred in discerning no clear error in the Superior Court's "for the purpose of obstruction" determination.

- *Inescapably High Value Evidence*

A majority of this Honorable Court went on in its opinion to explicate why it believed "the 'high value' of Carrier's new statements to the defense could not have escaped the former prosecutor's attention" (*Tempest*, No. SU-15-0257, slip op. at 9) and, after a somewhat lengthy explication of Carrier's various pre-trial statements with respect to Gordon's knowledge of his brother's culpability (*id.* at 9-11),¹⁸ concluded that this was so because the Gordon-hid-pipe-in-closet statement was "a significant modification from Carrier's previous [on topic] statements and trial testimony, in which Carrier stated not only that Tempest told her that Gordon was unaware of his involvement in Picard's murder, but which also seemed to indicate that it was Tempest's *father* who helped him cover up his involvement in the crime" (*id.* at 11-12) (emphasis in original). Respectfully, this "'high value' to the defense" rationale for determining a deliberate suppression on the part of the former prosecutor – a rationale, incidentally, *nowhere* expressed by the Superior Court itself during its discussion of the issue (*Tempest*, 2015 WL 4389908, at *19-20) – *cannot* be correct for the obvious reason that the information that Gordon hid the pipe – irrespective of the fact that it arguably contradicted some of Carrier's earlier exculpatory-to-Tempest pre-trial statements to the contrary – is plainly not "high value" information, that is, information which is,

¹⁸ Although the Court's majority opinion also details Carrier's *trial* testimony respecting Tempest's brother's and father's knowledge of his crime, and any involvement they had in covering it up (*Tempest*, No. SU-15-0257, slip op. at 11), the former prosecutor in this case can obviously not be held accountable for any Carrier trial testimony not reflective of her pre-trial statements.

“almost by definition” “*highly material*” evidence (*Lerner v. Moran*, 542 A.2d at 1092) (emphasis added), because its only “value” was *to the State* – to support *the State’s theory of Gordon’s complicity in covering up for his brother*.

To appreciate how evident this is, requires, respectfully, no more knowledge about this case than that one of the *central* battles in the 1992 trial was the admissibility of the State’s evidence that Gordon was complicit in the cover-up of his brother’s crime, the defense spending the better part of the 1992 trial trying to exclude or limit the admission of such highly inculpatory evidence, and the State arguing for its trial admissibility. (*See, e.g.*, TT 747, 870-71, 884-85, 889-90, 956-67, 974, 997-99, 1203-04, 1289, 2025-26.) Indeed, the propriety of the State’s Gordon-complicit-in-cover-up evidence was so central to the trial that it was strenuously litigated by Tempest in *this* Court on Tempest’s direct appeal,¹⁹ and taken up by this Court in its decision affirming Tempest’s conviction (*State v. Tempest*, 651 A.2d at 1215 (setting out some of the trial evidence detailing Gordon’s attempted cover-up of the murder), 1216 (“It is *significant* that the state demonstrated through its witnesses not only that defendant had admitted his crimes but also how heavily he relied upon and actively participated in efforts by his father, *brother*, and their friends to conceal his involvement in the crime.”) (emphasis added)).²⁰ Thus, while the State

¹⁹ *See, e.g.*, Tempest’s Direct Appeal Brief at 23 (arguing that “[t]hroughout the trial, by oral and written Motion in Limine, the defendant attempted to exclude evidence of this ‘cover up.’ The State’s contention was that the friends and family of the defendant conspired to ‘cover up’ the defendant’s possible culpability in the instant murder.”); *id.* (arguing that “[i]t was unduly prejudicial and improperly burdensome for the defense to have had to marshal his resources and battle these unfounded and unrelated contentions.”), and *id.* at 28 (arguing that “[t]he State’s incredibly transparent attempt to prejudice the jury by infecting the trial with a litany of cover up evidence ultimately led to a motion to pass.”).

²⁰ And, of course, Gordon’s *own* perjury convictions and resultant incarceration arose out of his efforts to cover-up for his brother. *State v. Gordon Tempest*, 660 A.2d 278 (R.I. 1995).

certainly appreciates that Carrier's March 10, 1992 statement that Gordon hid the pipe contradicted at least her pre-August 1991 statements that Gordon did not know about his brother's culpability and that, if he had, he would have turned-in his brother,²¹ it is, respectfully, simply incorrect to say that the former prosecutor should have recognized that this *contradiction* – and the possibility that defense counsel may have “impeached” Carrier on it – was “high value” defense information, information that was “almost by definition” “*highly material*” evidence (*Lerner v. Moran*, 542 A.2d at 1092) (emphasis added). To hold otherwise, as this Court's majority opinion did, would be to accept the clearly erroneous position, rejected in a number of this Court's previous decisions (*see, e.g., State v. Chalk*, 816 A.2d 413, 420-21 (R.I. 2002)), that virtually any matter with which a witness may be impeached may be characterized as “high value” information. *Particularly* in this case, where the supposed “high value” impeachment evidence consisted of evidence (that Gordon hid the murder weapon) that was not only *highly incriminating* – and which Tempest had spent the better part of his 1992 trial *trying to exclude* and which he argued to this Court on direct appeal had been improperly and prejudicially introduced at his trial – but that also contradicted Carrier's *non-incriminating* earlier statements that Gordon did not know about his brother's culpability, it is, respectfully, even more astonishing to suggest that the impeachment value of Carrier's Gordon-hid-murder-weapon statement constituted “high value” evidence. Indeed, if this Court's majority opinion stands, it would be, to the State's knowledge, the only case of which it is aware to have held that “impeachment” evidence consisting of highly inculpatory evidence (in this case, Gordon's complicity in the murder cover-up) contradicting a witness's previously asserted

²¹ This, of course, is what the former prosecutor meant when he testified at the post-conviction relief hearing – in respect *not*, as suggested in the Court's majority opinion, to the puppy-excitement statement (*Tempest*, No. SU-15-0257, slip op. at 13 n.14) – that “[if] you look at it that way, it is inculpatory – exculpatory” (PCRT 2573).

favorable-to-the-accused statement (Gordon’s non-complicity in any murder cover-up) should be new-trial entitling.²² Moreover, any such holding in this case is *especially unfair* to the State because of the fact that the at-issue Carrier statement (of Gordon’s having hid the pipe in the closet) *would never even have been used* by Tempest’s counsel in his cross-examination of Ms. Carrier, as should be apparent not only from familiarity with the fact that one of Tempest’s *central* battles in the 1992 prosecution of his trial-defense was his determination to prevent the jury from hearing *any* evidence of Gordon’s complicity in the cover-up of his brother’s crime (*see, e.g.*, TT 747, 870-71, 884-85, 889-90, 956-67, 974, 997-99, 1203-04, 1289, 2025-26; Direct appeal brief of Tempest at 24-27, 31-32; *State v. Tempest*, 651 A.2d at 1215-16),²³ but also from the fact that, while Tempest’s defense in fact possessed before and during trial the August 26, 1991 Carrier statement that *directly contradicted* her pre-trial statements that Gordon was unaware of Tempest’s

²² To be sure, the State recognizes “that facially inculpatory evidence can be used to impeach a witness” (*Tempest*, No. SU-15-0257, slip op. at 12), as was the case in the High Court’s decision in *Strickler v. Greene*, 527 U.S. 263 (1999), where a witness’s mildly inculpatory police statement (*id.* at 282 (the witness’s police statement that “her initial perception of th[e] event [was of] . . . ‘a trivial episode of college kids carrying on’ that her daughter did not even notice”)) was held to have been *Brady* material with respect to the witness’s incredibly more damning *inculpatory* trial testimony (*id.* (“the *terrifying* incident that [the witness] confidently described in her testimony”)) (emphasis added)). But, however, *Brady* impeachment evidence, almost by definition, cannot be said to pertain to impeaching a witness on evidence – in this case, that Gordon was *not* complicit in the murder cover-up – *favorable* to the accused (*see, e.g.*, *Wolfe v. Bock*, 412 F. Supp. 2d 657, 674 (E.D. Mich. 2006) (“The *Brady* rule is violated when . . . the evidence at issue is favorable to the accused, either because it is exculpatory or because it may impeach *important inculpatory* evidence”) (emphasis added); *State v. Belone*, 343 P.3d 128, 149 (Kan. Ct. App. 2015) (“Evidence is exculpatory if it tends to disprove a fact in issue that is material to guilt or punishment or if it may be used to impeach *inculpatory* evidence of the prosecution”) (emphasis added)), and the State is aware of *no* case *ever* decided holding to the contrary.

²³ The United States Court of Appeals for the First Circuit has admonished, when assessing what the impeachment value of a witness’s former statement might have been if used at trial, “not to ignore the[] realities of trial when in engaged in a *Brady* analysis” (*Conley v. United States*, 193 F.3d 183, 193 (1st Cir. 2005)).

culpability (indeed, that if he had been aware, he would have turned in his brother),²⁴ Tempest's defense *elected not to impeach Carrier with such August 26, 1991 statement* – evidently, almost certainly, because Tempest would not *himself present* to the jury *further evidence* of Gordon's complicity in the cover-up. For these reasons, then, the opinion for a majority of this Honorable Court seriously erred in determining, from its "own review of the evolution of Carrier's statement" (*Tempest*, No. SU-15-0257, slip op. at 10), "that the 'high value' of Carrier's new statements to the defense could not have escaped the former prosecutor's attention" (*id.* at 9).

- *Materiality*

Moreover, and respectfully, the "materiality" analysis in the Court's majority opinion is, essentially for the same reasons as explicated above with respect to the puppy-excitement question, untenable: There is simply no "reasonable probability" that Tempest might have been acquitted had only his counsel been able to "impeach" Carrier with and bring to the jury's attention Carrier's March 10, 1992 statement, highly inculpatory to Tempest and consistent with the testimony of the State's other witnesses,²⁵ of Gordon's murder-weapon cover-up complicity. And, since Carrier was only one of four confession-witnesses, and the only one who admitted to the jury that she could not possibly have observed the myriad events she testified, at the grand jury, to having observed, and since Tempest was, apart from the four confessed-to witnesses, implicated by the

²⁴ Though the Court's majority opinion also speaks in terms of contradicting Carrier's pre-trial claim that Gordon had no "involvement . . . in concealing the murder weapon" (*Tempest*, No. SU-15-0257, slip op. at 11), none of the favorable-to-Tempest Carrier pre-trial statements with respect to Gordon spoke specifically to Gordon's "involvement . . . in concealing the murder weapon" (*id.* at 11), but, rather, only spoke, more generally, to Gordon's alleged unawareness of his brother's culpability.

²⁵ This Court's direct appeal affirmance detailed the testimony of the State's witnesses who had, some days after Ms. Picard's murder, seen Gordon, at 409 Providence Street, among Woonsocket officers "holding a pipe wrapped in a piece of cloth," and later "point[ing] out the pipe" to other officers on the scene. (*State v. Tempest*, 651 A.2d at 1215.)

highly inculpatory evidence that Tempest was terrified of what Gelinias might have seen at the crime scene, that, following the murder, Tempest had changed his boots and was sporting a not-previously-observed bite or scratch mark while standing outside of a car the same color of which was just earlier observed at the crime scene, and that Tempest, the day after the murder, sat around his sister-in-law's kitchen table to create, with Allard and his sister-in-law, a time-of-the-murder alibi, it is not remotely possible – let alone reasonably probable – that the jury would have voted to acquit if only Carrier had been impeached with the fact that, as the State had sought to introduce at trial over the most strenuous objections of Tempest, Gordon *actually was involved in trying to cover-up his brother's crime.*

This Court is recognized and respected for its judicial integrity, reflected, in large measure, in the soundness and persuasiveness of its written decisions. This Court's judicial integrity is further enhanced when, on that rare occasion in which an opinion of this Court is unsound, and so fails to do justice between the parties, it invokes its own Rule 25 to ensure that its final determination in a cause conforms to the highest standards of judicial probity. Particularly in this case, in which so many criminal justice stakeholders are relying on this Court to put the final imprimatur on a criminal justice saga that began on the afternoon of February 19, 1982, when Doreen Picard was brutally beaten to death with a metal pipe in the basement of 409 Providence Street, Woonsocket, it is all the more important that the members of this Court invoke this Court's Rule 25 to reconsider the legal soundness of the majority opinion's decision in this case.

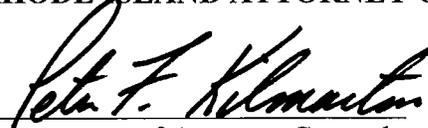
Respectfully submitted,

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