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1996 Survey of Rhode Island Law: Cases: Criminal Law/Procedure

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Criminal Law/Procedure. *In re George G.*, 676 A.2d 764 (R.I. 1996). When the court orders the appointment of private counsel to assist indigent litigants, the court must bear the expense of such counsel.

When counsel is required to assist a litigant, the court appoints the Public Defender to assist those persons who cannot afford a private attorney. If the Public Defender is not available due to a conflict of interest, then the court must appoint private counsel. It may be unclear, however, who bears the costs of such counsel. In *In re George G.*,[1] the Rhode Island Supreme Court held that when a minor requires private counsel, the court must bear the costs, not any other department or agency.[2]

Facts and Travel

In *George*, a juvenile (George), was brought to family court for a pre-trial hearing on criminal petitions of waywardness and a parental petition asserting disobedience.[3] The court determined that the Public Defender's Office had a conflict of interest because it already was representing a co-defendant, and thus could not represent George.[4] The family court judge subsequently ordered the Department of Children, Youth and Families (DCYF), which had temporary custody of George, to retain counsel for him at DCYF's expense.[5] DCYF requested the court to vacate the order, or, in the alternative, to stay the order pending appeal to the Rhode Island Supreme Court.[6] The trial court denied these requests.[7] Thereafter, DCYF filed a petition for certiorari, which was granted.[8]

Background

In June 1994, the Rhode Island Supreme Court issued Executive Order No. 94-02 (Order), indicating which cases might require

1. 676 A.2d 764 (R.I. 1996).
2. *Id.* at 765.
3. *Id.* at 764.
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.* DCYF retained counsel for George, as ordered by the family court. *Id.*
8. *Id.*

court-appointed counsel to assist indigent litigants.[9] The Order stated that the court previously had overspent its budget "for appointment of counsel for indigent litigants," for which deficit the Rhode Island Legislature had made supplemental appropriations.[10] Because the court must bear the costs of court-appointed counsel and the current legislature had not provided any additional funds, the intent of the Order was to ensure that the court stay within its budget.[11] Specifically, the Order stated that "no private counsel shall be appointed to assist any indigent litigants save where constitutionally required."[12] In addition to the situation of a juvenile facing possible incarceration, as in *George*, all defendants are entitled to counsel when charged with a felony, both at trial and preliminary hearings.[13] When charged with a misdemeanor, counsel is required only where the defendant is actually incarcerated.[14] Although the Public Defender would continue to represent parents accused of child abuse or neglect, or where parental rights were at issue, private counsel could not be provided with "public funds" for these cases.[15] Finally, neither guardians ad litem nor educational advocates could be compensated by the court.[16]

A review of other jurisdictions reveals some statutory authority for the allocation of the financial responsibility for private counsel in cases involving children. For example, New Jersey requires that the Office of Public Defender pay for private counsel to represent indigent parents in child abuse or neglect cases.[17] By contrast, Florida requires that the Department of Health and Re-

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9. The authority for such orders exists in Rhode Island General Laws section 8-15-2 which states, "[t]he chief justice of the supreme court shall be the executive head of the judicial system." R.I. Gen. Laws § 8-15-2 (1985).

10. R.I. Sup. Ct. Exec. Order No. 94-002. In the prior two fiscal years, the deficit had exceeded $300,000. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* (citing Gideon v. Wainwright, 372 U.S. 335 (1963); Coleman v. Alabama, 399 U.S. 1 (1970)).

14. *Id.* (citing Scott v. Illinois, 440 U.S. 367 (1979)).

15. *Id.*

16. *Id.* Guardians ad litem could be appointed from Court Appointed Special Advocate (CASA) attorneys, non-attorney volunteers or the private bar (on a pro bono basis) or where the litigants would bear the costs. *Id.* Educational advocates could be appointed only if the Rhode Island Commissioner of Education provided funds. *Id.*

17. *In re* R.J.B., 644 A.2d 1093 (N.J. 1994).

habilitative Services bear the costs of providing a guardian ad litem when such counsel is not constitutionally required, although the county must pay where such counsel is mandated.[18] Georgia provides counties with state funds to assist in the defense of indigents.[19]

ANALYSIS AND HOLDING

As a threshold matter, the Rhode Island Supreme Court stated that the particular facts at issue were moot, but because "the issue presented is one of importance which is capable of repetition and evades review," it would address the issue.[20] The family court judge had stated that he possessed the discretion to appoint private counsel pursuant to Executive Order No. 94-02.[21] However, the supreme court held that once the trial judge found that the charges against George might result in loss of liberty, and the Public Defender was unavailable to represent him, the lower court was obligated "to appoint private counsel at the expense of the court pursuant to Executive Order No. 94-02."[22] In its per curiam opinion in this case, the court did not state explicitly whether the lower court would have had to appoint counsel based solely on the petitions of waywardness and disobedience.[23] However, the court did hold that when a juvenile faces possible incarceration, the

18. *In re* M.P., 453 So. 2d 85, 88-91 (Fla. Dist. Ct. App. 1984).

19. *See In re* Echols, 475 S.E.2d 658 (Ga. Ct. App. 1996) (citing Ga. Code Ann. § 17-12-30 to -44 (1990)).

20. *In Re* George G., 676 A.2d 764, 765 (R.I. 1996) (citing Morris v. D'Amario, 416 A.2d 137, 139 (R.I. 1980)).

21. *Id.* The Order states:

> 4. In the Family court the Public Defender may be appointed for respondents charged with acts of delinquency or in the discretion of the court where incarceration is expected for charges of acts of waywardness. Private counsel should only be appointed in situations in which the Public Defender is for good cause unavailable by reason of a conflict.

R.I. Sup. Ct. Exec. Order No. 94-02 (1994).

22. *In re George G.*, 676 A.2d at 765.

23. *Id.* Several situations exist in which a minor is entitled to counsel in Rhode Island. R.I. R. Juv. P. 6 (1996) (minor charged with acts of delinquency and waywardness summoned to appear in juvenile court, where such appearance may result in detention); R.I. R. Juv. P. 8 (1996) (hearing to detain a child for a period longer than one day); R.I. R. Juv. P. 9 (1996) (appearance before the court for arraignment); R.I. R. Juv. P. 12 (1996) (hearing before the court when "the child is by law subject to waiver to the criminal jurisdiction of another court").

court must appoint private counsel, at court expense, if the Public Defender is unavailable due to a conflict.[24]

Conclusion

In *In re George G.*, the Rhode Island Supreme Court made clear that whenever charges that could result in loss of liberty are brought in family court against an indigent minor, the court is obligated to appoint private counsel if the Public Defender is unavailable due to a conflict of interest, pursuant to its Executive Order No. 94-02. The court clarified any ambiguity that might have been present in the language of the Order, at least insofar as the court's obligation to provide counsel to a juvenile who faces possible incarceration. It is clear that, in the future, the court must pay for appointed counsel.

Renee G. Vogel, MD, MPH

24. *In re George G.*, 676 A.2d at 765.

Criminal Procedure. *State v. Chabot*, 682 A.2d 1377 (R.I. 1996). Where a defendant explicitly informs the court that he intends to waive his Sixth Amendment right to counsel, and there is legitimate doubt that the waiver is made knowingly, voluntarily and intelligently, the court must conduct a competency hearing: failure to do so is reversible error.

In a criminal proceeding, a defendant has a constitutional right to waive counsel and proceed *pro se*.[1] However, the waiver must be "knowing, intelligent and voluntary,"[2] which requires consideration of "the defendant's background and experience, his knowledge of the nature of the charges against him, possible defenses, and the possible penalty; his understanding of the rules of procedure, evidence, and . . . his experience in criminal trials; and whether the waiver was the result of mistreatment or coercion."[3] In *State v. Chabot*,[4] the Rhode Island Supreme Court held that it was reversible error when the trial court failed to conduct an inquiry into the defendant's competence to waive counsel.[5]

Facts and Travel

On March 21, 1995, Michael Chabot assaulted his former girlfriend in her home, thereby violating the restraining order which had been issued against him two weeks earlier.[6] As a result of this incident, the State charged Chabot with violating his probation.[7] A violation hearing was scheduled before a superior court judge, at which the defendant appeared pro se.[8]

During this hearing, Chabot "expressed confusion" and "confessed incompetence."[9] During cross-examination, the defendant requested that he undergo a psychiatric evaluation, claiming that the medication he was taking for anxiety was adversely affecting

1. United States v. Fant, 890 F.2d 408, 409 (11th Cir. 1989) (citing Faretta v. California, 422 U.S. 806, 835 (1975)).
2. *Id.*
3. *Id.*
4. 682 A.2d 1377 (R.I. 1996).
5. *Id.* at 1381.
6. *Id.* at 1378.
7. At various times in 1992, Chabot was charged with three separate offenses for which he was placed on probation until the year 2002. *Id.* at 1379.
8. *Id.* at 1378.
9. *Id.*

his ability to represent himself.[10] The trial judge denied the defendant's request and found him in violation of the terms of his probation.[11] In addition to a nine year prison sentence, the judge extended Chabot's probationary period.[12] Chabot appealed, claiming that the trial court erred by extending his probation beyond the previously imposed term,[13] and by denying his request for a psychiatric evaluation.[14]

BACKGROUND

The Sixth Amendment of the United States Constitution does not provide merely that a defense shall be made for the accused; it grants the accused the right to defend himself personally.

> In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and the cause of the accusation; to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.[15]

In *Faretta v. California*[16] the United States Supreme Court opined that implied in this language is the right to self-representation and to present one's own defense.[17] The defendant in *Faretta*, charged with grand theft, notified the court well in advance of his trial date that he wanted to proceed pro se.[18] The trial court ruled that the defendant had not "made an intelligent and knowing waiver" of his right to counsel, and as such, appointed a public defender to his case.[19] The defendant was convicted, and the state appellate court affirmed the conviction. The United States Supreme Court, finding support in the Sixth Amendment, held

10. *Id.* at 1378-79.
11. *Id.* at 1379.
12. *Id.*
13. *Id.* In making this claim, Chabot relied on *State v. Taylor*, 473 A.2d 290, 291 (R.I. 1984). The supreme court agreed, citing Rhode Island General Laws section 12-19-9 (1994), which provides that when a defendant has violated probation, the court "may remove the suspension and order the defendant committed on the [previous sentence], or on a lesser sentence, or impose a sentence if one has not been previously imposed, or may continue the suspension of a [previous sentence]." *Chabot*, 682 A.2d at 1370.
14. *Chabot*, 682 A.2d at 1370.
15. U.S. Const. amend. VI.
16. 422 U.S. 806 (1975).
17. *Id.* at 834.
18. *Id.* at 807.
19. *Id.* at 809-10.

that the state could not demand that the defendant accept a state-appointed public defender against his will, whether or not defendant was versed in the technical, legal knowledge required to follow proper trial procedure.[20] The defendant, the Court held, could proceed pro se, so long as his decision to do so was made voluntarily and intelligently.[21]

The Eleventh Circuit narrowed this holding in *United States v. Fant.*[22] In *Fant,* the court articulated specific factors that trial courts should consider in order to ensure that a defendant is making a knowing and intelligent waiver of his right to counsel. These factors include the background, experience and age of the defendant; the defendant's experience in criminal proceedings and his knowledge of the nature of the charges against him; any available defenses and the possible penalty in the event of conviction; the defendant's familiarity with the rules of evidence and courtroom procedure; and whether the request to proceed pro se was the result of coercion or mistreatment.[23] In *Fant,* the court stated that "the clear way to avoid the dilemma created by *Faretta* is for the trial court to conduct a hearing on the record."[24] A mere warning to the defendant about the dangers of proceeding pro se is not enough.[25] Representation by counsel is a fundamental right and trial judges must ask more than just pro forma questions in order to ensure that a defendant's request to proceed in his own defense is knowing and voluntary.[26]

In *State v. Hazard,*[27] the Rhode Island Supreme Court similarly noted the danger of Sixth Amendment violations, stating that a "violation proceeding presents the possibility of the loss of liberty prompting the requirement of certain constitutional safeguards."[28] These safeguards consist of fully determining the defendant's competence when requesting waiver of counsel.[29]

20. *Id.* at 835-36.
21. *Id.*
22. 890 F.2d 408 (11th Cir. 1989).
23. *Id.* at 409.
24. *Id.* at 410.
25. *Id.* at 409.
26. *Id.*
27. 671 A.2d 1225 (R.I. 1996).
28. *Id.* at 1226 (citing State v. Deroche, 389 A.2d 1229, 1234 (R.I. 1978)).
29. *See Faretta*, 422 U.S. 806 (1975).

Previously, in *State v. Perry*,[30] the Rhode Island Supreme Court addressed the validity of a defendant's waiver of his Miranda rights in light of his mental deficiency. The trial judge in *Perry* ruled the waiver invalid on the basis of testimony by a psychologist who had tested the defendant.[31] The trial court denied the State's motion for a competency hearing, although one was apparently mandated by statute.[32] In holding that the trial court erred when it did not order a competency hearing, the supreme court noted that the testimony by defendant's expert was enough to "create a suspicion of incompetence in and of itself."[33] The court stated that in evaluating a defendant's ability to comprehend his fundamental rights and to competently waive those rights, a court must consider the "totality of the circumstances."[34]

ANALYSIS AND HOLDING

The Rhode Island Supreme Court acknowledged that the right of self-representation had been granted to Chabot during the revocation hearing. However, the court said, it was imperative that the lower court conduct an inquiry into Chabot's ability to make that decision before granting his request for a waiver of counsel.[35] First, the defendant alerted the court to his recent history of psychiatric illness.[36] He disclosed the fact that he was confused and "incompetent."[37] Furthermore, the defendant specifically asked for

30. 508 A.2d 683 (R.I. 1986).

31. *Id.* at 687. The psychologist testified that Perry was "unable to comprehend the admonitions given him by the . . . police," based on her testing. *Id.* The trial court rejected the state's witness's testimony that Perry could understand "the essence" of the Miranda warnings. *Id.*

32. *Id.* at 688. Rhode Island General Laws section 40.1-5.3-3(b) states that "if a court in which a criminal proceeding is pending has reason to suspect that a defendant is incompetent, it shall order an examination of the defendant by one or more qualified physicians." *Id.* (quoting R.I. Gen. Laws § 40.1-5.3-3(b) (1990 & Supp. 1996)).

33. *Id.*

34. *Id.* Rejecting evidence of the defendant's prior educational inadequacies as remote and immaterial, the trial court took the position that the records "[stretched] the totality of these circumstances beyond the breaking point." However, the supreme court stated, "[t]o suggest that the school record of a defendant is immaterial because the record was acquired a number of years prior to the interrogation is erroneous." *Id.*

35. State v. Chabot, 682 A.2d 1377, 1380 (R.I. 1996).

36. *Id.* at 1379.

37. *Id.* at 1378.

a psychiatric evaluation.[38] The supreme court stressed the importance of the defendant's knowledge and understanding of the proceedings and charges. "In order to effectuate a voluntary waiver of the [Sixth Amendment] right to counsel, an inquiry into the matter must sufficiently establish that knowledge and understanding on the record."[39] The trial court erred in failing to ascertain the accuracy and completeness of representations concerning: Chabot's alleged recent hospitalization for psychiatric problems; the medications he may have taken for those problems, and their effect on his competence to waive counsel and defend himself at the revocation hearing.[40] Holding "that it was incumbent upon the trial justice to conduct a more searching inquiry of the defendant's then existing mental health and physical condition,"[41] the court vacated the probation violation and remanded the case back to the trial division for a competency hearing, stating that if the hearing indicated the need for further questioning regarding defendant's competency, the defendant should be ordered to undergo a psychiatric evaluation.[42]

Conclusion

Failure to inquire into a defendant's psychiatric stability when the defendant waives counsel constitutes reversible error.[43] It is incumbent on the trial court to establish that the defendant's waiver of counsel is knowing and intelligent, as established in *Faretta*.[44] The Rhode Island Supreme Court's ruling in *Chabot* is consistent with its previous position on a defendant's waiver of fundamental rights. As established in *Perry*, the court considers education and intellectual ability important factors in establishing whether the defendant is making an intelligent decision.[45] Without this inquiry by the trial court, a defendant's rights under the Sixth Amendment are violated because of the uncertainty about his ability to comprehend the proceedings and to understand the consequences stemming therefrom. Thus, in *Chabot*, the court

38. *Id.* at 1378-79.
39. *Id.* at 1380-81.
40. *Id.*
41. *Id.* at 1380.
42. *Id.* at 1381.
43. *Id.*
44. *Id.*
45. *Id.*; *cf.* State v. Perry, 508 A.2d 688 (R.I. 1986).

firmly establishes that protecting defendants who cannot protect themselves is fundamental to the administration of justice.

William J. Powers, IV

Criminal Procedure. *State v. Dominguez,* 679 A.2d 873 (R.I. 1996). A court may extend the time limit for filing a motion to dismiss if it finds excusable neglect.

Where the Rhode Island Superior Court finds "excusable neglect," it may extend the ten day time limit of the Superior Court Rules of Criminal Procedure Rule 9.1, thereby allowing a criminal defendant to move to dismiss an indictment for lack of probable cause. In *State v. Dominguez,*[1] the Rhode Island Supreme Court found such "excusable neglect" where the criminal defendant was entitled to appointment of counsel, but no appointment was made, and during that time the ten day period of Rule 9.1 elapsed.

Facts and Travel

The defendant, Daniel Dominguez, was arraigned in Rhode Island Superior Court on July 26, 1996, on a charge of conspiracy to commit murder.[2] He was referred to the Office of the Public Defender to determine eligibility.[3] On August 9, 1996, the court was advised that while Dominguez was eligible for representation by a Public Defender, counsel had not yet been appointed.[4] Seven days later, counsel entered his appearance on behalf of Dominguez, but a conflict of interest soon precluded further involvement.[5] New counsel was assigned and she simultaneously entered her appearance and a motion to dismiss.[6]

In the weeks between the arraignment and the final appointment of counsel, Dominguez remained pro se, but never waived his right to counsel.[7] Also during that period, the ten day limit quietly

1. 679 A.2d 873, 874 (R.I. 1996).
2. Petitioner's Memorandum at 2, State v. Dominguez, 679 A.2d 873 (R.I. 1996).
3. *Dominguez*, 679 A.2d at 874.
4. Petititioner's Memorandum at 3, *Dominguez* (No. 95-735-M.P.).
5. *Id.* at 3-4.
6. *Dominguez*, 679 A.2d at 874. This motion was filed pursuant to R.I. Super. Ct. R. Crim. P. 9.1:

> A defendant who has been charged by information may, within ten (10) days after he or she has been served with a copy of the information, move to dismiss on the ground that the information and exhibits appended thereto do not demonstrate the existence of probable cause to believe that the offense charged has beencommitted or that the defendant committed it. The motion shall be scheduled to be heard within a reasonable time.

Id.

7. Petitioner's Memorandum at 3, *Dominguez* (No. 95-735-M.P.).

expired.[8] The trial judge, at the hearing on the motion to dismiss, concluded that under Rule 9.1's ten day deadline, any motion to dismiss "must be filed within [that] time."[9] It was from this decision that Dominguez appealed.[10]

BACKGOUND

The Superior Court Rules of Criminal Procedure provide "for the just determination of every criminal proceeding to which they apply."[11] The two rules at issue in *Dominguez* were Rules 9.1 and Rule 45(b) of the Superior Court Rules of Criminal Procedure. Rule 9.1 permits a criminal defendant to request dismissal of the charges on the ground that the information does not demonstrate the existence of probable cause.[12] This rule limits that opportunity to the ten days following defendant's service of a copy of the information.[13] Rule 45(b) provides the court with discretion to extend time restrictions upon the motion, even after their expiration, where the failure to act in a timely fashion was the result of "excusable neglect."[14] In *Nichola v. John Hancock Mutual Life Insurance Co.*,[15] the court, applying the analogous civil rule,[16] explained

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8. *Id.*; Brief-In-Chief of the Defendant Petitioner at 2, State v. Dominguez, 679 A.2d 873 (R.I. 1996).

9. Trial Record at 17, *Dominguez*, 679 A.2d 873 (R.I. 1996).

10. *Dominguez*, 679 A.2d at 874.

11. R.I. Super. Ct. R. Crim. P. 2. "They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay." *Id.*

12. R.I. Super. Ct. R. Crim. P. 9.1.

13. *Id.*

14. R.I. Super. Ct. R. Crim. P. 45(b). The rule reads:

> Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice, order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 33, 34 and 35, and except to the extent and under the conditions stated in them.

Id. R.I. Super. Ct. R. Crim. P. 33 (pertaining to motions for a new trial); R.I. Super. Ct. R. Crim. P. 34 (dealing with the arrest of judgment if the indictment, information or complaint does not charge an offense or if the court was without jurisdiction); R.I. Super. Ct. R. Crim. P. 35 (concerning the correction, decrease or increase of a sentence).

15. 471 A.2d 945 (R.I. 1984).

that the time limits of particular rules "should be read in conjunction with Rule 6(b), which gives the court discretion where cause is shown to enlarge" time limits imposed by other rules.[17]

HOLDING AND ANALYSIS

The Rhode Island Supreme Court found the language of Rule 45 clear and held that the trial court's discretionary acts fell within Rule 45's broad reach.[18] The court found that the "record show[ed] unequivocally that although the defendant was entitled to the appointment of counsel, none was provided."[19] Therefore, the court concluded, the defendant's failure to file the Rule 9.1 motion to dismiss "was the result of excusable neglect."[20] At the motion hearing to dismiss, counsel for Dominguez had argued that constitutional concerns are raised when enlargement is denied, and when an indigent defendant who is entitled to, but denied counsel, must assert his rights pro se, or lose them.[21] Although the court did not expressly address this issue, the opinion indicates that the justices gave great weight to the defendant's right to counsel.[22]

CONCLUSION

Shifting focus from the civil to the criminal context, *Dominguez* mirrored the *Nichola* analysis and holding. The *Dominguez* court concluded that a criminal defendant "to whom meaningful representation is not afforded,"[23] and who subsequently fails to move to dismiss an information for lack of probable cause, has suffered from excusable neglect. The brevity of the court's analysis, however, belies the comprehensive scope of its decision; a succinct and unembellished acknowledgement of the trial court's discretion

16. R.I. Super. Ct. R. Civ. P. 56.

17. *Nichola,* 471 A.2d at 947.

18. State v. Dominguez, 679 A.2d 873, 874 (R.I. 1996).

19. *Id.* Defendant's counsel, in the motion to dismiss, presented the plain meaning argument ultimately adopted by the supreme court. Transcript from Hearing on Motion at 14, *Dominguez*, (Dec. 1995) (P295-1960B).

20. Transcript from Hearing on Motion at 14.

21. *Id.* at 16.

22. *Dominguez*, 679 A.2d at 874.

23. Brief-In-Chief of the Defendant Petitioner at 12, *Dominguez* (No. 95-735-M.P.).

to enlarge time limits in order to "provide for the just determination" of criminal proceedings.[24]

John A. Leidecker, Jr.

24. R.I. Super. Ct. R. Crim. P. 2. Counsel for Dominguez also raised constitutional concerns regarding the adverse impact of the rule where enlargement is denied and an indigent defendant, entitled to, but denied counsel, is compelled to either assert or lose a significant right. Whether a trial judge could deny an enlargement and satisfy the constitutional obligations at such a critical stage, she asserted, is unlikely. Transcript from Hearing on Motion at 16, *Dominguez* (Dec. 1995) (P295-1960B).

Criminal Law/Procedure. *State v. Morel*, 676 A.2d 1347 (R.I. 1996). Admissibility of expert testimony based on novel scientific evidence is within the discretion of the trial judge, who must consider its relevance, the appropriateness of expert testimony, qualifications of the expert, and the usefulness of the testimony to the trier of fact.

Deoxyribonucleic Acid (DNA) evidence is offered in court to help prove the identity of a suspect. Such testimony relies on the statistical probability that matched DNA samples may not be from the same source. The lower the probability, the more likely that the samples had the same origin. However, the assumptions underlying the statistical methodology have not been scientifically proven.[1] In *State v. Morel*,[2] the Rhode Island Supreme Court upheld the trial court's admission of disputed DNA testimony because it was relevant and would assist the trier of fact.[3] The court also agreed with the trial court's holding that any dispute about the methodology would affect the weight of the evidence, not its admissibility.[4]

FACTS AND TRAVEL

David Morel was convicted of three counts of first degree sexual assault and one count of assault with a dangerous weapon, for which he was sentenced to thirty years in prison.[5] Morel appealed, claiming error on the part of the trial judge for admitting certain expert testimony on DNA testing, as well as testimony of a prior criminal conviction.[6] Specifically, he was charged with raping a sixteen year old female, who immediately reported it to the police.[7]

1. *See, e.g.*, State v. Marcus, 683 A.2d 221, 228 (N.J. Super. Ct. App. Div. 1996) (Differentiation of genetic markers in subpopulations must be determined empirically, according to population geneticists.). For a discussion of DNA processing and statistical analysis, see Sue Rosenthal, *My Brother's Keeper: A Challenge to the Probative Value of DNA Fingerprinting*, 23 Am. J. Crim. L. 195 (1995).
2. 676 A.2d 1347 (R.I. 1996).
3. *Id.* at 1355.
4. *Id.* at 1356. In a separate holding in this case, which will not be discussed in detail, the court also upheld the trial judge's admission of the defendant's prior conviction for kidnaping to attack his credibility, after the defendant had taken the stand in his own defense. *Id.* at 1356-57.
5. *Id.* at 1348-49.
6. *Id.* at 1348.
7. *Id.* at 1349.

The victim was taken to an emergency room and examined by a physician who found evidence of genital trauma "consistent with forced sexual intercourse."[8] Sperm samples collected from her body and clothing, and a sample of Morel's blood, were all sent to the Federal Bureau of Investigation (FBI) laboratory for comparison of their DNA content.[9] At trial, an FBI expert testified over defendant's objection that "there was a one in one thousand chance that defendant's DNA would match that of a randomly selected Caucasian individual."[10] Morel denied his guilt, and stated that he was at his parents' home from eleven o'clock in the morning until eight-thirty that evening,[11] but the court allowed testimony of Morel's prior conviction for kidnaping to impeach his credibility.[12]

BACKGROUND

Prior to being considered by the *Morel* court, DNA testing had been admitted in the majority of state and federal courts that addressed the issue.[13] DNA testing involves a process by which certain genetic material is separated into bands, which may be visually inspected to see if their patterns match.[14] The relevance of DNA testing is that if two samples match, it may help prove that they came from the same source, for example, that a sample from the crime scene also came from the defendant.[15] Although a non-match is conclusive proof that the two samples are from different sources,[16] a match can only give rise to an inference that the samples were from the same person, because it is always possible that

8. *Id.*

9. *Id.* at 1349-50.

10. *Id.* at 1350.

11. *Id.*

12. *Id.* at 1348. On this issue, the Rhode Island Supreme Court held that the trial court did not abuse its discretion in allowing the testimony "because the eyewitness testimony of the victim had been heard by the jury, the probative value of the prior conviction would outweigh its prejudicial impact." *Id.* at 1357.

13. State v. Pierce, 597 N.E.2d 107, 110-11 (Ohio 1992) (listing cases). By 1990, 38 states had admitted DNA evidence, and between 1990 and 1992, five states passed statutes recognizing its admissibility. *Id.* at 111 (citations omitted). It is interesting to note that in one of the earliest criminal cases heard by a state supreme court, the DNA evidence exonerated the defendant. Yorke v. State, 556 A.2d 230 (Md. 1989).

14. *Morel*, 676 A.2d at 1350-52 (explaining DNA and the processing technique).

15. *Id.* at 1352.

16. Commonwealth v. Blasioli, 685 A.2d 151, 162 (Pa. Super. Ct. 1996).

someone else has the same DNA pattern.[17] The statistical probability that the two samples "coincidentally" came from different sources is critical, because the lower the probability, the stronger the inference that the samples came from the same person.[18] The problem is that different statistical methods may yield markedly different probabilities,[19] and it is still unclear whether the scientific assumptions underlying any of the methods are correct.[20]

The debate over which method should be admitted in court centers around two methods: the "ceiling principle" and the "product rule."[21] The ceiling principle mathematically adjusts for the possibility that genetic material may not be totally independent, but may occur more often in racial or ethnic sub-populations, due to non-random mating between these groups.[22] The product rule assumes that each characteristic is independent, and thus, the characteristics that have been analyzed are multiplied to obtain an overall probability that two samples would coincidentally, or randomly, match.[23]

Defendants are more likely to object to testimony based on the product rule because it may yield a lower probability than the ceiling principle, and thus allow a jury to draw a stronger inference of identity between the samples.[24] Because Morel did not object to the admissibility of DNA evidence in general, the supreme court only addressed the admissibility of the product rule.[25]

Analysis and Holding

The Rhode Island Supreme Court first discussed in detail the scientific basis for DNA testing, the process by which samples are prepared for analysis, and the statistical methods by which

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17. *Id.*
18. *Id.*
19. *Id.* at 165 (using the same sample, three different methods yielded probabilities of one in 2220 (counting method), one in thirty million (ceiling principle), and one in ten billion (product rule)).
20. State v. Marcus, 683 A.2d 221, 227-28 (N.J. Super. Ct. App. Div. 1996).
21. State v. Morel, 676 A.2d 1347, 1352-53 (R.I. 1996).
22. *Id.*
23. *Id.* at 1352.
24. *Id.* at 1353.
25. *Id.* at 1354.

probability estimates are prepared.[26] The court noted that the product rule "is the most straightforward method of computing the probability of obtaining a DNA profile in which the forensic and suspect's samples match."[27] However, the court also acknowledged that if the alleles[28] are not independent, this method "may underestimate or overestimate the true probability of matching alleles in the chosen population and thereby misstate the incriminating value of the evidence."[29] The court then addressed the fact that in 1992 the National Research Council (NRC) of the National Academy of Sciences recommended the use of a "modified" ceiling principle,[30] even though "recent empirical studies [had] detected no evidence of a departure from independence within or across commonly used genetic probes."[31] At that time, the NRC was concerned that population substructures might exist, and use of the ceiling principle would yield a more conservative estimate that would err, if at all, in favor of a defendant.[32] The court also reviewed more recent scientific studies, including a 1996 report issued by the NRC, which indicated that evidence using the product rule was appropriate.[33]

Next, the court discussed the evidence heard by the trial judge at the voir dire hearing held in response to Morel's motion to suppress the DNA evidence.[34] The FBI presented evidence to the trial judge about the testing procedure used, and testified that certain adjustments were made to their calculations that actually favored

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26. *Id.* at 1350-52 (citing Reference Manual on Scientific Evidence 281 (Federal Judicial Center 1994); DNA Technology in Forensic Science 35-36 (National Research Council 1992)).

27. *Id.* at 1352.

28. "Alleles are alternative forms of a gene at a given locus." *Id.* at 1350.

29. *Id.* at 1352.

30. The modification contains two adjustments to the calculation to account for the possibility of a coincidental match due to population substructures. *Id.* at 1353 (quoting Reference Manual on Scientific Evidence, *supra* note 26, at 301-02).

31. *Id.* at 1352.

32. *Id.* at 1352-53.

33. *Id.* at 1353 (noting that the 1996 NRC report concluded that the "data [from] different ethnic groups within the major races . . . imply that both the ceiling principle and the [modified] ceiling principle are unnecessary"). The court also noted that some experts argued that the ceiling principle was not meant to be used exclusively, and experts could use the product rule to give their "statistical 'best estimate' of genotype frequencies." *Id.* (quoting Eric S. Lander & Bruce Bodowle, *DNA Fingerprinting Dispute Laid To Rest*, 371 Nature 735 (1994)).

34. *Id.* at 1353-54.

Morel.[35] In its analysis of the trial court's admission of the DNA evidence, the supreme court stated that the decision to admit expert testimony is "within the sound discretion of the trial justice."[36] Specifically addressing the issue of expert testimony based on "novel scientific evidence," the court applied the four part test it had articulated in *State v. Wheeler*:[37] (1) is the evidence relevant; (2) is expert testimony appropriate; (3) is the expert qualified; and most importantly, according to the court, (4) will the testimony be useful to the trier of fact.[38] The court also noted that *Wheeler* was consistent with the United States Supreme Court's holding in *Daubert v. Merrell-Dow Pharmaceuticals*,[39] in which the Court said that the standard for admitting scientific evidence in federal courts is that contained in the Federal Rules of Evidence.[40]

After reviewing the trial record, the Rhode Island Supreme Court found that the trial judge had "carefully considered each of the criteria set forth in *Wheeler*," and had correctly decided "the mixed question of law and fact concerning the reliability and validity of the DNA evidence."[41] In so holding, the court noted that when a trial court decides mixed questions of law and fact, it is entitled to the same deference as when it makes a finding of fact, and its decision will not be disturbed unless clearly erroneous.[42] In addressing a concern that evidence might be unfairly prejudicial to a defendant, the court noted that the method used by the FBI "gives a defendant the benefit of any doubt about the data."[43] Finally, the court agreed with the trial judge that any dispute concerning the "statistical probabilities" would affect the weight of the evidence, not its admissibility, and "thus DNA evidence is not un-

35. *Id.* at 1354. The FBI agent stated that the modified 10% ceiling principle excluded approximately 99.8% of the population, whereas the product rule excluded 99.9%. *Id.*

36. *Id.* (citing State v. Capalbo, 433 A.2d 242, 246 (R.I. 1981); State v. Anil, 417 A.2d 1367, 1373 (R.I. 1980); State v. Benton, 413 A.2d 104, 113 (R.I. 1980)).

37. 496 A.2d 1382 (R.I. 1985).

38. *Morel*, 676 A.2d at 1355.

39. 509 U.S. 579 (1993).

40. *Id.* at 587. "[I]f scientific . . . knowledge will assist the trier of fact . . . a witness qualified as an expert . . . may testify thereto in the form of opinion or otherwise." Fed. R. Evid. 702.

41. *Morel*, 676 A.2d at 1355.

42. *Id.* (citing Morrow v. Norfolk & Dedham Mut. Fire Ins. Co., 661 A.2d 967, 968 (R.I. 1995); Cerilli v. Newport Offshore, Ltd., 612 A.2d 35, 39 (R.I. 1992)).

43. *Id.* at 1356. In this case, the product rule excluded 99.9% of the Caucasian population, while the ceiling rule would have excluded 99.8%. *Id.* at 1353-54.

like other conflicting scientific . . . or medical evidence regularly presented to juries by experts," and also subjected to cross-examination.[44] The court concluded that in Rhode Island, "novel scientific evidence" is admissible if it is relevant, helpful to the trier of fact, and appropriate for presentation by a qualified expert, even though it may be disputed in the scientific community.[45]

CONCLUSION

Morel was a case of first impression regarding the admissibility of DNA evidence in Rhode Island. Although the holding may appear radical because of the willingness to admit even disputed scientific testimony, the trial judge is still responsible for examining and evaluating the basis for the evidence. Using the *Wheeler/Daubert* standard merely gives the court the flexibility to admit evidence that may not "have gained general acceptance in the particular field to which it belongs,"[46] but which the court finds credible and helpful to the trier of fact.[47]

Renee G. Vogel, MD, MPH

44. *Id.* at 1356.

45. *Id.* at 1355.

46. Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923). In *Wheeler*, the defendants had argued that to be admissible, the science had to be generally accepted in the scientific community under the older, and more widely used *Frye* test, but the *Wheeler* court rejected this test. State v. Wheeler, 496 A.2d 1382, 1387-89 (R.I. 1985).

47. Some jurisdictions admitted the product rule under the *Frye* test, even before the 1996 NRC report. *See, e.g.*, Lindsey v. People, 892 P.2d 281 (Colo. 1995). *But see* State v. Streich, 658 A.2d 38 (Vt. 1995).

Criminal Law. *State v. Price*, 672 A.2d 893 (R.I. 1996). The common law offense statute does not limit the court's inherent power to punish an individual for criminal contempt.

In *State v. Price*,[1] the Rhode Island Supreme Court considered whether the court's inherent power to penalize criminal contempt was limited by Rhode Island General Laws section 11-1-1.[2] Reversing the family court, the supreme court held that the court's inherent power to punish for contempt was not limited by section 11-1-1.[3] The court stated that the statute applies only to common law offenses for which no punishment is prescribed by the general laws, and contempt is not one of those offenses.[4]

FACTS AND TRAVEL

At age 15, Craig C. Price was adjudged delinquent on four counts of murder by the Rhode Island Family Court.[5] On September 21, 1989, he was committed to the Rhode Island Training School[6] until the age of twenty-one.[7] The court had also ordered him to undergo psychiatric evaluation as part of a court-ordered treatment plan,[8] and almost five years passed and Price had yet to comply with the court ordered evaluation.[9] On August 4, 1994, the State brought charges against Price alleging that his failure to comply with the ordered evaluation constituted criminal contempt.[10] Price filed a motion to amend the complaint arguing that

1. 672 A.2d 893 (R.I. 1996).

2. *Id.* Hereinafter referred to as the common law offense statute, Rhode Island General Laws section 11-1-1 states that "[e]very act and omission which is an offense at common law, and for which no punishment is prescribed by the general laws, may be prosecuted and punished as an offense at common law. Every person who shall be convicted of . . . a misdemeanor at common law shall be imprisoned for a term not exceeding one year." *Id.* at 894 (quoting R.I. Gen. Laws § 11-1-1 (1994)).

3. *Id.*

4. *Id.* at 897-98.

5. *Id.* at 894-95.

6. The training school is a locked detention facility for children under the auspices of the Rhode Island Department of Children, Youth and Families. *See* R.I. Gen Laws § 42-56-33 (1993).

7. *Price*, 672 A.2d at 895.

8. *Id.*

9. *Id.*

10. *Id.* Price refused to participate in evaluation and treatment programs on numerous occasions between November 16, 1989, and July 6, 1994. He was 20

contempt is a misdemeanor offense, not a felony.[11] The family court agreed with Price's assertion that criminal contempt was a misdemeanor at common law.[12] Based upon section 11-1-1, the court held that punishment for misdemeanor criminal contempt could not exceed one year.[13] The State appealed, contending that the inherent power of the court to punish for contempt was not limited by the common law offense statute.[14]

BACKGROUND

When the Rhode Island Supreme Court was established in 1798, the Rhode Island General Assembly expressly granted the court inherent powers to punish individuals for contempt.[15] This grant was an "affirmation of the inherent power" given to courts under the common law of England.[16] It had long been held that courts may punish criminal contempt summarily.[17] Legislation has never been enacted to limit the punishment that courts may impose for contempts, and any legislative limitations may invoke a separation of powers issue.[18]

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years old and close to release from the training facility when these charges were filed. *Id.*

11. *Id.* Price also filed a motion to dismiss which was denied by the trial court. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* at 896.

15. *Id.* An Act to Establish a Supreme Judicial Court in This State, 1798 R.I. Pub. Laws § 4 (current version in R.I. Gen. Laws § 8-6-1 (1985 & Supp. 1996). Later, the powers were extended to the family court. R.I. Gen. Laws § 8-10-38 (1993). The Act provided that the "Supreme Judicial Court [of Rhode Island] shall have the power to . . . punish by fine or imprisonment, at the reasonable discretion of said Court, all contempts of authority in any cause or hearing before the same." *Id.* (quoting R.I. Gen. Laws § 8-6-1 (1985)).

16. *Id.* at 895. "The process of attachment for . . . contempts must necessarily be as ancient as the laws themselves; for laws without competent authority to secure their administration from disobedience and contempt would be vain and nugatory." Bloom v. Illinois, 391 U.S. 194, 198 n.2 (1968) (citing William Blackstone, 4 Commentaries on the Laws of England 286-87 (describing contempt cases)). "The inherent power to punish for [criminal] contempt has long been recognized as part of our country's common law." *Price*, 672 A.2d at 896 (citations omitted).

17. *See* Green v. United States, 356 U.S. 165, 191 n.2 (1958) (Frankfurter, J., concurring) (chronicling the history of the treatment of criminal contempt).

18. *Price*, 672 A.2d at 896 n.2. The General Assembly may not constitutionally exercise judicial functions. *Id.* (citing G & P Taylor & Co. v. Place, 4 R.I. 324, 343 (1856)).

Abuses by courts of the open-ended contempt authority led both the legislature and the courts to limit the contempt power.[19] The Rhode Island contempt statute is considered equivalent to the federal contempt statute,[20] which was written to limit the authority of federal courts, and which describes the conduct punishable by the courts under the contempt powers.[21]

Rule 42 of the Superior Court Rules of Criminal Procedure allows the court to fix punishments for contempt.[22] Rule 42 was also similar to its federal counterpart, and neither rule provided any limitations on the court's authority to punish.[23] The United States Supreme Court ruled in *Bloom v. Illinois*[24] that due process and trial by jury may be invoked in criminal contempt cases.[25] The Court stated that "[m]ost other western countries seem to be highly restrictive of the latitude given judges to try their own contempts without a jury."[26] Courts and legislatures slowly have eroded the contempt powers of judges.[27]

Analysis and Holding

The State argued that section 11-1-1 of the Rhode Island General Laws was not intended to be applied to the inherent powers of courts in punishing criminal contempt.[28] The purpose of section 11-1-1, the State argued, was to assure punishment of a person

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19. The limitations to the inherent contempt powers were delineated in the Act of 1831, 4 Stat. 487. The Act was established to curtail the courts and limited the contempt powers to misbehavior in the presence of the court that obstructs justice, misbehavior of court officers, and disobedience to the lawful writ, process, order or decree of the court. These provisions have continued as the basis for 18 U.S.C. § 401. *See Bloom,* 391 U.S. at 203-4.

20. Rhode Island General Laws section 8-6-1 is given the same interpretation as the United States Supreme Court has given to 18 U.S.C. § 401. *See Price,* 672 A.2d at 896.

21. *Id.*

22. *Id.* at 897 (citing R.I. Super. Ct. R. Crim. P. 42(b)). Rule 42 provides many procedural protections for criminal contemnors. Upon finding guilt, "the court shall enter an order fixing the punishment." *Id.*

23. *Id.*

24. 391 U.S. 194 (1968).

25. *Id.* at 207 ("If the right to jury trial is a fundamental matter in other criminal cases, which we think it is, it must also be extended to criminal contempt cases.").

26. *Id.*

27. *Id.*

28. *Price,* 672 A.2d at 895.

that has committed an offense at common law, offenses for which punishment was not otherwise provided.[29]

The Rhode Island Supreme Court agreed with the State that the punishment for contempt of the court's authority was not controlled by the common law offense statute.[30] The court's inherent powers to punish for contempts made the common law statute "inapplicable and wholly unnecessary to ensure contempts could be punished."[31] The court reasoned that the common law offense statute was not intended to be used as a restraint of the court's contempt powers.[32]

The supreme court also stated that "it is nonetheless indisputable that Congress has imposed no statutory limitation on the extent of the punishment that the federal courts may impose in sentencing for contempt under 18 U.S.C. § 401."[33] This conclusion by the Rhode Island Supreme Court is in contradiction with *Bloom*, where the United States Supreme Court asserted that the intent of Congress to punish contempt has been substantially curtailed to the present day.[34] The *Bloom* Court noted that over half the states limit punishment for contempt to one year or less.[35]

In *Price*, the court recognized that the United States Supreme Court, while not imposing limitations on sentencing for contempts, did caution lower courts regarding their special duty to exercise "responsibility and circumspection."[36] The court reversed the judgment and returned the papers to the family court.[37]

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29. *Id.* at 898. Rhode Island General Laws section 11-1-1 provides that an offense at common law which is not covered by the general laws may be prosecuted as a misdemeanor, and provides for imprisonment for not more than one year or a fine not exceeding five hundred dollars. *Id.*

30. *Id.* at 897-98.

31. *Id.*

32. *Id.*

33. *Id.* at 897. (citing Green v. United States, 356 U.S. 165, 188 (1958)). The United States Supreme Court overruled *Green* in *Bloom v. Illinois*, 391 U.S. 194 (1968). In *Bloom*, the Court noted that Congress had limited contempt punishments in the Clayton Act, the Norris-LaGuardia Act, the Civil Rights Act of 1957 and the Civil Rights Act of 1964. The 1964 Civil Rights Act limited fines to $1000 or imprisonment for six months, and required proof of criminal mens rea. *Bloom*, 391 U.S. at 204 (citing 42 U.S.C. § 2000(h)).

34. *Bloom*, 391 U.S. at 203.

35. *Id.* at 206 n.8. The Court stated that many punishments for criminal contempt have been set aside because they were unauthorized by statute or were too harsh. *Id.*

36. *Id.* (quoting *Green*, 356 U.S. at 188).

37. *Id.*

CONCLUSION

The Rhode Island Supreme Court has vested tremendous power in the courts to punish criminal contempt. Without knowing the express intent of the legislature, the court has assumed the power on historical grounds. Unfortunately, abuses of this untrammeled contempt power have historically led to legislative restrictions on the punishments allowed. Rhode Island appears to be going against the modern trend evinced by the United States Supreme Court in *Bloom*: a more restrictive use of the court's contempt powers, with many states looking to the legislature to define appropriate punishments.

Lesley S. Rich

Criminal Law. *State v. Quattrocchi*, 681 A.2d 879 (R.I. 1996). A trial judge shall exercise a "gatekeeping" function and conduct a preliminary examination prior to allowing scientific evidence of repressed recollections to be submitted to the jury where that evidence is challenged by an appropriate objection or motion to suppress.

Rhode Island's courts were recently faced with expert scientific testimony regarding repressed recollections, a relatively novel science, in *State v. Quattrocchi*.[1] In *Quattrocchi*, the Rhode Island Supreme Court was confronted with a criminal defendant's challenge to the admission of such testimony.[2] The court concluded that the trial judge is obligated to ascertain the reliability of such scientific evidence as a precondition to its admission when that evidence is challenged.[3]

Facts and Travel

John Quattrocchi was convicted of two counts of first degree sexual assault in Rhode Island Superior Court.[4] The complaining witness, Gina (a fictitious name), had known the defendant for thirteen years at the time of trial.[5] The relationship between Gina and the defendant began in 1978, while Quattrocchi was dating Gina's mother. The defendant assumed a paternal role with Gina, and continued involvement in her daily life even after dissolution of his relationship with her mother.[6]

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1. 681 A.2d 879 (R.I. 1996). The *Quattrocchi* court decided two other matters in addition to the issue discussed herein. The court held that, when requested by the attorney general, a county grand jury has jurisdiction to return an indictment with respect to an incident that took place on Narragansett Bay, despite the existence of a statewide grand jury. Moreover, the court determined that testimony concerning uncharged and unrelated incidents of sexual encounters, where the defendant did not place his character at issue, were of such "extreme prejudice that no curative instruction would have been adequate to overcome or even palliate its effect." *Id.*

2. *Id.*

3. *Id.* at 884.

4. *Id.* at 879.

5. *Id.* at 879-80. Gina was 19 years old when the case was heard.

6. *Id.* at 879. Gina was three or four years old when the defendant began dating her mother, and she did not know her biological father. *Id.* After the relationship with Gina's mother ended, "the defendant [continued to give] gifts to Gina, read to her, paid her private school tuition for two years of high school, at-

Following two years of psychotherapy, Gina was twice admitted to Butler Psychiatric Hospital and treated for depression in the spring of 1992.[7] While at Butler, doctors originally diagnosed Gina as suffering from a bipolar disorder.[8] However, following a series of "flashbacks" in which she recalled incidents of abuse by the defendant, doctors substituted a diagnosis of post traumatic stress disorder (PTSD).[9] The treating physician, Dr. Daniel Harrop, Ph.D., testified at trial that PTSD is precipitated by traumatic stress or a traumatic event, including sexual abuse, outside normal human experience.[10] The trial judge admitted, in the presence of the jury, evidence of both the flashback recollections and the expert testimony in corroboration thereof without holding a preliminary evidentiary hearing to assess the reliability and competency of such testimony.[11] According to the judge, the probative value of the evidence went to its weight, not its admissibility.[12] The defendant did not ask the trial judge to conduct a preliminary hearing or to make any determination concerning the reliability or applicability of the evidence, but he did file a motion in limine to suppress or exclude the evidence.[13] In its rebuttal, the State presented evidence concerning unrelated sexual incidents between the defendant and two minor girls.[14] The trial court held that this evidence was inadmissible due to its extreme prejudicial nature.[15]

BACKGROUND

For courts, finding a precise fit between the law and scientific developments offered as evidence has proven elusive. For decades, courts have followed the standard announced in *Frye v. United*

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tended school events with her, celebrated holidays with her and encouraged her educational and career aspirations." *Id.*

7. *Id.* at 879.

8. *Id.* "Bipolar disorder is [a mental illness] sometimes described as manic depression." *Id.*

9. *Id.*

10. *Id.*

11. *Id.* at 881.

12. *Id.*

13. *Id.* at 888.

14. *Id.* at 884-85. The first incident occurred in 1977. It went unreported and was relayed by the victim to her parents several years later. The second incident occurred in 1981. In that instance, the defendant was charged and arrested by the police; however, the grand jury returned a finding of "not true bill." *Id.* at 885.

15. *Id.* at 885-86.

States.[16] The *Frye* court, faced with a proffer of purported scientific evidence, rejected the scientific evidence because the proponent did not demonstrate that it was generally accepted within the relevant scientific community.[17] The *Frye* standard for admission became widely used.[18]

Nearly one-half century after *Frye*, the federal courts adopted the Federal Rules of Evidence, which now govern, inter alia, the admission of evidence, including scientific evidence.[19] The *Frye* standard, however, survived the adoption of the Federal Rules of Evidence and remained intact until *Daubert v. Merrell Dow Pharmaceuticals.*[20] In *Daubert*, the United States Supreme Court was presented the question, "Does *Frye* or do the Federal Rules of Evidence provide the standard for admitting expert scientific evidence in a federal trial?"[21] The Court held that the federal rules provide the standard for admitting evidence.[22] Thereafter, the Court articulated guidelines for assessing, as a precondition to admission, the reliability of scientific evidence.[23]

Though Rhode Island's standard for the admission of scientific evidence developed independently, its development paralleled the national trend.[24] In one early case, the Rhode Island Supreme Court concluded that the trial court's admission of the results of an

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16. 293 F. 1013 (D.C. Cir. 1923).

17. *Id.* at 1014. The *Frye* court was faced with a proffer of purported scientific evidence derived by a machine that measured changes in systolic blood pressure from which the veracity of statements could be inferred. *Id.* at 1013-14. It rejected this early lie detector because the proponent of the evidence did not demonstrate that it was generally accepted within the relevant scientific community. *Id.* at 1014.

18. John William Strong et al., McCormick on Evidence § 203, at 363 (4th ed. 1992).

19. *Id.* at 362; *see* Fed. R. Evid. 702 ("If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.").

20. 113 S. Ct. 2786 (1993).

21. *Id.*

22. *Id.* at 2795.

23. *Id.* at 2796-97.

24. *See generally* State v. Dery, 545 A.2d 1014 (R.I. 1988); State v. Wheeler, 496 A.2d 1382 (R.I. 1985); Sweet v. Hemingway Transp., Inc., 333 A.2d 411 (R.I. 1975); Powers v. Carvalho, 281 A.2d 298 (R.I. 1971); State v. Gregoire, 148 A.2d 751 (R.I. 1959).

Alcometer test constituted reversible error.[25] The court stated that reliance upon novel science "depends upon general acceptance of its reliability by experts in the relevant scientific field."[26] More recently, in *State v. Wheeler*,[27] the court recognized the potency of expert testimony. Cautioning against the admission of untested and unproven science, the court observed that experts may "assume a posture of mystic infallibility in the eyes of a jury of laymen."[28] Ultimately, the court opined that admission of expert testimony required only that the trial judge conclude that the evidence is relevant and helpful to the trier of fact.[29]

After the *Wheeler* decision, Rhode Island adopted its own rules of evidence, whose language closely tracks the language of the federal rules regarding the use of expert testimony.[30] Though they have looked to the federal courts for guidance in interpreting the Rhode Island Rules of Evidence,[31] Rhode Island courts have yet to adopt *Daubert*'s recommendations. With respect to the narrow issue of repressed memories, Rhode Island courts have only recently had the opportunity to speak.[32]

Analysis and Holding

In *State v. Quattrocchi*, the court did not attempt to resolve the controversy regarding the reliability and admissibility of repressed

25. *Gregoire*, 148 A.2d at 754 (upholding the same standard articulated in 1923 by the *Frye* court). The Alcometer test was a precursor to the modern day breathalyser. *Id.*

26. *Id.* (quoting Wigmore, Science of Judicial Proof § 220).

27. 496 A.2d 1382 (R.I. 1985).

28. *Id.* at 1387-88 (quoting State v. Williams, 446 N.E.2d 444, 446 (Ohio 1983) (quoting United States v. Addison, 498 F.2d 741, 744 (D.C. Cir. 1974))).

29. *Id.* at 1388-89.

30. The Rhode Island Rules of Evidence became effective on October 1, 1987. R.I. R. Evid. 702 ("If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of fact or opinion.").

31. *See, e.g.*, State v. Hartley, 656 A.2d 954 (R.I. 1995); State v. Traficante, 636 A.2d 692 (R.I. 1994); State v. Garcia, 622 A.2d 446 (R.I. 1993); IBEW, Local 99 v. United Pac. Ins., 573 A.2d 270 (R.I. 1990).

32. State v. Quattrocchi, 681 A.2d 879 (1996); Kelly v. Marcantonio, 678 A.2d 873 (R.I. 1996) (answering questions certified from the United States District Court for the District of Rhode Island). The *Kelly* court limited claims made against non-perpetrator defendants where testimony based upon repressed memory recollections was admitted. *Id.* at 883-84.

memories or supporting expert testimony.[33] The cases cited by the court, however, evince a cautious skepticism of the new science.[34]

For example, the Washington Supreme Court, in *Tyson v. Tyson*,[35] declined to extend the statute of limitations based on the claim of repressed memory, observing that "[p]sychology and psychiatry are imprecise disciplines," and distinguished the subjectivity of psychological science with the objectivity of the biological sciences.[36] The court later commented that the "distance between historical truth and psychoanalytic 'truth' is quite a gulf."[37]

A Wisconsin court similarly refused to extend its statute of limitations to accommodate repressed memories.[38] That court evinced a concern in its decision that truth may prove elusive in "this esoteric and largely unproved field" even with careful cross-examination.[39] This same concern was voiced by the Supreme Court of New Hampshire, which noted that it remained unconvinced that a "thorough cross-examination can effectively expose any unreliable elements or assumptions in [the psychologist's] testimony."[40] Finally, the New Jersey Supreme Court, faced with hypnotically induced or enhanced testimony, addressed procedural requirements and established that the trial judge will review the record of the evidence outside the presence of the jury as a precondition to admission.[41]

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33. *Quattrocchi*, 681 A.2d at 881-83.

34. These jurisdictions cited by the court were frequently faced with the question as to whether statutes of limitations should be extended and whether discovery rules should be modified in order to accommodate recently resurrected recollections. In each instance the courts expressed concern about the reliability of the testimony. *See generally* Pritzlaff v. Archdiocese of Milwaukee, 533 N.W.2d 780 (Wis. 1995) (expressing skeptism concerning courts' ability to ascertain truth regarding complaints based on repressed memory and declining to extend statute of limitations in a case involving this claim); State v. Cressey, 628 A.2d 696 (N.H. 1993) (reversing a criminal conviction for aggravated felonious assault of children while expressing concern regarding the subjectiveness of methodology used in psychiatric evaluations); Tyson v. Tyson, 727 P.2d 226 (Wash. 1986) (declining to allow for extension of the statute of limitations based on claim of repressed memories).

35. *Tyson*, 727 P.2d at 230.

36. *Id.* at 229.

37. *Id.* (citing Marianne Wesson, *Historical Truth, Narrative Truth, and Expert Testimony*, 60 Wash. L. Rev. 331, 338 (1985)).

38. Pritzlaff v. Archdiocese of Milwaukee, 533 N.W.2d 780, 791 (Wis. 1995).

39. *Id.* at 788 (quoting Steele v. State, 294 N.W.2d 2, 13 (Wis. 1980)).

40. State v. Cressey, 628 A.2d 696, 701 (N.H. 1993).

41. State v. Hurd, 432 A.2d 86, 95-97 (N.J. 1981).

In *Quattrocchi*, the Rhode Island Supreme Court's concerns appeared two-fold. First, the sciences of psychology and psychiatry are imprecise.[42] Second, the methodology used in psychological assessments may not be sufficiently amenable to courtroom analysis, making the "presentation of evidence effectively beyond reproach."[43] Having articulated its fears, the court resolved its concerns by requiring the procedural mechanism it had suggested in *Wheeler*.[44] The trial judge "exercise[s] a gatekeeping function" by holding a preliminary evidentiary hearing outside the presence of a jury to determine the reliability and appropriateness of the proffered testimony.[45] At that time, "the essential findings of fact and conclusions of law" must be made.[46] The court confined this requirement, however, to those situations where the proffer is challenged by an appropriate objection or motion to suppress.[47] The court, by analogizing the situation to one where a confession is challenged on the issue of voluntariness, reasoned that failure to conduct such a hearing deprives the defendant of the opportunity to "actively" challenge the admissibility of the proffer.[48]

CONCLUSION

The court's decision to require a preliminary evidentiary hearing creates a territorial consistency in Rhode Island between federal and state courts, obliged as the federal courts are to conduct a preliminary hearing consistent with *Daubert*. Moreover, the decision maintains the liberal trend of the Rhode Island Rules of Evidence.

What remains unclear, however, are the guidelines to be utilized by trial judges when assessing the reliability of such evidence. *Daubert*'s guidelines were not mandated by the *Quattrocchi* court. Indeed, the court specifically indicated that it had not abandoned the test enunciated in *Frye*.[49] Even if *Daubert*'s guidelines were adopted, it is doubtful that, apart from the general acceptance test, they could serve to guide the courts when assessing the

42. State v. Quattrocchi, 681 A.2d 879, 881-82 (R.I. 1996).
43. *Id.* at 883.
44. *Id.* at 884.
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.* at 884 n.2.

reliability of psychological sciences. What tests will sufficiently validate theories upon which the proffer is based? Can error rates be calculated for psychological sciences? Unfortunately, the *Quattrocchi* court does not outline any other guidelines, in spite of its express acknowledgment that it had not previously given "adequate guidance to a trial justice when confronted with the proffer of a novel and controversial body of scientific evidence."[50] Although the court relies on the procedural protections it had required previously to ensure the reliability of evidence prior to its admission, the earlier cases concerned the more quantifiable "hard" sciences.[51]

The *Quattrocchi* court's narrow mandate is sufficiently elastic to accommodate other psychological sciences the court may yet face. Relying on the general acceptance requirement of *Daubert* and *Frye* as a precondition to admission under Rule 702 will ensure that untested and questionable "soft" sciences will not get before the jury.[52]

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50. *Id.* at 884.

51. *Id.*

52. For example, in recent cases courts have been faced with defenses such as urban trauma, neonaticide syndrome, and Arab trauma. *See* Junda Woo, *Urban Trauma Mitigates Guilt, Defenders Say*, Wall Street J., Apr. 27, 1993, at B1; People v. Wernick, 215 A.2d 50 (1995); *An "Arab Trauma" Defense for Baz*, The New Yorker, Nov. 28, 1994, at 50.

Criminal Law. *State v. Russell*, 671 A.2d 1222 (R.I. 1996). Authority to enter into binding and enforceable non-prosecution agreements with criminal defendants rests solely with the Office of the Attorney General.

FACTS AND TRAVEL

In May of 1993, David Russell's apartment was searched by the East Providence police department pursuant to a valid search warrant.[1] During this search, the police uncovered marijuana, drug paraphernalia and a firearm.[2] As a result, Russell was charged with manufacturing marijuana, possession of marijuana with intent to deliver, and possession of a firearm while possessing marijuana with intent to deliver.[3]

In court, Russell moved to dismiss two of the charges[4] on the ground that he and an officer of the East Providence police department had made an agreement.[5] Russell alleged that he was promised immunity in return for information regarding the source of his marijuana supply.[6] The superior court judge found that the East Providence detective had entered into an agreement of non-prosecution with Russell, and that Russell "had substantially complied with that agreement."[7] As a result, Russell's motion to dismiss was granted[8] and the Attorney General filed an appeal.[9]

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1. State v. Russell, 671 A.2d 1222 (R.I. 1996).
2. *Id.*
3. *Id.*
4. *Id.* Russell sought to overturn the charges of possession of marijuana, and possession of a firearm while possessing or intending to deliver the marijuana. Procedurally, Russell was brought before the superior court pursuant to Rule 32(f) of the Superior Court Rules of Criminal Procedure. Under this rule, "[t]he court shall not revoke probation or revoke a suspension of sentence or impose a sentence previously deferred except after a hearing at which the defendant shall be afforded the opportunity to be present and appraised of the grounds on which such action is proposed." R.I. Super. Ct. R. Crim. P. 32(f). Apparently, Russell had received probation on a previous charge and these two new charges placed him in violation of that probation. *Russell*, 671 A.2d at 1222.
5. *Id.* at 1222-23.
6. *Id.* at 1222.
7. *Id.* at 1222-23.
8. *Id.* at 1223.
9. R.I. Gen. Laws § 9-24-32 (1985). "In any criminal proceeding, the attorney-general shall have the right to object to any finding, ruling, decision, order or judgment of the superior court . . . and . . . may appeal . . . at any time before the defendant has been placed in jeopardy." *Id.*

BACKGROUND

In Rhode Island, it is well established that prosecutorial discretion is vested solely in the Attorney General.[10] This elected official, and those authorized by him, make the ultimate decision whether to prosecute or not to prosecute.[11] Additionally, in this state there is a specific statutory procedure for the granting of immunity from prosecution, and its scope extends only to a limited class of individuals.[12] Under this statute, "[w]henever a witness . . . refuses . . . to answer a question or to produce other evidence of any kind . . . the Attorney General may, in writing, request the presiding justice of the superior court or the chief judge of the family court or the district court to order the witness to answer" or produce desired evidence.[13] This formal limitation on immunity from prosecution in no way deprives the Attorney General of his inherent prosecutorial discretion. However, this provision "is illustrative of the various safeguards that surround the granting of immunity."[14]

Other jursidictions, such as Pennsylvania and Alaska have accepted the proposition that police officers lack authority to enter into non-prosecution agreements. For example, in *Green v. State*,[15] a defendant claimed he had been told that burglary and theft were "not . . . very serious crime[s]" and he interpreted this statement as a promise that he would not be prosecuted.[16] Additionally, while the defendant was physically incarcerated, he was asked to sign a statement entitled, "Voluntary Statement (Not Under Arrest)."[17] Despite these rather extraordinary facts, the court of appeals held "that police officers, acting on their own, cannot enter into a binding immunity or nonprosecution agreement with a suspect or defendant."[18]

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10. Jefferson v. State, 472 A.2d 1200, 1204 (R.I. 1984); State v. Rollins, 359 A.2d 315, 318 (R.I. 1976) (citing Rogers v. Hill, 48 A. 670 (R.I. 1901)).
11. *Russell*, 671 A.2d at 1223.
12. R.I. Gen. Laws § 12-17-15 (1994).
13. *Id.*
14. *Russell*, 671 A.2d at 1223.
15. 857 P.2d 1197 (Alaska Ct. App. 1993).
16. *Id.* at 1198.
17. *Id.*
18. *Id.* at 1201. The Court of Appeals of Alaska relied on decisions from several states, including Michigan, Maryland, Alabama, Arizona, Missouri and West Virginia. *Id.*

In a per curiam opinion, the Supreme Court of Rhode Island addressed the issue when it ruled on the validity of the alleged agreement between Russell and the East Providence police department.

ANALYSIS AND HOLDING

Since Rhode Island had never ruled on this precise issue, the court accepted the Attorney General's reference to other jurisdictions. Notably, the court reviewed the holding of the Supreme Court of Pennsylvania in *Commonwealth v. Stipetich*.[19] With facts almost identical to *Russell*, the Supreme Court of Pennsylvania held that "district attorneys, in their investigative and prosecutorial roles, have broad discretion over whether charges should be brought in any given case . . . [and this] power to prosecute cannot be restricted by the actions of . . . police officers."[20] Persuaded by both the previous Rhode Island cases[21] and the reasoning in *Stipetich*,[22] the Rhode Island Supreme Court held "[t]he East Providence detective had no authority to enter into a binding agreement of nonprosecution *without* the consent of the Attorney General."[23] Since the Attorney General's consent was lacking, the court reversed the order dismissing the two criminal informations and the probation violation proceeding.[24]

CONCLUSION

The rule adopted by the court is supported by sound policy and the common law of foreign jurisdictions. However, this decision may have the undesired effect of making suspects, and later defendants, more distrustful of the police. To prevent this potential adverse effect, a rule should be adopted to prohibit law enforcement officers from making unauthorized promises, such as the non-prosecution promise in *Russell*.

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19. 652 A.2d 1294 (Pa. 1995).
20. *Id.* at 1295.
21. Jefferson v. State, 472 A.2d 1200 (R.I. 1984); State v. Rollins, 359 A.2d 315 (R.I. 1976); Rogers v. Hill, 48 A. 670 (R.I. 1901).
22. State v. Russell, 671 A.2d 1222, 1223 (R.I. 1996).
23. *Id.* (emphasis added).
24. *Id.*