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Reversal of Fortunato: Textualism Un-Dunn in State v. Dunn

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NOTES

Reversal of Fortunato:* Textualism Un-*Dunn* in *State v. Dunn*

Rules of procedure are a necessary part of an orderly system of justice. Their efficacy, however, depends upon the willingness of the courts to enforce them according to their terms. Changes in rules whose inflexibility has turned out to work hardship should be effected by the process of amendment, not by ad hoc relaxations by this Court in particular cases. Such dispensations in the long run actually produce mischievous results, undermining the certainty of the rules and causing confusion among the lower courts and the bar.

The Honorable Tom C. Clark[1]

INTRODUCTION

Throughout history, textualists have defended their position on the battlefield of American jurisprudence against the advancement of public-policy interpretations.[2] On August 6, 1997, Judge Stephen Fortunato of the Rhode Island Superior Court, perhaps

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* This title lampoons the well-known title of a book about another noteworthy Rhode Island case. Alan Dershowitz, Reversal of Fortune (Random House 1986) (chronicling State v. Von Bulow, 475 A.2d 995 (R.I. 1984)). Technically, Judge Fortunato did not reverse his original verdict. He overturned his verdict and granted the defendant a new trial.

1. Thompson v. Immigration & Naturalization Serv., 375 U.S. 384, 389 (1964) (Clark, J., dissenting) (emphasis omitted).

2. *See, e.g.*, Calder v. Bull, 2 U.S. (3 Dall.) 386 (1798); Maryland v. Craig, 497 U.S. 836 (1990). The majority and dissenting opinions in *Calder* and *Craig* evince this ongoing debate's durability. In *Calder*, Justice Chase wrote the majority opinion favoring a policy-based interpretation; Justice Iredell, in dissent, favored textualism. In *Craig*, Justice O'Connor, writing for the majority, favored a policy-based interpretation; Justice Scalia, in dissent, favored textualism. *But see, e.g.*, State of Cowart v. Nicklos Drilling Co., 505 U.S. 469 (1992); Coy v. Iowa, 487 U.S. 1012 (1988). Justice Kennedy wrote the majority opinion favoring a textualist interpretation in *Cowart*. Justice Scalia, writing for the majority in *Coy*, similarly

inadvertently, took up arms and joined this struggle on the side of policy-based interpretations. The attack began on June 24, 1997, when Judge Fortunato convicted a former catholic priest, Monsignor Louis Ward Dunn, of first-degree sexual assault.[3] On August 6, 1997, however, Judge Fortunato, relying heavily on public-policy justifications, derogated Rhode Island Superior Court Rule of Criminal Procedure 33,[4] overturned his June 24th verdict and granted Dunn a new trial.[5]

After his conviction, Dunn had moved for a new trial. In the interest of justice, Dunn based his motion for a new trial on the insufficiency of the evidence to support the verdict.[6] Judge Fortunato, however, granted the new-trial motion on his own particular grounds, rather than on the grounds presented by the defendant. Judge Fortunato's particular grounds for the new-trial motion were newly-discovered evidence and "in the interest of justice," ineffectiveness of counsel.[7] His decision evoked a public firestorm, bringing protestors to the steps of the superior court and sending shockwaves throughout Rhode Island's legal community.[8]

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argued in favor of textualism. Arguing for policy-based interpretations, Justice Blackmun wrote the dissenting opinions in both cases.

In addition, proponents of textualism can be found beyond the confines of American jurisprudence. Porcia's judgment against Shylock in Shakespeare's *The Merchant of Venice* is illustrative:

> A pound of that same merchant's flesh is thine.
> The court awards it, and the law doth give it . . . .
> And you must cut this flesh from off his breast.
> The law allows it, and the law doth give it . . . .
> Tarry a little. There is something else.
> This bond doth give thee here no jot of blood.
> The words expressly are 'a pound of flesh'.
> Take then thy bond. Take thou thy pound of flesh.
> But in the cutting it, if thou dost shed
> One drop of Christian blood, thy lands and goods
> Are by the laws of Venice confiscate
> Unto the state of Venice.

William Shakespeare, The Merchant of Venice act 4, sc. 1.

3. *See* Record, State v. Dunn (R.I. Super. Ct. June 24, 1997) (No. 96-1005A).

4. Rule 33 sets out the procedural requirements for a motion for a new trial.

5. *See* Opinion Granting Motion for a New Trial, State v. Dunn (R.I. Super. Ct. Aug. 6, 1997) (No. 96-1005A).

6. *See* Defendant's Motion for a New Trial, State v. Dunn (R.I. Super. Ct. June 30, 1997) (No. 96-1005A).

7. *See* Opinion Granting Motion for a New Trial, *Dunn*, *passim* (No. 96-1005A).

8. *See Judge Criticized in Rape Case*, 18 R.I. Laws. Wkly., Aug. 18, 1997, at 234 (discussing the public backlash to Judge Fortunato's decision to overturn his

In response to this criticism, Judge Fortunato simply said "read the decision."[9]

Thus began a legal search to inquire whether Judge Fortunato could lawfully overturn his own decision by using his own particular grounds to grant the defendant's motion for a new trial, rather than those supplied by the defendant. The touchstones of this inquiry are the Rhode Island Superior Court Rules of Criminal Procedure and sections 8-6-2 and 10-9.1-1 of the Rhode Island General Laws. Section 8-6-2 grants a majority of superior court judges the power to make court rules;[10] section 10-9.1-1 governs motions for post-conviction relief.[11] The Rhode Island Superior Court Rules of Criminal Procedure, most notably Rules 1 and 2, were designed to create uniformity and predictability in litigation.[12] In line with that purpose, Rule 33 governs motions for a new trial.[13]

Although Judge Fortunato advances several policy-based arguments to support his actions, these policy arguments do not justify altering Rule 33 in any manner except through a majority of the superior court judges.[14] This Note asserts that Judge Fortunato exceeded his authority and violated not only the text but also the policy behind Rule 33 when he overturned his prior ver-

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prior conviction); Laura Meade Kirk, *Reversal of Priest's Conviction Shocks Many in Legal Community*, Prov. J. Bull., Aug. 10, 1997, at A8, *available in* 1997 WL 10848465; Elizabeth Rau, *Protesters Plead Case Against Fortunato*, Prov. J. Bull., Sept. 22, 1997, at B1, *available in* 1997 WL 13865312 (describing protestors who carried signs reading, for example, "a Dunn deal?," "[r]etire the fan-mail judge" and "[t]he judicial system in Rhode Island is for sale").

9. Charles M. Bakst, *Reading Fortunato's Decision in Dunn Case Will Still Leave You Baffled*, Prov. J. Bull., Aug. 24, 1997, at B1, *available in* 1997 WL 10849431 (describing Judge Fortunato's August 6th decision as unconvincing); *see also* Karen Lee Ziner, *Protesters Rally Against Reversal of Dunn Rape Verdict*, Prov. J. Bull., Aug. 18, 1997, at A1, *available in* 1997 WL 10848251 (discussing the protestors' criticism of Judge Fortunato's decision).

10. R.I. Gen. Laws § 8-6-2 (1956) (1997 Reenactment).

11. R.I. Gen. Laws § 10-9.1-1 (1956) (1994 Reenactment).

12. R.I. Super. Ct. R. Crim. P. 1 ("These rules govern the procedure . . . in all criminal proceedings in the Superior Court . . . ."); *id.* 2 ("These rules . . . shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay."); *see also* R.I. Gen. Laws § 8-6-2 ("In prescribing such rules, the court shall have regard to the simplification of the system of pleading, practice, and procedure in the courts in which the rules shall apply in order to promote the speedy determination of litigation on the merits; . . .").

13. R.I. Super. Ct. R. Crim. P. 33.

14. *See* R.I. Gen. Laws § 8-6-2 (providing that a majority of the superior court shall promulgate court rules).

dict. He should have denied Dunn's original motion and provided the defendant with the opportunity to amend his motion for a new trial or make a motion for post-conviction relief.

Part I of this Note describes the factual and procedural background as well as the reasoning of Judge Fortunato's June 24th verdict and his August 6th opinion granting the motion for a new trial. Part II discusses in detail Rule 33 and section 10-9.1-1 of the Rhode Island General Laws governing post-conviction relief. Part III analyzes Judge Fortunato's August 6th opinion within both textual and policy constructs of Rule 33 and demonstrates that he exceeded his authority. Part IV assumes arguendo that Judge Fortunato had the authority to grant a new trial on his own motion. It then examines (1) whether newly-discovered evidence existed to warrant a new trial and (2) whether the defense attorney's performance was so ineffective as to warrant a new trial in the interest of justice. Hypothetically, Part IV concludes that, if he had the power to grant a new trial sua sponte, then Judge Fortunato would not have succeeded on either ground.

I. *STATE V. DUNN*

A. *Factual and Procedural Background*

The State of Rhode Island filed a two-count indictment in Rhode Island Superior Court charging Louis Ward Dunn with first-degree sexual assault.[15] Count One pertained to an incident which had occurred thirty-two years earlier in 1965 involving Dunn, a Roman Catholic priest, and a parishioner named Lucille Farr.[16] Judge Fortunato granted Dunn's motion for acquittal on Count One.[17] Count Two stemmed from a 1982 incident involving the defendant, still a Roman Catholic priest, and Mary Ryan, one of his parishioners.[18]

In Count Two, the State charged Dunn under section 11-37-2 of the Rhode Island General Laws.[19] Section 11-37-2 provides that:

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15. *See* Record, State v. Dunn (R.I. Super. Ct. June 24, 1997) (No. 96-1005A).
16. *See id.* at 212-13.
17. *See id.* at 221.
18. *See id.*
19. *See id.*; *see also* R.I. Gen. Laws § 11-37-2 (1979) (providing the applicable statutory law regarding first-degree sexual assault).

> a person is guilty of first degree sexual assault if he or she engages in sexual penetration with another person, not the spouse of the accused, and if any of the following circumstances exist[:] . . . the accused knows or has reason to know that the victim is mentally incapacitated, mentally defective or physically helpless . . . [or] the accused uses force or coercion.[20]

The State, which carries the burden of proving every element of the charge beyond a reasonable doubt,[21] argued that Dunn used force when engaging in sexual intercourse with Ryan.[22] In defense, Dunn argued that the sexual intercourse was consensual.[23] He waived his right to a jury trial[24] and chose not to testify on his own behalf.[25]

The relevant statutory definition of sexual penetration is "any . . . intrusion, however slight, by any part of a person's body . . . into the genital . . . openings of another person's body."[26] The force involved in first-degree sexual assault need not be brutal or violent but must be greater than that which is employed during the normal act of sexual intercourse.[27] Also, the court may infer coercion from the circumstances surrounding a relationship where the accused occupies a position of power in relation to the accuser.[28] Based on the above criterion, Judge Fortunato found Dunn guilty under Count Two of the indictment.[29]

B. *The Original Verdict*

Judge Fortunato began his opinion by commending the attorneys for their professional and non-inflammatory presentations.[30] The court then considered the primary issue of whether Dunn used force to commit the sexual act, thus violating section 11-37-2; a corollary to that issue was whether consent and/or resistance oc-

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20. R.I. Gen. Laws § 11-37-2.
21. *See* State v. Mora, 618 A.2d 1275, 1280 (R.I. 1993); State v. Lamoureux, 573 A.2d 1176, 1179 (R.I. 1990).
22. *See* Record at 252, *Dunn* (No. 96-1005A).
23. *See id.* at 259.
24. *See id.* at 254.
25. *See id.* at 262.
26. R.I. Gen. Laws § 11-37-1 (1979).
27. *See* State v. St. Amant, 536 A.2d 897, 900 (R.I. 1988).
28. *See id.*
29. *See* Record at 262-63, *Dunn* (No. 96-1005A).
30. *Id.* at 251.

curred.[31] In determining "resistance," the court considered the surrounding circumstances.[32] Judge Fortunato asserted that the following surrounding circumstances existed: Dunn became Ryan's parental surrogate, Dunn knew of Ryan's past history of sexual abuse at her father's hands and Dunn began a pattern of sexual predations against her until Ryan, at age sixteen or seventeen, succumbed to his advances.[33] Sexual activity between the two then continued for three or four years, culminating with the night that gave rise to the alleged crime.[34]

Although Judge Fortunato neither penalized the defense for failing to present character evidence nor drew adverse inferences regarding Dunn's failure to testify on his own behalf, the testimony of Mary Ryan and other state witnesses remained unimpeached.[35] Accordingly, Judge Fortunato determined that on the evening in question, despite Ryan's resistance, Dunn used force to insert the head of his penis into her vagina.[36] Judge Fortunato therefore, on June 24th, found Dunn guilty of first-degree sexual assault, a capital offense.[37] On June 30th, Dunn's counsel, Bruce Vealey, in accordance with Rule 33, filed a motion for a new trial in the interest of justice on the grounds that the court's decision was against the law, against the evidence and against the law and the evidence and the weight thereof.[38] Judge Fortunato held two conferences, one on July 28th and the other on August 5th, to consider this new-trial motion.[39]

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31. *See id.* at 257.

32. *See id.*

33. *See id.* at 258-59 (stating, in response to Dunn's consent claim, that Dunn clearly engaged in psychological coercion to prey upon Ryan, as "he took advantage of his priestly collar and his role within her life, not to mention his knowledge gained as a confidant about her prior history").

34. *See id.* at 254.

35. *See id.*

36. *See id.* at 260.

37. *See* Record at 262-63, *Dunn* (No. 96-1005A).

38. *See* Defendant's Motion for a New Trial, State v. Dunn (R.I. Super. Ct. June 30, 1997) (No. 96-1005A); *see also* R.I. Super. Ct. R. Crim P. 33 (providing the basis for making a motion for a new trial).

39. The judge placed these conferences on the record so that the Rhode Island Supreme Court would have an adequate basis to review his ruling if the State appealed. The Attorney General and defense counsel Bruce Vealey attended both conferences. Steven Famiglietti, counsel for Vealey, attended one conference. *See* Opinion Granting Motion for a New Trial at 9 app. at 321, State v. Dunn (R.I. Super. Ct. Aug. 6, 1997) (No. 96-1005A) (referring to the chambers–conference par-

C. *The Opinion Granting The Motion for a New Trial*

On August 6th, Judge Fortunato, in the interest of providing Dunn with a fair trial leading to a just result, granted the motion for a new trial.[40] Rather than grant the motion on the particular grounds offered in Dunn's motion, however, Judge Fortunato supplied his own grounds: (1) newly-discovered evidence and (2) ineffective assistance of defense counsel.[41] Judge Fortunato claimed that, because defense counsel Vealey had no prior experience in representing alleged felons, Vealey incorrectly chose to forsake valuable character evidence.[42] Moreover, his inexperience negatively influenced his advice on two strategic decisions: (1) Dunn's waiver of a jury trial and (2) Dunn's decision not to take the stand.[43]

The first ground Judge Fortunato supplied for granting the motion was newly-discovered character evidence. Judge Fortunato referred to his post-trial receipt of numerous letters describing Dunn not as a forceful or violent person but rather as a kind, humble, generous and gentle man.[44] He characterized these letters as "a treasure trove of material . . . that could be placed before a Court as evidence going to the presence or absence of force."[45] Judge Fortunato determined that, because the defense did not present any of this readily available character evidence rebutting the claim of force, Mary Ryan's damaging testimony against Dunn remained uncontradicted and unimpeached.[46] Had it been introduced, Judge Fortunato reasoned, his earlier verdict may have been different. In any event, Judge Fortunato concluded that this new evidence undermined his confidence in his earlier verdict.[47]

As his second supplied ground for granting the motion, Judge Fortunato claimed that defense counsel Vealey was ineffective.

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ticipants). Dunn was not present at any of the conferences. *See* Interview with Bruce Vealey, Esq., in Greenville, R.I. (Nov. 12, 1997).

40. *See* Opinion Granting Motion for a New Trial at 31 app. at 332, *Dunn* (No. 96-1005A).

41. *See id. passim.*

42. *See id.* at 23 app. at 328.

43. *See id.*

44. *See id.* at 6-8 app. at 320-21.

45. *Id.* at 7 app. at 320 (citing Michelson v. United States, 335 U.S. 409 (1948) (supporting the value of this type of character evidence)). Judge Fortunato stated that, "in some circumstances, [such testimony alone] may be enough to raise a reasonable doubt of guilt." *Id.* at 11 app. at 322.

46. *See id.* at 14 app. at 323-24.

47. *See id.* at 29-30 app. at 331-32.

His reasoning was twofold. First, referring to the newly-discovered character evidence, Judge Fortunato stated that Vealey did not sufficiently investigate whether those character witnesses would be credible or withstand cross-examination.[48] Second, Vealey did not possess the requisite experience to act as counsel in a capital or major felony case.[49] Thus, he lacked the legal expertise to assess the value of the character evidence and negatively advised Dunn on whether to waive his right to a jury trial or whether to take the witness stand.[50]

In response to Judge Fortunato's decision, the State argued that a party may only bring ineffectiveness claims on a motion for post-conviction relief.[51] However, Judge Fortunato felt an "overriding responsibility" to ensure the trial process's integrity.[52] Thus, he was obliged to raise issues that may call into question the

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48. *See id.* at 15 app. at 324 (quoting American Bar Association Standard 4-4.1).

> [I]t is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of the conviction . . . the duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty.

Id.

49. *See id.* at 19, 31 app. at 326, 332, *Dunn* (No. 96-1005A); *see also* Executive Order No. 95-02 (1994-1995) R.I. (643-657 A.2d) LXXII (1995) (prescribing the requirements for attorneys representing indigent clients). Executive Order 95-01, cited in Judge Fortunato's opinion, represents a correction of a typographic error. Executive Order 95-02 at LXIV provides the substantive text.

See also United States v. Cronic, 466 U.S. 648, 665 n.38 (1984) (stating that the Supreme Court has deferred to the states to set appropriate standards for administering justice more effectively when, for instance, defense counsel's ineffectiveness deprived the defendant of his Sixth Amendment rights).

50. *See* Opinion Granting Motion for a New Trial at 23 app. at 328, *Dunn* (No. 96-1005A).

51. *See* State's Memorandum Responding to the Decision Granting Motion for a New Trial at 1, State v. Dunn (R.I. Super. Ct. Aug. 6, 1997) (No. 96-1005A); *see also* R.I. Gen. Laws § 10-9.1-1 (1956) (1997 Reenactment) (describing the procedure for post-conviction relief); State v. Heath, 665 A.2d 1336, 1337-38 (R.I. 1995) (holding that one may only bring claims of ineffective assistance of counsel in post-conviction relief proceedings); *infra* section I.D (discussing the State's position that post-conviction relief is the more appropriate procedure for claims of ineffective assistance of counsel).

52. Opinion Granting Motion for a New Trial at 25 app. at 329, *Dunn* (No. 96-1005A).

verdict's reliability and significantly impact the trial's integrity.[53] Judge Fortunato claimed that he could raise these issues sua sponte via a new-trial motion as long as a fully-developed record describing his reasoning existed for possible appellate-court review.[54] Although Rule 33 requires that a judge in a non-jury trial must vacate the judgement if entered, take additional testimony and direct the entry of a new judgment,[55] Judge Fortunato forwent these procedures.[56] He reasoned that the judiciary's goal is to conduct fair trials that reach just results. Moreover, the Rule 33 procedure for new-trial motions brought after a bench trial was "not an apt one."[57] He therefore granted Dunn a new trial on the foregoing grounds.[58]

D. *The State's Memorandum Responding to the Decision to Grant the Motion for a New Trial*

In its memorandum responding to Judge Fortunato's August 6th opinion, the State criticized Judge Fortunato's decision. This criticism was twofold. First, the State argued that claims of inef-

53. *See id.* at 25 app. at 329 (citing *McMann v. Richardson*, 397 U.S. 759 (1970) (emphasizing the trial judge's role in ensuring that attorneys who represent criminal defendants in court maintain proper performance standards)); *see also* A.B.A. Standard 6-1.1 (incorporating *McMann's* theory that "[t]he adversary nature of the proceeding does not relieve the trial judge of the obligation of raising on his or her initiative at all appropriate times and in an appropriate manner, matters which may significantly promote a just determination of the trial"); Opinion Granting Motion for a New Trial at 24 app. at 329, *Dunn* (No. 96-1005A) (citing William Schwarzer, *Dealing With Incompetent Counsel—The Trial Judge's Role*, 93 Harv. L. Rev. 633 (supporting the trial judge's ability to ensure, through timely intervention, a fair trial and just outcome when it appears that an attorney has ineffectively represented a defendant)).

54. *See* Opinion Granting Motion for a New Trial at 26 app. at 329-30, *Dunn* (No. 96-1005A) ("[T]hat is why we have a record in this case, as to the background and the concerns of the court regarding this, at which time the attorneys involved could, where appropriate, be questioned or where appropriate, ask questions.").

55. R.I. Super. Ct. R. Crim. P. 33.

56. *See* Opinion Granting Motion for a New Trial at 25-26 app. at 329-30, *Dunn* (No. 96-1005A).

57. Opinion Granting Motion for a New Trial at 31 app. at 332, *Dunn* (No. 96-1005A); *see also* R.I. Super. Ct. R. Crim. P. 33 (providing the qualifications for new-trial motions made after bench trials); *infra* notes 105-106 (discussing Judge Fortunato's argument against applying the post-conviction relief option).

58. *See* Opinion Granting Motion for a New Trial at 31 app. at 332, *Dunn* (No. 96-1005A).

fectiveness of counsel are reserved for post-conviction relief.[59] Therefore, bringing an ineffectiveness claim as grounds for a new trial is premature.[60] The State reasoned that the post-conviction relief proceedings provide both sides with the specific procedural rights needed when arguing complex issues such as counsel's effectiveness.[61] Second, the State defended Vealey's decision not to put on certain character witnesses as a tactical choice which did not fall to the level of ineffectiveness.[62]

II. DUNN'S POST-TRIAL OPTIONS

A. *Motion for a New Trial*

Rule 33 of the Rhode Island Superior Court Rules of Criminal Procedure governs motions for a new trial:

> The court on motion of a defendant may grant a new trial to the defendant if required in the interest of justice, except that a new trial may not be granted for error of law occurring at the trial. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly-discovered evidence may be made only before or within two (2) years after entry of judgment by the court, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within ten (10) days after

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59. *See* State's Memorandum Responding to the Decision Granting Motion for a New Trial at 1, 2, 4, *Dunn* (No. 96-1005A) (asserting that, under the plain meaning of Rhode Island Rule 33, a judge may not move for a new trial, questions of effective assistance of counsel are questions of law and a judge may not grant a new trial on questions of law occurring at trial).

60. *See id.* at 1.

61. "The court has correctly held that such proceedings provide the only appropriate vehicle for litigating the frequently complex issues raised in claims of ineffective assistance of counsel." *Id.* at 3; *see also supra* section II.B (discussing the post-conviction relief proceeding); R.I. Gen. Laws § 10-9.1-7 (1956) (1997 Reenactment) (delineating the specific procedural rights afforded both parties in a post-conviction relief hearing).

62. *See* State's Memorandum Responding to the Decision Granting Motion for a New Trial at 8, 9, *Dunn* (No. 96-1005A) (arguing that sound trial strategy is not open to an ineffectiveness claim).

verdict or finding of guilty or within such further time as the court may fix during the ten-day period.[63]

In Rhode Island, a defendant may motion the court for a new trial in the interest of justice or on the basis of newly-discovered evidence.[64] A party must file a motion based on newly-discovered evidence within two years after entry of judgment.[65] A motion requesting a new trial in the interest of justice "shall be made within ten . . . days after verdict or finding of guilty or within such further time as the court may fix during the ten-day period."[66] In bench trials, the trial judge may, on motion of the defendant, vacate the judgment if entered, take additional testimony and direct the entry of a new judgment.[67]

B. *Post-Conviction Relief*

Post-conviction relief provides the defendant with an opportunity to claim that his conviction violated his constitutional rights.[68] Section 10-9.1-1 of the Rhode Island General Laws sets out the procedure for obtaining post-conviction relief.[69] As opposed to a Rule 33 new-trial motion, post-conviction relief, via sec-

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63. R.I. Super. Ct. R. Crim. P. 33 (providing that "a copy of the motion for a new trial shall be filed with the trial justice contemporaneously with its filing with the clerk of the court").

64. *See* State v. Scurry, 636 A.2d 719, 724 (R.I. 1994).

65. *See* R.I. Super. Ct. R. Crim. P. 33.

66. *Id.*

67. *See id.*; *see also* John A. MacFadyen & Barbara Hurst, Rhode Island Criminal Procedure, § 33.6, at 324 (stating that, although Rule 33 does not state whether, in bench trials, the grounds upon which a judge may take the above action is limited to the interests of justice, such a limitation would seem implied). Even though a party may bring a motion for a new trial in a case tried without a jury, the motion has limited effectiveness. In such instances, the defendant is afforded the opportunity to convince the judge that his factual findings were wrong. *See* State v. Champagne, 668 A.2d 311, 313 (R.I. 1995) (discussing the limitations of a new-trial motion after a bench trial).

68. *See* R.I. Gen. Laws § 10-9.1-1 (1956) (1997 Reenactment).

69. *Id.*

> Any person who has been convicted of, or sentenced for, a crime, a violation of law, or a violation of probationary or deferred sentence status and who claims: (1) [t]hat the conviction or the sentence was in violation of the constitution of the United States or the constitution or laws of this state . . . may institute, without paying a filing fee, a proceeding under this chapter to secure relief. (b) This remedy is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction.

Id.

tion 10-9.1-1, provides both sides with important procedural safeguards. Specifically, a party shall bring a motion for post-conviction relief in the court where the judgment of conviction was entered.[70] That court then provides a hearing where it may receive evidence in the form of affidavits, depositions or oral testimony. At this hearing, the applicant has the burden of proving his claim, the court must make specific findings of fact and conclusions of law, and any ground not raised in the motion is deemed waived.[71] An appeal may be taken from the court's decision to the appropriate appellate court.[72] In addition, with respect to a claim that his counsel was ineffective, a defendant need not rely solely on the events occurring at trial. Rather, the defendant may present outside evidence of his counsel's ineffectiveness.[73]

A defendant making a motion for post-conviction relief based on ineffective assistance of counsel must first demonstrate that direct appellate-court review of his claim was unavailable.[74] Direct appellate review is unavailable when the defendant offers a general objection to the manner in which inexperienced counsel conducted the defense.[75] Instead, the defendant must show that a

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70. *See* R.I. Gen. Laws § 10-9.1-2 (1956) (1997 Reenactment). Generally, a motion for post-conviction relief contains no time limit for filing. The Attorney General, after receiving notice that the application was docketed, must answer within twenty days. *See id.* § 10-9.1-6.

71. *See id.* § 10-9.1-7; *see also* Charles E. Torcia, Wharton's Criminal Procedure § 576, at 882 (13th ed. 1992) (describing the post-conviction relief procedure).

72. *See* R.I. Gen. Laws § 10-9.1-7; *see also* Torcia, *supra* note 71 (discussing the process of appeal after a post-conviction relief proceeding).

73. In a post-conviction relief proceeding, "both sides have a right to discovery with the permission of the court." R.I. Gen. Laws § 10-9.1-7; *see also* State's Memorandum Responding to the Decision Granting Motion for a New Trial at 3, State v. Dunn (R.I. Super. Ct. Aug. 6, 1997) (No. 96-1005A) ("[L]itigation regarding competence of counsel is more complicated and time consuming than the trial of the substantive crime . . . . For this complex litigation, it is clear that under Rhode Island procedure, the vehicle for raising and litigating the issue is an application by the defendant for post-conviction relief."). In a post-conviction relief proceeding, the applicant may discuss out-of-court conversations he had with his attorney that could substantiate an ineffectiveness claim. *See infra* p. 280-81.

74. *See* State v. Duggan, 414 A.2d 788, 791 (R.I. 1980); R.I. Gen. Laws § 10-9.1-1(b) (1956) (1997 Reenactment) ("This remedy is not a substitute for . . . direct review of the sentence or conviction.").

75. *See id.*; State v. Roderick, 403 A.2d 1090, 1092 (R.I. 1979).

> [T]hese alleged judicial transgressions [the assignments of error made by defendant on appeal] were not met with an objection. The failure to make such a contemporaneous objection, as mandated by Super. R. Crim. P. 51, generally precludes claiming error for the first time in this court . . . .

specific trial-court ruling deprived him of a fair trial.[76] The principle behind post-conviction relief is to provide the appellate court with a *precise* record for review by affording the trial judge an opportunity to rule on the specific issue.[77] If a fully-developed record and a specific trial-court ruling on the issue already exists, then there is no need for a post-conviction relief proceeding.[78]

III. A *DUNN* DEAL?: TEXTUALIST AND POLICY-BASED COUNTER-ARGUMENTS

A. *A Textualist Approach to Rule 33: Granting a New Trial "On Motion of the Defendant"*

Rule 33 states that the court *on motion of the defendant* may grant a new trial to the defendant if the interest of justice so requires.[79] Additionally, Rhode Island Superior Court Rule 47, pertaining to motions in general, provides that a motion "shall state with particularity the grounds upon which it is made and shall set forth the relief or order sought."[80] Therefore, a motion of the de-

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> Review may be had notwithstanding a failure to comply with these procedural rules, however, when the conduct complained of rises to substantial constitutional dimensions, and the failure to comply with these procedural requirements is not an intentional tactical bypass . . . . Rather than draw our attention to any specific ruling by the trial court, defendant asserts that counsel's general conduct of the case rises to the level of incompetency. Without diminishing the importance of this sixth amendment challenge, we adhere to our prior practice of not reviewing such claims unless they are founded upon specific trial court rulings. Our ruling today, however, has no effect on defendant' s right to raise this issue in the more appropriate form of a post-conviction proceeding.

Id.; *see also Duggan*, 414 A.2d at 791 ("[T]he trial record must indicate clearly that the defendant did not deliberately bypass the issue at trial. The record must reveal also that the alleged deprivation of basic constitutional rights would not constitute harmless error.").

76. *See* State v. Levitt, 371 A.2d 596, 600 (R.I. 1977).

77. *See generally* Sunseri v. State 656 A.2d 619 (R.I. 1995) (describing how the defendant first made a motion for a new trial and, after it was denied, then made a petition for post-conviction relief on the grounds that his attorney was ineffective).

78. *See* State v. Caruolo, 524 A.2d 575, 585 (R.I. 1987) ("In light of this standard for review it is crucial for the trial justice to articulate the facts upon which the ruling is based.").

79. R.I. Super. Ct. R. Crim. P. 33.

80. R.I. Super. Ct. R. Crim. P. 47. Rule 47 provides that:

> An application to the court for an order shall be by motion. A motion other than one made during trial or hearing shall be in writing unless the court permits it to be made orally. It shall state with particularity the grounds upon which it is made and shall set forth the relief or order

fendant, stating the *particular* grounds relied on, is a condition precedent to a court's granting a new-trial motion.[81] Even if in the best interests of the defendant, the right to move for a new trial is not for the trial judge to usurp; the right is reserved for the defendant only.[82]

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sought. It may be supported by affidavit. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

Id.

See R.I. Super. Ct. R. Crim. P. 33 reporter's notes ("The requirement of G.L. 1956 (1969 Reenactment), § 9-23-1 [repealed] (Supp. 1970) that the motion 'state the grounds relied upon' is covered by the requirement of Rule 47 that motions, other than those made during trial, be in writing and state the grounds upon which they are made.") (alteration in original). Since Judge Fortunato supplied his own particular grounds for the motion that displaced those of the defendant, the motion did not comply with Rule 47 and therefore ceased to be the defendant's as required by Rule 33. Rule 47 makes clear that when one makes an application to the court via a motion, at that time the motion must state the grounds with particularity. R.I. Super. Ct. R. Crim. P. 47. *Cf.* Defendant's Motion for a New Trial, State v. Dunn (R.I. Super. Ct. June 30, 1997) (No. 96-1005A) (stating Dunn's particular ground supporting his motion for a new trial).

81. *See* R.I. Super. Ct. R. Crim. P. Form 30. Motion for a New Trial (Rule 33). The form provides that:

> The defendant moves the court to grant him a new trial for the following reasons:
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> 1. The verdict is contrary to the clear weight of the evidence.
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> 2. The defendant was substantially prejudiced and deprived of a fair trial by reason of the following circumstances: On _____, 19__, ...
>
> 3. Since the completion of the trial defendant has discovered new evidence of which he was ignorant at the time of the trial and which in the exercise of due diligence he could not have discovered sooner. The evidence is material, is not cumulative, and is of such character that if received at the trial it would probably have resulted in a different verdict.

Id.; *see also* State v. Scurry, 636 A.2d 719, 724 (R.I. 1994) (discussing the defendant's particular grounds for a new trial). The court in *Scurry* stated that the defendant's first motion for a new trial cited as grounds (1) newly-discovered evidence and (2) the interest of justice because of a prosecutorial misrepresentation which adversely affected the defense. The court granted the motion, focusing on the particular ground raised by the defendant, i.e., the prosecutorial misrepresentation. *Id.*; *see also* State v. Diaz, 654 A.2d 1195, 1200 (R.I. 1995) (showing that the defendant, in the interest of justice, based her new-trial motion on insufficient evidence); State v. Cardoza, 649 A.2d 745, 749 (R.I. 1994) (stating that the defendant raised a motion for a new trial, in the interest of justice, because the verdict was against the weight of the evidence).

82. *See* R.I. Super. Ct. R. Crim. P. 33; *see also infra* note 86 (reasoning that a judge who grants a defendant's new-trial motion on his own grounds exceeds his jurisdiction because he is, in effect, making his own motion).

United States v. Braman[83] illustrates this premise. The defendant in *Braman* moved for a new trial in the interest of justice and provided several supporting grounds. Similar to *Dunn*, the trial judge in *Braman* granted a motion for a new trial in the interest of justice but not on the particular interest of justice grounds asserted in the defendant's motion.[84] Rather, he granted the motion sua sponte on the ground of prejudicial joinder of defendants.[85] The District of Columbia Court of Appeals stated that, since the defendant's motion for a new trial did not raise the ground of prejudicial joinder, the trial court's action exceeded its jurisdiction.[86] Thus, the appellate court held that, when a trial

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83. 327 A.2d 530 (D.C. Cir. 1974).

84. The defendant's motion read:

> 1. The verdict returned in this cause rested only upon conjecture and speculation, the government failing to negate reasonable inferences consistent with innocence with respect to defendants' flight.
> 2. The jury gave impermissive weight to identification testimony . . . the court having previously ruled at the conclusion of the identification hearings and this cause that it had serious question with respect to the independent source for [the witness'] identification of defendant . . . .
> 3. The jury should not have been permitted to conjecture merely or to conclude upon pure speculation or from passion, prejudice or sympathy.
> 4. The in court and in the presence of the jury outburst of [a witness] created such an aura of bias, prejudice, sensationalism and passion such as to render impossible for the defendant to be afforded a fair and impartial trial.
> 5. And for such other reasons as may be pointed out in the argument, points and authorities attached hereto and further oral argument to be heard on this motion.

Id. at 531. The motion did not mention a newly-discovered evidence ground. Since the only two grounds for a new trial are newly-discovered evidence and the interest of justice, the ground relied on by the defendant was in the interest of justice.

See also Torcia, *supra* note 71, § 633.02[2] (discussing the wide variety of grounds which fall under the rubric of "interest of justice"). *See generally* State v. Gauldin, 737 S.W.2d 795, 798 (Tenn. Crim. App. 1987) (stating that a motion must state its grounds with particularity). "When . . . the issue [that the jury instructions were unclear and confusing] does not advise the trial court or opposing counsel of the basis of the error or irregularity, the issue should not have been considered by the trial court on the motion for a new trial. . . ." *Id.* The defendant in *Gauldin* did not raise his motion for a new trial on the newly-discovered evidence ground. Thus, the defendant raised the interest of justice ground. If the ground raised in *Gauldin* was not sufficient to satisfy the Rule 47 particularity requirement, then neither is a general interest of justice ground.

85. *See Braman*, 327 A.2d at 535.

86. *See id.* ("[T]he ruling of the trial court granting the motion for a new trial on grounds not asserted in defendant's motion 'but articulated sua sponte by the trial court, is action by the court 'on its own motion,' and, being beyond the jurisdiction of the court, is ineffective.'") (citing United States v. Newman, 456 F.2d

judge grants a motion for a new trial on grounds not presented in the defendant's original motion, the judge is, in effect, making his own motion. Such action, the court reasoned, is plainly forbidden by the language of Rule 33.[87]

A trial judge must exercise his authority within the linguistic boundaries of the rule.[88] In the interest of justice, Vealey motioned the court for a new trial on the particular ground that the evidence was insufficient to support the verdict. However, Judge Fortunato granted the motion on the grounds of newly-discovered evidence and, in the interest of justice, ineffective assistance of counsel.[89] Thus, in *Dunn*, the defendant did not present, in accordance with Rule 33 and Rule 47, a motion for a new trial which became the basis for Judge Fortunato's ultimate decision.[90] Although based on the interest of justice ground, Dunn's motion provided a particular ground—the verdict was against the weight of the evidence. Judge Fortunato relied on a different particular ground—ineffective assistance of counsel—when ordering a new trial in the interest of justice. The motion did not comply with Rule 47; therefore, Judge Fortunato could not grant Dunn's motion for a new trial on his own grounds because to do so would, in effect, mean that he was granting a new trial on his own motion. Such an action is plainly forbidden by Rules 33 and 47.[91]

668, 672 (3rd Cir. 1972)); *see also* United States v. Saban-Gutierrez, 783 F. Supp. 1538, 1547 (D.P.R. 1991) (citing the above language from *Braman* and *Newman*).

87. *See Braman*, 327 A.2d at 535. Except for the language excluding new trials for errors of law, the language of Rule 33 governing *Braman* is identical to Rhode Island Rule 33. *Compare* D.C. Super. Ct. R. Crim. P. 33 *with* R.I. Super. Ct. R. Crim. P. 33.

88. *See* State v. Tooher, 542 A.2d 1084, 1087 (R.I. 1988) ("A newly-discovered evidence claim must be presented to the trial justice in accordance with Rule 33 of the Superior Court Rules of Criminal Procedure.").

89. *See supra* section 1.B.

90. Rhode Island Superior Court Rules of Criminal Procedure 47 states that "[a]n application to the court for an order shall be by motion. A motion . . . shall state with particularity the grounds upon which it is made." *Id.*

91. *See id. See generally* Mitchell v. United States, 259 F.2d 787, 791-92 (D.C. Cir. 1958).

> [I]f an accused has not had a trial, and a fair one in the jurisprudential sense of that word, the courts will supply a remedy. We do so upon occasion. But it is an extraordinary remedy. Courts ought not—must not—forget that our vaunted rule of law is a structure of rules; it is not an amorphous jelly of judicial pleasure. The rule of law is government by rules properly adopted. The precise opposite of that prized system is a

In *Dunn*, one could argue that Judge Fortunato did not order a new trial on his own motion. Rather, the argument follows, he granted the defendant's motion for a new trial but merely supplied his own *grounds*. This argument fails however. When a judge grants a defendant's motion for a new trial but inserts his own grounds and negates those provided by the defendant, the judge is ordering the new trial *on his own motion*.[92]

It is worth noting that Rhode Island Rule 29, which pertains to motions for acquittal, expressly includes language that gives the trial judge power to grant a motion for acquittal on his own motion: "[t]he court on motion of a defendant or *of its own motion* shall order the entry of judgment of acquittal."[93] The reporter's notes accompanying Rule 29 expressly refer to the drafters' intention to grant the trial judge such sua sponte power: "[Rule 29(a)] expressly authorizes the trial court to grant judgment of acquittal on its own motion. Moreover, no authorities in Rhode Island either recognize or deny a trial judge's right to act sua sponte."[94] When the members of the superior court amended Rule 33 in 1983, it stands to reason that they would have taken similar steps with respect to new-trial motions if they intended to include a similar grant of power. It is indeed unreasonably baffling to assume that the superior court would make the same grant of sua sponte power specifically clear in one rule—Rule 29—and hopelessly ambiguous in the other—Rule 33.

B. *Statutory Constructs*

1. *Section 8-6-2 Constrains Rule 33 Sua Sponte Power*

Section 8-6-2 of the Rhode Island General Laws grants a majority of superior court judges the power to promulgate court rules.[95] A single superior court judge, however, does not possess this concomitant power. Thus, Judge Fortunato's modification/in-

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practice of disposing of each case without regard to rules and according to the individual and perhaps ephemeral pleasure—or opinion—of a judge.

Id.

92. *See supra* note 86.

93. R.I. Super. Ct. R. Crim. P. 29 (amended 1975) (emphasis added).

94. *Id.* reporter's notes.

95. R.I. Gen. Laws § 8-6-2 Note 1 (1956) (1997 Reenactment) (stating that "[t]he evident intent of the legislature was to confer upon the courts power to facilitate progress in the conduct of litigation by the making and promulgating of rules for regulating practice").

terpretation of Rule 33, a court rule which should be treated with the deference of a statute,[96] contradicts section 8-6-2. When court rules' plain meanings are clear, a judge cannot unilaterally override the court rules to achieve a just result in a particular case.[97] Rather, altering the rules requires observance of the proper statutory channels. The legislature has provided such proper statutory channels which sufficiently protect a defendant's right to a fair trial.[98] Only a majority of the superior court may agree to enlarge Rule 33 to include the power to grant a new trial according to Judge Fortunato's reasoning.[99] Thus far, a majority of the superior court has not done so. Until that time, the boundaries imposed by section 8-6-2 limit judicial powers.

2. *Post-Conviction Relief as the More Appropriate Vehicle*

A motion for post-conviction relief is a more appropriate vehicle for an ineffectiveness claim because the intent of post-conviction relief is to govern alleged violations of substantive rights, e.g., the right to have effective assistance of counsel.[100] By contrast, the drafters created Rule 33, and the accompanying superior court rules, to govern procedural issues only.[101] Rule 33 unambiguously provides the procedure for a new-trial motion in a bench trial: "the

96. *See* R.I. Gen. Laws § 8-6-2 Note 2 (citing Letendre v. Rhode Island Hosp. Trust Co., 60 A.2d 471(1948)).

97. *See* State v. Duggan, 414 A.2d 788, 791 (R.I. 1980) ("Legislative intent controls judicial interpretation when it is ascertainable and within legislative competence."); *accord* R.I. Gen. Laws § 8-6-2 (providing that "[t]he rules presently in effect in the courts of the judicial system shall remain and continue in force and effect until revised, amended, repealed, or superseded by rules adopted *in accordance with this section*") (emphasis added); *see also* State v. Pacheco, 481 A.2d 1009, 1018 (R.I. 1984) (noting that, "as in statutory construction, if a court rule is free of ambiguity and expresses a clear and definite meaning, there is no room for interpretation or extension, and the court must give to the words of the rule their plain and obvious meaning").

98. *See* R.I. Gen. Laws §§ 8-6-2; 10-9.1-1 (governing defendants' petitions for post-conviction relief for alleged violations of constitutional rights).

99. *See* R.I. Gen. Laws § 8-6-2.

100. *See* State v. Gatone, 698 A.2d 230, 242 (R.I. 1997); State v. Malstrom, 672 A.2d 448, 450 (R.I. 1996) (quoting State v. Heath, 665 A.2d 1336, 1337-38 (R.I. 1995)) ("This court has held, however, that it will not consider ineffective-assistance of counsel claims on direct appeal. Such issues are considered only in an application for post-conviction relief."); Dyer v. Keefe, 198 A.2d 159, 161-62 (R.I. 1964) ("[T]he rulemaking power . . . conferred upon the court must be confined to regulating the pleading, practice and procedure therein. It cannot be extended to categories not reasonably comprehended by those terms.").

101. *See* R.I. Super. Ct. R. Crim. P. 1.

court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct entry of a new judgment."[102] In his attempt to fashion Rule 33 into a vehicle for addressing alleged constitutional violations, Judge Fortunato inadvertently exposed the rule's inadequacy for an ineffectiveness claim.

Judge Fortunato, sitting without a jury, did vacate his judgment and took some additional, yet limited, testimony which he placed on the record for possible supreme-court review.[103] Rule 33 mandates, however, that the trial judge must admit additional testimony, vacate the judgment *and* direct entry of a new judgment. Judge Fortunato did not direct entry of a new judgment in *Dunn*.[104] In response to this argument, Judge Fortunato stated that he saw little point in reopening and continuing the trial after he had determined that Vealey had thus far been ineffective.[105] Most notably, Judge Fortunato stated that the waiver of Dunn's right to a jury trial could not be "redone."[106] As a result, instead of directing a new judgment, Judge Fortunato ordered a new trial, an option not contained in Rule 33's procedure for bench trials. Therefore, Judge Fortunato unnecessarily and improperly redefined Rule 33 to supplant a motion for post-conviction relief.

While the procedure for a new-trial motion is found in a court rule and a motion for post-conviction relief is statutory, a properly-promulgated court rule has the same force and effect of a statute.[107] If the remedies provided for within Rule 33 prove inadequate, then the defendant can obtain a remedy for constitutional

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102. R.I. Super. Ct. R. Crim. P. 33.

103. *See* Opinion Granting Motion for a New Trial at 7, 15 app. at 320, 324, State v. Dunn (R.I. Super. Ct. Aug. 6, 1997) (No. 96-1005A).

104. *See id.* at 31 app. at 332 (stating that "the context of this case makes that solution to the problem [entry of a new judgment] not an apt one, if the goal, as [Judge Fortunato] said, is and must be, the conduct of a fair trial that reaches a just result").

105. *See* Interview with Judge Steven J. Fortunato, Jr., Rhode Island Superior Court Justice, in Providence, R.I. (Oct. 31, 1997).

106. *Id.*

107. *See* R.I. Gen. Laws § 8-6-2 Note 2 (1956) (1997 Reenactment) ("A rule of court, if promulgated under the proper exercise of judicial power to make rules of practice and procedure within that court, is given the same force and effect as a statute.").

violations via post-conviction relief.[108] If a particular rule does not provide an effective procedure to insure a trial's just result, then a trial judge should employ the proper vehicle for reforming the rule provided by the state legislature. That vehicle is section 8-6-2 of the Rhode Island General Laws, stating that the superior court has the power to promulgate court rules by a majority of its members.[109] Such court rules will remain in effect until they are reformed, which again requires a majority of the superior court.[110]

A motion for a new trial on the grounds of ineffective assistance of counsel is appropriate if based on specific rulings of the trial judge resulting in a fully-developed record ready for supreme-court review.[111] Judge Fortunato believed that his specific findings concerning Vealey's performance created a fully-developed

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108. *See generally* State v. Heath, 665 A.2d 1336, 1337-38 (R.I. 1995) ("This court . . . will not consider ineffective-assistance-of-counsel claims on direct appeal. Such issues are considered only in an application for post-conviction relief.").

109. R.I. Gen. Laws § 8-6-2. Section 8-6-2 sets out the procedure for promulgating court rules:

> The superior court . . . *by a majority of their members*, shall have the power to make rules for regulating practice, procedure and business therein. The rules of the superior . . . court shall be subject to the approval of the supreme court. Such rules, when effective, shall supersede any statutory regulation in conflict therewith . . . . In prescribing such rules, the court shall have regard to the simplification of the system of pleading, practice and procedure in the courts in which the rules shall apply in order to promote the speedy determination of litigation on the merits; . . . The rules presently in effect in the courts of the judicial system shall remain and continue in force and effect until revised, amended, repealed, or superseded by rules adopted in accordance with this section.

Id. (emphasis added).

110. *See id.*

111. *See* State v. Lussier, 686 A.2d 79, 81 (R.I. 1996); *see also* State v. Farlett, 490 A.2d 52, 54 (R.I. 1985) (requiring a fully-developed record for appellate court review).

> [T]he appropriate vehicle for review of claims of ineffective assistance of counsel is the request for post-conviction relief. Our reluctance to entertain such claims is based on the rooted principle that "only specific rulings of a trial justice are reviewable on direct appeal." Unless a defendant complies with the procedure for post conviction relief, we shall not have the benefit of a full record and a decision of the Superior Court regarding whether or not defense counsel's alleged failings were a deliberate bypass of the required procedure or a genuine manifestation of ineffective assistance of counsel."

Id. In *Dunn*, Judge Fortunato did not create a full record upon which to base his opinion because Vealey was unable to develop fully his defenses.

record for review on appeal.[112] Though Judge Fortunato made specific findings concerning defense counsel's effectiveness, he developed merely a one-sided record[113] which does not support his opinion.[114]

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112. *See* Opinion Granting Motion for a New Trial at 26 app. at 329-30, State v. Dunn (R.I. Super. Ct. Aug. 6, 1997) (No. 96-1005A); *see also Lussier*, 686 A.2d at 81 (discussing the appellate court's need for a fully-developed record when reviewing lower court decisions); State v. Vanasse, 593 A.2d 58, 67-68 (R.I. 1991) ("If the trial justice has sufficiently articulated the rationale for whatever decision he or she has rendered, then such ruling is entitled to great weight and will not be disturbed by this court unless the trial justice overlooked or misconceived material evidence or was otherwise clearly wrong.").

113. *See* R.I. Gen. Laws § 10-9.1-7 (1956) (1997 Reenactment) (discussing the myriad of potential procedural alternatives including proof by affidavits, depositions, oral testimony and ordering the applicant to appear before the court); *id.* § 10-9.1-3 (1956) (1997 Reenactment) (stating that a party may file an application for post-conviction relief at any time). Judge Fortunato's two in-chambers conferences did not substitute for the rights provided to the prosecution, the defendant and the accused attorney by post-conviction hearing because they lacked the section 10-9.1-7 procedural safeguards. *But see* Commonwealth v. Kozerski, 294 N.E.2d 460, 463 & n. 4 (Mass. 1973) (noting that, unlike in *Dunn,* the defendant made a motion for a new trial on grounds of ineffective assistance of counsel). In *Kozerski*, two hearings were held on the motion for a new trial and the defendant elicited evidence supporting his claim. The trial judge denied the motion. The appellate court was apparently satisfied that the record was fully developed. It heard the appeal and ruled that the evidence elicited at these hearings fully supported the trial judge's determination on the issue presented in the defendant's motion for a new trial.

114. *See infra* section IV.B. On appeal, the Rhode Island Supreme Court will not disturb the determinations of the trial judge unless he or she has overlooked or misconceived relevant and material evidence or was otherwise clearly wrong. *See* R.I. Gen. Laws § 8-6-2; State v. Scurry, 636 A.2d 719, 725 (R.I. 1994); State v. Caruolo, 524 A.2d 575, 585 (R.I. 1987).

> In reviewing a denial of a new-trial motion, [the Supreme Court] will not disturb a trial justice's ruling unless the trial justice overlooked or misconceived material evidence relating to a critical issue or was otherwise clearly wrong. In light of this standard for review it is crucial for the trial justice to articulate the facts upon which the ruling is based.

Id. See generally In re Paul, 626 A.2d 694, 695 (R.I. 1993) (noting that "[a] trial justice's decision in a non-jury . . . criminal trial . . . is entitled to great weight and will not be disturbed by this court, unless it is incorrect as a matter of law or is otherwise clearly wrong"); Fontaine v. State, 602 A.2d 521, 524 (R.I. 1992) (holding that "[t]he findings and decisions of a trial justice should not be disturbed unless it is clearly shown that such an exercise of his or her discretion is improper or an abuse").

C. *Policy Arguments Against Rule 33 Sua Sponte Power*

Judge Fortunato makes myriad policy arguments to support his actions in *Dunn*. However, such policy-based justifications do not necessitate the sweeping changes Judge Fortunato made to Rule 33 procedure. Also, policy arguments exist that warn against such judicial action.

1. *Double Jeopardy*

a. United States v. Smith, *Double Jeopardy and Their Effect on Rule 33*

The United States Constitution, as well as the Rhode Island Constitution, prevents the government from prosecuting defendants twice for the same crime.[115] The Supreme Court addressed the dangers associated with violating this right in *United States v. Smith*.[116] In *Smith*, the Court stated that judgments would never truly be considered final if judges could reserve power to grant a defendant a new trial after the case had been appealed to and decided by an appellate court.[117] In *Smith*, the Supreme Court ruled that a judge could not grant a new trial on his own motion beyond the time limit placed upon a defendant's motion:

> [I]t would be a strange rule which deprived a judge of power to do what was asked when request was made by the person most concerned, and yet allowed him to act without petition. If a condition of the power is that request for its exercise not be made, serious constitutional issues would be raised. For it is such request which obviates any later objection the defendant might make on the ground of double-jeopardy.[118]

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115. U.S. Const. amend. V, cl. 2 ("[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb; . . ."); R.I. Const. art. 1, § 7 ("No person shall be subject for the same offense to be twice put in jeopardy.").

116. 331 U.S. 469 (1947).

117. *See id.* at 474-75 (stating that "[q]uestions of finality would be raised if the trial court, while formally denying the motion for new trial on the record, reserves the right to change its mind after the opinion of an appellate court has been elicited. . . .[and] to approve the practice . . .would almost certainly subject trial judges to private appeals or application by counsel or friends of one convicted"); *see also* 26 James Wm. Moore, et al., Moore's Federal Practice § 633.22[1] (3d ed. 1997) (discussing the need for finality as justification for removing a judge's sua sponte power to grant new trials).

118. *Smith*, 331 U.S. at 474.

The holding in *Smith* denied judges the power to grant a motion for a new trial sua sponte if the time in which a defendant could file a similar motion had passed.[119] In response to the *Smith* Court's concerns regarding the problem of timeliness and its effect on double jeopardy, the drafters of the federal rules amended Federal Rule 33 in 1966 to deny explicitly a trial judge's power to grant a new trial on his own motion at any time.[120] The rule, as amended, now protects the defendant from possible double-jeopardy problems arising from a new trial that he or she did not request.

b. *The Relationship Between Federal and Rhode Island Rule 33*

Although some jurisdictions grant a trial judge the power to order a new trial on his own motion,[121] other jurisdictions forbid such an action precisely because of the risk of double jeopardy.[122] Federal Rule 33 does not allow a judge to grant a new trial on his own motion because of the concerns regarding timeliness and double jeopardy.[123] The Rhode Island Supreme Court has looked to the federal rules and related case law to interpret the Rhode Island rules.[124] Therefore, one may reason by analogy that the "timeliness" policy behind the federal rule's double-jeopardy restriction on a judge's sua sponte power exists as well in Rhode Island Superior Court.[125]

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119. *Id.* at 475 ("We think that expiration of the time within which relief can openly be asked of the judge, terminates the time within which it can properly be granted on the court's own initiative.").

120. Fed. R. Crim. P. 33 advisory committee's notes.

121. For example, the state judicial branches in Arizona, Alabama, Florida, New Mexico, Tennessee and Utah have promulgated rules regarding motions for a new trial that expressly grant the trial justice the power to order a new trial sua sponte. *See* Ariz. R. Crim. P. 24.1; Ala. R. Crim. P. 24.1; Fla. R. Crim. P. 3.580; N.M. R. Crim. P. 5-614; Tenn. R. Crim. P. 33; Utah R. Crim. P. 24.

122. *See, e.g.*, Powell v. District Court of Seventh Judicial Dist., 473 P.2d 254 (Okla. Crim. 1970) (construing 22 Okla. Stat. § 952 (1961) to deny judges sua sponte power to grant new trials); Zaragosta v. State, 588 S.W.2d 322 (Tex. Crim. 1979) (construing V.A.C.C.P. 40.02 to deny sua sponte power); Vt. R. Crim. P. 33.

123. Fed. R. Crim. P. 33 advisory committee's notes ("The amendments to the first two sentences make it clear that a judge has no power to order a new trial on his own motion, that he can act only in response to a motion timely made by a defendant. Problems of double jeopardy arise when the court acts of its own motion.").

124. *See infra* notes 138-39.

125. Rhode Island's Rule 33 is principally the same as its federal counterpart with two major exceptions. Since neither of those two exceptions pertain to sua

At this point, a brief textual analysis of Federal Rule 33 is appropriate. Federal Rule 33 provides that:

> The court on motion of a defendant may grant a new trial to that defendant if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly-discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period.[126]

The first sentence of the federal rule is identical to that of the Rhode Island rule: "[t]he court *on motion of a defendant* may grant a new trial to that defendant if required in the interest of justice."[127] The remainder of the two rules is principally the same with two exceptions.[128] First, in Rhode Island, a judge may not grant a motion for a new trial for errors of law which occurred at trial.[129] Second, in Rhode Island, a defendant has a greater period of time—up to two years after the court enters judgment—to file a motion on the grounds of newly-discovered evidence.[130] Neither exception is relevant to the federal rule's ban on sua sponte new-trial motions because of the possible double-jeopardy implications.[131]

One could hypothesize that Federal Rule 33 is permissive because it provides that the court *may* grant a new trial. Thus, the argument follows, the drafters of the federal rules must have intended to allow judges to grant new trials without a defendant's

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sponte prohibition, it stands to reason that the prohibition survived along with the other similarities to Federal Rule 33. R.I. Super. Ct. R. Crim. P. 33 reporter's notes; *see also* State's Memorandum Responding to the Decision Granting Motion for a New Trial at 4, State v. Dunn, (R.I. Super. Ct. Aug. 6th, 1997) (No. 96-1005A) (comparing Rhode Island Rule 33 with its federal counterpart).

126. Fed. R. Crim. P. 33.

127. *Compare* Fed. R. Crim. P. 33 (emphasis added) *with* R.I. Super. Ct. R. Crim. P. 33.

128. *See* R.I. Super. Ct. R. Crim. P. 33 reporter's notes.

129. *See* R.I. Super. Ct. R. Crim. P. 33.

130. *See id.*

131. *See supra* section III.A.

motion.[132] However, this hypothesis permits a possible double-jeopardy situation—a judge with sua sponte power could subject a defendant to another trial at any time.[133] Such a double-jeopardy situation is exactly what the drafters attempted to avoid by allowing trial judges to grant new trials only upon the *timely*-made motions of defendants.[134]

The 1966 amendment to Federal Rule 33 clarified this intent and obviated the *Smith* Court's fears by denying a trial judge the power to grant a motion for a new trial sua sponte: "[The court] can act only in response to a motion timely made by a defendant. Problems of double jeopardy arise when the court acts on its own motion."[135] *Smith* provides a clue to the drafters' intent underpinning the 1966 amendment to Federal Rule 33: "It is not necessary for us now to decide whether . . . retrial on the court's own motion would amount to double-jeopardy. That a serious constitutional issue would be presented by such a procedure is enough to suggest that we avoid a construction that will raise such an issue."[136] The amendment, denying outright a judge's ability to grant a new trial on his own motion, is a procedural safeguard to avoid even the mere possibility of a constitutional violation.[137]

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132. *See* Carlisle v. United States, 517 U.S. 416, 431 (1996).

133. *See* United States v. Smith, 331 U.S. 469, 472 (1947).

134. *See id.*

135. Fed. R. Crim. P. 33 (1966 Amendment) (The pre-1966 version of the rule stated in pertinent part that "[t]he court may grant a new trial to a defendant if required in the interest of justice"); *see also Smith*, 331 U.S. at 472 (discussing the potential double jeopardy dangers resulting if judges could grant new trials sua sponte beyond the time limit allowed for a defendant to file a similar motion).

136. *Smith*, 331 U.S. at 474-75. *See generally* United States v. Saban-Gutierrez, 783 F. Supp. 1538, 1548 (D.P.R. 1991) ("[T]he reality that sua sponte action by this court *may* create a double-jeopardy issue causes us concern.") (emphasis added).

137. *See, e.g.*, United States v. Braman, 327 A.2d 530, 534 (D.C. 1974).

> [T]he amendment to Federal Rule 33 in 1966 not only extended the time limitation from five to seven days but specifically provided that a new trial may be granted only "on motion of a defendant." The purpose of the amendment, according to a note of the Advisory Committee of the Judicial Conference of the U.S., is to "make clear that a judge has no power to order a new trial on his own motion, that he can only act in response to a motion timely made by a defendant."

Id. (citing 18 U.S.C. Rule 33 Supp. 1961-70, Notes of Advisory Committee on Rules). The drafters of the federal rules viewed this safeguard as necessary in view of the serious constitutional issue being raised.

The Rhode Island rule, like its federal counterpart, does not provide for a case-by-case analysis to determine whether, in specific instances, concerns of double jeopardy will in fact arise. Until a superior-court majority votes to amend it, the Rhode Island rule must stand in its current form as a general safeguard which does not allow for a case-by-case analysis of possible double-jeopardy claims. Since the Rhode Island rule is principally the same as the federal rule, one may analogize the two rules, as the Rhode Island Supreme Court generally has done.[138] Accordingly, in light of the past practice of using the federal rules and precedent to interpret the Rhode Island rules, the Rhode Island rule should also deny a judge the power to order a new trial on his own motion.[139]

c. *Double Jeopardy and* Dunn

In *Dunn*, one could argue that the defendant waived his right to raise subsequently the constitutional ground of being tried twice for the same offense when he filed a motion for a new trial.[140] However, the new-trial motion still became the judge's own motion and not that of the defendant.[141] Therefore, the *defendant* did not

138. *See* Nocera v. Lembo, 298 A.2d 800, 803 (R.I. 1973) ("In construing the Superior Court rules it has been our practice to look for guidance in the precedents of the federal courts, upon whose rules those of the Superior court are closely patterned."); *see also* State v. Tobin, 602 A.2d 528, 532 (R.I. 1992) (using federal jurisprudence regarding the Federal Rules of Evidence to interpret the corresponding Rhode Island Rules of Evidence); State v. LaChappelle, 424 A.2d 1039, 1045 n.5 (R.I. 1981) (looking to federal authorities for guidance in interpreting a superior court rule of criminal procedure); State v. Grover, 314 A.2d 138, 140 (R.I. 1974) (stating that, if the Rhode Island Superior Court Rules of Criminal Procedure were clearly lifted from the Federal Rules of Criminal Procedure, then one may use the federal rule interpretation to analyze the state rule).

139. *See* State v. Heath, 665 A.2d 1336, 1337 (R.I. 1995) (emphasizing the similarity between Federal and Rhode Island Rule 33). *See generally* State's Memorandum Responding to the Decision Granting Motion for a New Trial at 4, State v. Dunn (R.I. Super. Ct. Aug. 6, 1997) (No. 96-1005A) (comparing Rhode Island Rule 33 with its federal counterpart); State's Memorandum in Support of Petition for Writ of Certiorari at 31, State v. Dunn (No. 97-414 M.P.) ("The federal rule of criminal procedure governing motions for a new trial, upon which the Rhode Island Rule is based, is essentially the same . . . .").

140. *See Saban-Gutierrez*, 783 F. Supp. at 1548 ("Literally, all that is lacking is a formal motion made by the defendant. On the other hand, the plain language of Rule 33, the Advisory Committee note, other circuits' case law, all point toward the need for strict compliance with the mandates of Rule 33. The reality is that sua sponte action by this court may create a double-jeopardy issue causes us concern.").

141. *See supra* note 86.

waive his double-jeopardy protection by moving for a new trial. There exists the danger that if a judge retains the power to grant new trials sua sponte, then defendants may be placed at risk of double jeopardy. Such action is unconstitutional under either the state or federal Constitution.[142] Even though Dunn requested a new trial, nothing in Rhode Island's Rule 33 suggests a case-by-case inquiry that avoids the federal ban on sua sponte motions. Granting Judge Fortunato the power to grant a new trial on his own motion would be tantamount to creating a sua sponte power which "lingers on indefinitely."[143] This dangerous and ill-defined procedure is exactly what the *Smith* Court was trying to avoid.

The policy concerns regarding timeliness apply to Judge Fortunato's ability to grant a new trial on his own motion. Rhode Island Rule 33 adopted the time limitation imposed by the federal rule for motions based on newly-discovered evidence—two years—and expanded the time limit for motions based on all other grounds, except errors of law, from seven to ten days.[144] Thus, the timeliness concern does not affect a new-trial motion on grounds of newly-discovered evidence because Judge Fortunato's motion on such grounds was brought well within the two-year time limit. But a party must bring a motion on interest of justice grounds within ten days after entry of the verdict.[145] Judge Fortunato rendered a verdict in *Dunn* on June 24th, and then overturned that verdict and granted a new trial on his own grounds on August 6th, forty-three days later. His action, therefore, did not fall within the prescribed time limit of ten days to grant a motion for new trial on interest of justice grounds. Such a belated action by a trial judge invokes the policy dangers discussed in *Smith*.[146] The more correct procedure would be to request that Dunn move for a new trial

142. *See generally* 21 Am. Jur. 2d *Criminal Law* §263 (1981) ("[A]n order of the trial court granting a new trial in a criminal case upon its own motion places the defendant in double jeopardy where the court lacks the power to enter such an order or improperly exercises its power.").

143. United States v. Smith, 331 U.S. 469, 473-74 (1947).

144. *See* Fed. R. Crim. P. 33.

145. R.I. Super. Ct. R. Crim. P. 33; State v. Heath, 665 A.2d 1336, 1337 (R.I. 1995). *See generally* United States v. Garcia, 19 F.3d 1123, 1126 (6th Cir. 1994) (stating that "the only ground [for a new trial] entertained after seven days is that of newly-discovered evidence").

146. *E.g.*, *Smith*, 331 U.S. at 473-74 (discussing how a judge's power to grant new trials sua sponte would destroy the finality of verdicts because such power "lingers on indefinitely").

on the grounds cited by Judge Fortunato.[147] To do so would ensure that the motion remains timely and obviate potential double-jeopardy problems.[148] And if the time limit has run, then the option of a post-conviction relief motion still remains.[149]

Consequently, Judge Fortunato did not have the power to grant a new trial in the interest of justice on the grounds that defense counsel was ineffective.[150] The ten-day time limit may be extended "within such further time as the court may fix *during the ten-day period.*"[151] Even though he supplied the new grounds, Judge Fortunato did not state that he had extended the time frame for making the motion in his August 6th decision to grant a new trial. If the time has run, then a claim based on the interest of justice must be brought as an application for post-conviction relief.[152]

2. Dunn, *the Attorney-Client Privilege and the Start of a Slippery Slope*

Defense counsel Vealey could not defend Judge Fortunato's ineffectiveness claim during the two in-chambers colloquies because many of his answers would have violated the attorney-client privilege: "[t]he general rule is that communications made by a client to his attorney for the purpose of seeking professional advice, as well as the responses by the attorney to such inquiries, are privileged communications not subject to disclosure."[153] For an attorney to

147. *See* United States v. Saban-Gutierrez, 783 F. Supp. 1538, 1549 (D.P.R. 1991) (recognizing the court's ability to request that the defendant move for a new trial if he so desires).

148. *See id.*

149. *See* R.I. Gen. Laws § 10-9.1-1 (1956) (1997 Reenactment) (setting forth the procedure for post-conviction relief); *id.* § 10-9.1-3 (stating that a motion for post-conviction relief may be filed at any time).

150. *See, e.g.*, State v. Heath, 665 A.2d 1336, 1337 (R.I. 1995) ("Rule 33 of the Superior Court Rules of Criminal Procedure is similar to its federal counterpart. Time limitations under the federal rules are jurisdictional, and federal courts have held that they lack the authority to entertain a motion for new trial beyond the time limitations set forth in the rule.").

151. R.I. Super. Ct. R. Crim. P. 33 (emphasis added).

152. State v. Bishop, 439 A.2d 255, 263 (R.I. 1982); State v. Lanoue, 366 A.2d 1158 (R.I. 1976); *see also* R.I. Super. Ct. R. Crim. P. 45(b) (allowing parties an increased amount of time to do an act required by the court or the rules). Rule 45(b) explicitly excludes Rule 33 from such consideration. *Id.*

153. State v. Von Bulow, 475 A.2d 995, 1004 (R.I. 1984); *see also* Rosati v. Kuzman, 660 A.2d 263, 265 (R.I. 1995) (discussing an attorney's responsibility to

defend thoroughly a charge of ineffectiveness, the defendant must waive the attorney-client privilege.[154] When a defendant charges his attorney with ineffectiveness via a motion for post-conviction relief, he waives the attorney-client privilege.[155] Dunn, however, neither raised the ineffectiveness claim nor waived his attorney-client privilege because he did not bring a motion for post-conviction relief.

Judge Fortunato referred to the delicate matter presented by the attorney-client privilege in his August 6th opinion.[156] He stated that he held the colloquies in-chambers because the questions and answers came close to affecting the attorney-client privilege.[157] Because of the attorney-client privilege and the subsequent need to be "extremely circumspect," Vealey was only able to provide Judge Fortunato with "some answers."[158] In the context of this new-trial proceeding, Vealey could not supply all of the answers needed for a proper defense.[159]

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keep his client's communications confidential unless the client consents to disclosure); State v. Juarez, 570 A.2d 1118, 1119-20 (R.I. 1990) (same).

154. *See In re* Ethics Advisory Panel Opinion No. 92-1, 627 A.2d 317, 321 (R.I. 1993) ("The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client.") (quoting R.I. Rules of Professional Conduct Rule 1.6 official comment); *Von Bulow*, 475 A.2d at 1005.

155. *See, e.g.*, *Von Bulow*, 475 A.2d at 1008.

> It is not necessary that actual privileged communications or documents reflecting such communications be disclosed to effect a waiver of the privilege. "[A] disclosure of, or even merely an assertion about, the communication may effect a waiver of privilege not only as to that communication, but also as to other communications made during the same consultation and communications made at other times about the same subject.

Id.; *see also* Northup v. State, 272 A.2d 747, 751-52 (Me. 1971) (stating that when a defendant brings a claim of ineffectiveness against his attorney, he waives the attorney-client privilege); Pruitt v. Peyton, 243 F.Supp. 907, 909 (D. Va. 1965) (same).

156. *See* Opinion Granting Motion for a New Trial at 15 app. at 324, *Dunn* (No. 96-1005A) ("It was necessary for all persons, . . to be extremely circumspect; nonetheless, some of the answers are telling, and they do not have any impact upon the privilege.").

157. *See id.*

158. *Id.*

159. *See infra* note 168.

a. *The Law and the Policy Behind the Privilege*

Rhode Island Rule of Evidence 501, concerning privileges, does not modify nor supersede existing law pertaining to privileges.[160] If a defendant intends to invoke the attorney-client privilege, then he must prove the existence of the following four factors:

> (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is [a] member of a bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.[161]

In addition, if a defendant's attorney reveals the confidential communications between himself and his client, then such disclosure would void the purpose behind the privilege:

> Confidential disclosures by a client to an attorney made in order to obtain legal assistance are privileged . . . . [I]f the client knows that damaging information could more readily be obtained from the attorney following disclosure than from himself in the absence of disclosure, the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice.[162]

b. *The Privilege and Its Impact in* Dunn

Dunn was Vealey's client and their communications involved Vealey's role as Dunn's lawyer. Thus, the first two prongs of the attorney-client privilege test are satisfied. It goes without saying that Vealey and Dunn had an attorney-client relationship, thus satisfying the third prong.[163] The fourth prong requires that the

160. R.I. R. Evid. 501 ("Nothing in these rules shall be deemed to modify or supersede existing law relating to privilege.").

161. Rosati v. Kuzman, 660 A.2d 263, 265 (R.I. 1995) (citing State v. Von Bulow, 475 A.2d 995, 1004 (R.I. 1984)).

162. Fisher v. United States, 425 U.S. 391, 403 (1976).

163. Since Judge Fortunato uses the issues of whether or not to put on character witnesses, whether to waive the right to a jury trial and whether to testify on one's own behalf as bases for his ineffective-assistance claim, one may conclude

client did not waive the privilege. Although this prong implies that only the client may waive the privilege, an attorney may claim the privilege on behalf of the client.[164] Dunn did not waive the privilege because he did not bring the ineffectiveness claim against Vealey in his motion for a new trial. Rather, Judge Fortunato brought the ineffectiveness claim. Since neither Judge Fortunato nor Vealey can waive Dunn's attorney-client privilege,[165] Judge Fortunato's decision, rife with potential breaches of the attorney-client privilege,[166] countermands Rhode Island Supreme Court precedent which shields confidential attorney-client communications from disclosure.[167]

If, during the new-trial colloquies, Vealey revealed the context of his and Dunn's communications, then Dunn's interests in confidentiality could very well have been adversely affected.[168]

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that such issues involve assistance in some legal proceeding. *See* Opinion Granting Motion for a New Trial, *Dunn* (No. 96-1005A).

164. *See* R.I. R. Evid. 501 reporter's notes; Fisher v. United States, 425 U.S. 391, 402 & n.8 (1976). *But see* Callahan v. Nystedt, 641 A.2d 58, 61 (R.I. 1994) ("Only the client has standing to assert the attorney-client privilege . . . . If the clients wished to assert the privilege, then each client should have personally signed and submitted an affidavit declaring his or her intent."). *Callahan* is distinguishable because it involved a civil suit filed by a law firm against an attorney regarding a fee arrangement. The firm wanted certain client files in the attorney's possession. The attorney asserted the attorney-client privilege on behalf of his former clients. The court concluded that it was highly likely that disclosing the files would not involve the clients' continuing interests. In the present case, disclosure of conversations between Vealey and Dunn could affect Dunn's continuing interests in the pending civil suits. Vealey should be allowed to assert the privilege on his client's behalf.

165. *See supra* note 161.

166. *See* State v. Marrapese, 583 A.2d 537, 543 (R.I. 1990) (stating that "Rhode Island has long recognized the attorney-client privilege and has shielded from disclosure the confidential communications between a client and his or her attorney"); *see, e.g.*, State v. Juarez, 570 A.2d 1118 (R.I. 1990) (applying the attorney-client privilege to prevent an attorney from disclosing confidential communications between himself and his client); State v. Von Bulow, 475 A.2d 995 (R.I. 1984) (recognizing the attorney-client privilege and the client's ability to waive it); DeFusco v. Giorgio, 440 A.2d 727 (R.I. 1982) (acknowledging the protection that the attorney-client privilege affords to confidential communications between an attorney and his client); Wartell v. Novogard, 137 A. 776 (R.I. 1927) (same).

167. *See Marrapese*, 583 A.2d at 544.

168. *See In re* Request For Instructions From Disciplinary Counsel, 610 A.2d 115, 116-17 (R.I. 1992) (stating that the Rhode Island Supreme Court has adopted Rule 1.6 of the Rules of Professional Conduct requiring "that a lawyer shall not reveal information relating to representation of a client without the client's consent").

Although Vealey concluded that Dunn must obtain new counsel to argue the motion for a new trial,[169] he remained Dunn's counsel for the pending civil suits.[170] Even if such information may be integral to Vealey's defense, Vealey cannot reveal the conversations that he had with his client regarding Judge Fortunato's three claims of ineffectiveness.[171] Vealey's answers to Judge Fortunato's questions could negatively impact his client's interests in the civil suits as well as the new criminal trial (if Judge Fortunato's opinion stands). Even though Vealey is no longer Dunn's counsel for the remainder of the criminal case, the attorney-client privilege is not subject to any time limit.[172]

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169. *See* Strickland v. Washington, 466 U.S. 668, 690-91 (1984).

> [A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct . . . . The court must . . . determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. . . . The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions . . . . In short, inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions.

Id.

170. The situation is quite different where the defendant alleges ineffectiveness of counsel in a motion for post-conviction relief. *See* Jacques v. State, 669 A.2d 1124, 1146 (R.I. 1995) ("[The accused attorney] was called to the stand to corroborate the sworn statement he made in a signed affidavit . . . in response to Jacques' allegations of ineffective counsel."). For an example of the thorough development of a record for appellate court review provided by a post-conviction relief proceeding, see *id.* at 1148-49.

171. *See* Opinion Granting Motion for a New Trial, State v. Dunn (R.I. Super. Ct. Aug. 6, 1997) (No. 96-1005A) (stating that, at that time, Attorney David Martin began representing Dunn for the remainder of the criminal trial). *See generally* Gerald M. Carbone, *Priest to Get New Trial—Judge Reverses His Own Decision*, Prov. J. Bull., Aug. 7, 1997, at A13, *available in* 1997 WL 10846547 (stating that David Martin would represent Dunn during the remaining criminal proceedings).

172. *See* Vealey's Stipulation Withdrawing Appearance on Behalf of Defendant, State v. Dunn (R.I. Super. Ct. Aug. 6, 1997) (No. 96-1005A); Entry of Appearance for Defendant by David Martin, State v. Dunn (R.I. Super. Ct. Aug. 6, 1997) (No. 96-1005A); *see also* Vealey Interview, *supra* note 39 ("[I]f I'm going to argue on behalf of what I did in the trial, what I didn't do in the trial, then I am, in effect, arguing against my client, so we concluded that he would have to get new counsel to argue the motion for a new trial.").

Due to the constraints placed on Vealey by the attorney-client privilege,[173] it was impossible for Judge Fortunato to create a fully-developed record for appellate-court review. Therefore, post-conviction relief, with its waiver of the attorney-client privilege, represents the only option that allows Vealey to present a complete defense.[174]

D. *Counter-Arguments to Judge Fortunato's Specific Reasoning*

1. *Plain Error*

If Rhode Island had a plain-error rule, then Judge Fortunato could have ordered a new trial to remedy a defect like ineffective assistance of counsel, which affected Dunn's substantial rights. The federal plain-error rule, Rule 52(b), provides that the trial judge may notice plain errors or defects affecting substantial rights although they were not brought to the attention of the court.[175] Ineffective assistance of counsel, for example, affects one of a defendant's constitutional rights and the judicial proceeding's fairness. If the federal court discovers such a "miscarriage of justice," viz. ineffective assistance of counsel, then the plain error will warrant a reversal.[176]

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173. As previously mentioned, the three claims of ineffectiveness centered around three decisions: (1) Vealey's failure to present character evidence, (2) Dunn's waiver of jury trial and (3) Dunn's decision not to testify in his own defense. *See supra* notes 45-50; *see also* Vealey Interview, *supra* note 39 (discussing the limitations that the attorney-client privilege creates for attorneys).

> I cannot explain to him [Judge Fortunato] or anybody discussions I had with my client about taking the stand [or] not taking the stand. I can't tell the reasons why . . . what discussions I had with my client considering waiver of jury trial or the issue of putting on character evidence. There's still that privilege. So yes, he can ask questions about that, but my explanations are limited by the attorney-client privilege.

Id.

174. *See generally* State v. Juarez, 570 A.2d 1118, 1119-20 (R.I. 1990) (describing the attorney-client privilege as covering confidential communications between a client and his former attorney).

175. *Compare* Fed. R. Crim. P. 52 (providing that a court may notice plain errors sua sponte) *with* R.I. Super. Ct. R. Crim. P. 52 (providing no mention of a court's ability to notice plain errors sua sponte); *see also* United States v. Olano, 507 U.S. 725, 734 (1993) (acknowledging appellate authority to recognize plain errors that affect substantial rights); Moore, *supra* note 117, § 652.04 (1997) (stating that if the error affects the fairness of judicial proceedings, then the court will consider a claim of plain error within the context of the entire trial).

176. *See Olano*, 507 U.S. at 737; Moore, *supra* note 117, § 652.04.

Rhode Island has no such plain-error rule.[177] It was specifically deleted from the Rhode Island Superior Court Rules because the provision, "which was obviously intended to apply in appellate proceedings," conflicted with Rhode Island case law.[178] As a general rule, appellate review is restricted to trial-court rulings to which exceptions were taken.[179] When constitutional protections are deprived, however, the Rhode Island Supreme Court will recognize such "plain" errors even though not objected to by the defendant.[180] The supreme court, however, did not extend this power to superior court judges. The explicit deletion of the plain-error rule from Superior Court Rule 52 demonstrates that Judge Fortunato, a superior court judge, lacks the appellate court's power to recognize constitutional errors not raised by the defendant at trial.[181] Since a Rhode Island Superior Court judge cannot raise plain er-

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177. *See* R.I. Super. Ct. R. Crim. P. 52 Note 1 (citing State v. Williams, 432 A.2d 667 (R.I. 1981)) ("Rhode Island has not heretofore recognized the plain error rule. Indeed, in promulgating rules of criminal procedure, Rule 52(b) of the Federal Rules of Criminal Procedure, which deals with plain error, was specifically deleted to conform to Rhode Island case law.").

178. *Id.*

179. *See* R.I. Super. Ct. R. Crim. P. 52 reporter's notes.

180. *See generally* State v. Quattrocchi 235 A.2d 99, 104 (R.I. 1967) (noting that Rhode Island is not considered a jurisdiction "where plain error affecting substantial rights may be considered *on review* even though not raised at trial"). The exception to this rule, however, is in cases where parties are deprived of their constitutional protections. *See* State v. Burke, 522 A.2d 725, 731 (R.I. 1987).

> [The Supreme Court's] review of questions concerning basic constitutional rights, notwithstanding a defendant's failure to raise the issue at trial, is limited to the following circumstances. First, the error complained of must consist of more than harmless error. Second, the record must be sufficient to permit a determination of the issue. Third, counsel's failure to raise the issue is based upon a novel rule of law of which counsel could not reasonably have known at the time of trial.

Id.

181. Dunn did not raise an ineffectiveness claim at the trial-court level. *See* Defendant's Motion for a New Trial, State v. Dunn (R.I. Super. Ct. June 30, 1997) (No. 96-1005A); R.I. Super. Ct. R. Crim. P. 52 reporter's notes. *See generally* State v. Williams, 432 A.2d 667, 670 (R.I. 1981) (noting that "errors not asserted in the trial court will only be considered under extraordinary circumstances wherein a defendant has 'suffered an abridgment of his basic constitutional rights'") (quoting State v. Frazier, 235 A.2d 886, 887 (R.I. 1967)). Since the right to assistance of counsel is a constitutional right under the Sixth Amendment, the *supreme court* may review it on appeal even though Dunn did not raise the allegation. *See generally* MacFadyen & Hurst, *supra* note 67, § 52.2, at 442 (stating that "[another] reason for the limited applicability of Rule 52 is that, unlike the federal system, Rhode Island does not permit error of law to be raised on motions for new trial"). Rhode Island Superior Court Rule of Criminal Procedure 52 states that "[a]ny er-

rors sua sponte and the only exception applies to the supreme court, the appropriate, and only, vehicle for recognizing violations of a defendant's constitutional rights at the superior-court level is through a motion for post-conviction relief.[182] Consequently, Judge Fortunato overstepped his authority by granting a new trial based on *his* claim that Dunn's Sixth Amendment right to assistance of counsel had been violated.[183]

Both the court and the legislature have afforded defendants certain procedural safeguards in Rule 33 and section 10-9.1-1 of the Rhode Island General Laws, respectively, for obtaining relief from errors affecting constitutional rights.[184] Rule 33 allows a motion for a new trial in the interest of justice, and section 10-9.1-1 allows a party to bring a motion for post-conviction relief for errors of constitutional magnitude.[185] Accordingly, a judge need not step in after rendering a verdict when sufficient safeguards are available to protect a defendant's constitutional rights.[186] The judge's option is to deny the defendant's motion for a new trial and request, but not order, that he resubmit a motion on different grounds.[187] Such a course of action preserves the sanctity of the rules and also assures that a defendant would receive the full benefit of his rights under the rules and the state and federal Constitutions, either through a new trial or post-conviction relief.[188]

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ror, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

182. *See supra* section III.B.2; *supra* note 108.

183. *See* MacFadyen & Hurst, *supra* note 67, § 52.3, at 443. ("[T]he Court . . . will grant direct review of questions regarding 'basic constitutional rights' that were not raised at trial only when (1) the error asserted is not harmless; (2) *the record permits determination of the issue*; and (3) the failure to raise the issue was not due to its novelty.") (citing State v. Burke, 522 A.2d 725, 731 (R.I. 1987)) (emphasis added).

184. R.I. Gen. Laws § 10-9.1-1 (1956) (1997 Reenactment).

185. *Compare* R.I. Super. Ct. R. Crim. P. 33 *with* R.I. Gen. Laws § 10-9.1-1.

186. *See* Torcia, *supra* note 71, at 339 ("[A] trial judge retains the power, prior to verdict or finding of guilty, to declare a mistrial and order a new trial on his own motion, for 'manifest necessity.'") (citing United States v. Perez, 22 U.S. 579 (1824)).

187. *See, e.g.*, United States v. Saban-Gutierrez, 783 F. Supp. 1538, 1549 (D.P.R. 1991). ("We can find no reason why this court cannot request of defendant to move for a new trial, . . if that is the remedy he seeks . . . . Defendant is under no obligation to file this motion."). *But see supra* note 108.

188. *See* R.I. Super. Ct. R. Crim. P. 33; R.I. Gen. Laws § 10-9.1-1.

2. *Rule 2: A Square Peg in a Round Hole*

Judge Fortunato raised Rhode Island Superior Court Rule of Criminal Procedure 2, describing the purpose and construction of the rules, as a defense for his actions.[189] Rule 2 comports with the legislative intent to promote the speedy determination of litigation on the merits.[190] One could argue that Judge Fortunato saved time in bypassing the post-conviction relief proceeding. However, Rule 2, while requiring a judge to construe the rules to avoid unjustifiable delay, does not sanction ignoring the clear meaning of the court rules: "[i]n particular, where a rule is free from ambiguity, and expresses a clear and definite meaning, it should be adhered to strictly."[191] Similarly, in *Carlisle v. United States*,[192] the Court held that Federal Rule 2 should be used only to interpret ambiguous rules.[193] The language of Rule 33 clearly prohibits judges from granting new-trial motions sua sponte.[194] Thus, Rule

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189. *See* Judge Fortunato Interview, *supra* note 105; *see also* R.I. Super. Ct. R. Crim. P. 2 ("These rules are intended to provide for the just determination of every criminal proceeding to which they apply. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.").

190. *See* R.I. Super. Ct. R. Crim. P. 2 reporter's notes (citing R.I. Gen. Laws § 8-6-2 (1956) (1969 Reenactment) (Supp. 1970)).

191. State v. DiStefano, 593 A.2d 1351 (R.I. 1991).

> [I]t is well settled that when a statute is free from ambiguity and expresses a clear and definite meaning, we must impart to the words contained therein their plain and obvious meaning. Consequently, because a rule of court has the full force and effect of law we must accord the rule the same principles of construction . . . . [T]herefore . . . the clear and unambiguous rule in this jurisdiction . . . must be adhered to strictly.

Id. at 1352. *But see* Fallen v. United States, 378 U.S. 139, 142 (1964) (stating that "the Rules are not, and were not intended to be, a rigid code to have an inflexible meaning irrespective of the circumstances").

192. 116 S. Ct. 1460, 1465 (1996).

193. A judge cannot use Rule 2 to construe another rule as saying something beyond its plain meaning. *See* Fed. R. Crim. P. 2. "Rule [2] . . . sets forth a principle of interpretation to be used in construing ambiguous rules, not a principle of law superseding clear rules that do not achieve the stated objectives. It does not, that is to say, provide that rules shall be construed to mean something other than what they plainly say . . . ." *Id.* Although the rules are subject to a case-by-case application, they must also provide some element of predictability so that attorneys may plan their course of action without unduly endangering a just determination of their clients' criminal proceedings. *See* R.I. Gen. Laws § 8-6-2 (1956) (1997 Reenactment).

194. *See supra* section III.A.

2 does nothing to justify Judge Fortunato's abrogation of Rule 33's unambiguous meaning.

3. *Reinterpreting Judge Schwarzer and* The Trial Judge's Role

Judge Fortunato cites Judge William Schwarzer to support his purported ability to intervene on his own initiative, and thus ensure a "fair trial" and a "just outcome" when defense attorneys are providing ineffective assistance.[195] However, Judge Schwarzer's account, by no means binding on a Rhode Island court or any other court, does not support Judge Fortunato's actions. Both Judges Fortunato and Schwarzer agree that when presiding over a trial, a judge should seek to achieve fairness.[196] Judges Fortunato and Schwarzer, however, advocate divergent methods for achieving this fairness.[197] Judge Schwarzer recognizes that a judge must obtain fairness for the defendant by monitoring counsel's performance within the framework of the procedural rules.[198] Thus, the trial judge's function within this framework, as he sees it, is to remedy observed deficiencies before it is too late.[199] Judge Fortunato's sua sponte motion was procedurally "too late," however, because Rule 33 bans such action. Although Judge Schwarzer discusses a trial judge's post-trial options,[200] he does not advocate a

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195. *See* Opinion Granting Motion for a New Trial at 24 app. at 329, State v. Dunn (R.I. Super. Ct. Aug. 6, 1997) (No. 96-1005A) (citing Schwarzer, *supra* note 53, at 633).

196. *See* Schwarzer, *supra* note 53, at 650.

197. *See id.*

> Where the law affords [the judge] discretion in the application of substantive or procedural rules, fairness normally will guide its exercise. Since the competence of counsel is an element of a fair trial, achieving fairness will require the monitoring of counsel's performance and intervention *in appropriate circumstances*. This does not require the judge to evaluate the relative efficacy of trial tactics or to determine whether counsel's performance should receive a passing grade. Nor is the trial judge called upon to rule whether counsel's performance satisfies one of the minimum standards formulated by the appellate courts or whether a party is being denied effective representation. Instead, his function is to remedy observed deficiencies before it is too late, resorting always to the least intrusive measure adequate to the need.

Id. (emphasis added).

198. *See id.* at 664.

199. *See supra* note 197.

200. *See* Schwarzer, *supra* note 53, at 664 ("To prevent a default [of post-trial motions], therefore, the court may appropriately inquire whether counsel desires to present any post-trial motions.").

trial judge's granting a new trial on his own motion where the applicable rule forbids such action.[201] Instead, Judge Schwarzer requires the least intrusive measure adequate to the defendant's need for fairness.[202] Considering the possibilities for fairness presented by Rule 33 and post-conviction relief, Judge Fortunato's decision could hardly be described as the least intrusive measure.

4. *Executive Order 95-02: An "Ineffective" Argument*

In evaluating a defense attorney's ability to represent clients in felony cases, Judge Fortunato cites Chief Justice Weisberger's Executive Order 95-02 as an appropriate standard.[203] The executive order requires that an appointed defense attorney must (1) annually complete six hours of continuing legal education in criminal law and procedure, (2) be a member of the Rhode Island Bar for at least three years and (3) have previously represented, as either a lead attorney or an associate counsel under the supervision of a mentor attorney, any party in at least three Class One felony trials—cases with potential penalties of more than ten years in jail—to verdict.[204] Though he met the second prong of the executive order, Judge Fortunato determined that Vealey failed to meet the first and the third prongs.[205]

Judge Fortunato conceded that this executive order applies only to counsel assigned to indigent defendants.[206] However, he reasoned that it is anomalous to create standards only for appointed counsel representing indigent defendants.[207] Therefore, although he did not purport to amend the executive order, Judge Fortunato believed that he had an obligation, based on the order, to make a further inquiry into Vealey's criminal-trial experi-

201. Judge Schwarzer's discussion about achieving post-trial fairness and effective assistance of counsel demonstrates a marked deference to the rules governing post-trial motions. *See id.*

202. *See id.* at 650.

203. *See* Exec. Order No. 95-02 (1994-1995) R.I. (643-657 A.2d) LXXII (1995) Exec. Order 95-02, cited in Judge Fortunato's Aug. 6th opinion, represents a correction of a typographic error. Exec. Order 95-01 at LXIV provided the substantive text.

204. *See id.*; Opinion Granting Motion for a New Trial at 19-20 app. at 326-27, State v. Dunn (R.I. Super. Ct. Aug. 6, 1997) (No. 96-1005A).

205. *See id.* at 19-20 app. at 327 (evaluating defense counsel's experience based on the elements of the executive order).

206. *See id.* at 20-22 app. at 326-28.

207. *See id.* at 22 app. at 327-28.

ence.[208] The reality is, however, that Chief Justice Weisberger's executive order does not apply to all attorneys representing clients in felony cases. Rather, it applies *only* to attorneys representing *indigent clients* in felony cases.[209] Instead of covering privately-procured attorneys like Vealey, the executive order only provides the indigent client with additional safeguards to guarantee fairness.[210] Therefore, Chief Justice Weisberger's executive order should not be considered a measuring rod for every attorney in Rhode Island until the chief justice makes it clear that such is his intention.

5. *American Bar Association Standard 6-1.1: Everything But the Kitchen Sink*

In an effort to further buttress his sua sponte actions, Judge Fortunato cites American Bar Association Standard 6-1.1: "[t]he adversary nature of the proceeding does not relieve the trial judge of the obligation of raising on his or her own initiative at all appropriate times and in an appropriate manner, matters which may significantly promote a just determination of the trial."[211] However, this standard denies that which Judge Fortunato says it permits. The standard provides that a trial judge has an obligation to raise on his own initiative matters that promote a just determination of the trial *"at all appropriate times and in an appropriate manner."*[212] Regardless of its tendency to promote a just determi-

208. *See id.*

209. *See* Exec. Order No. 95-02 (1994-1995) R.I. (643-657 A.2d) LXXII (1995). *See generally* Opinion Granting Motion for a New Trial at 22 app. at 328, *Dunn* (No. 96-1005A) (comparing Vealey's level of experience to the elements of the executive order). Even though Judge Fortunato uses Chief Justice Weisberger's executive order to assess Vealey's level of experience, the executive order pertains only to court appointments, a fact not lost to Judge Fortunato.

210. *See supra* note 49 (stating that the executive order was promulgated to "provide competent representation, to ensure that the distribution of court appointments is made in a fair and equitable fashion, to provide a uniform and efficient system for making such appointments, and to protect the public interest"); State's Memorandum in Support of Writ of Certiorari at 41, State v. Dunn (R.I. Nov. 18, 1997) (No. 97-414 M.P.) (arguing that the executive order does not apply in *Dunn* because Vealey was privately procured); State v. Dowell (No. 95-383-A *slip op.*) (R.I. Oct. 24, 1997).

211. Opinion Granting Motion for a New Trial at 24 app. at 329, *Dunn* (No. 96-1005A) (quoting 1 A.B.A. Standards For Criminal Justice § 6-1.1 (2d ed. 1980)).

212. 1 A.B.A. Standards For Criminal Justice § 6-1.1 (2d ed. 1980) (emphasis added).

nation of the trial, a judge's grant of a new trial on his own motion is an *inappropriate* action in light of the other outlets that secure a defendant's constitutional rights.[213] Moreover, although the standard could be construed as persuasive, it does not carry the same statutory weight as a motion for post-conviction relief[214] or a motion for a new trial.[215] Therefore, any support that the standard lends to Judge Fortunato's ineffectiveness claim is tenuous at best.

6. McMann v. Richardson*: Been There,* Dunn *That*

Judge Fortunato reasons that a judge must seek to achieve, through effective assistance of counsel, a just result for the defendant.[216] Accordingly, Judge Fortunato quotes *McMann v. Richardson*: "judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts."[217] This quotation forms the latter half of the following sentence which Judge Fortunato omits: "we think the matter, for the most part, should be left to the good sense and discretion of the trial courts with the admonition that if the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel."[218] Section 8-6-2 of the Rhode Island General Laws provides that only a majority of the superior court judges shall have the power to promulgate court rules.[219] Rule 33, drafted by such a majority, and the motion for post-conviction relief, drafted by the state legislature, represent the "good sense and discretion of the trial courts," as well as the state legislature, in affording defendants the full benefit of their constitutional rights. Judge Fortunato therefore did not need to grant a new trial sua sponte to satisfy *McMann* when the rule governing new trials and the statute governing post-conviction relief adequately safeguarded Dunn's constitutional right to effective assistance of counsel.

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213. *See* R.I. Super. Ct. R. Crim. P. 33; R.I. Gen. Laws § 10-9.1-1 (1956) (1997 Reenactment).

214. *See* R.I. Gen. Laws § 10-9.1-1.

215. *See* R.I. Gen. Laws § 8-6-2 (1956) (1997 Reenactment).

216. *See* Opinion Granting Motion for a New Trial at 23 app. at 328, *Dunn* (No. 96-1005A) (quoting McMann v. Richardson, 397 U.S. 759, 771 (1970)).

217. *Id.*

218. *McMann*, 397 U.S. at 771.

219. R.I. Gen. Laws § 8-6-2.

Both the text of Rule 33 and the rule's policy background forbid Judge Fortunato's actions in *Dunn*. Although his outside policy arguments are novel, they are irrelevant to Rule 33 on both textual and policy grounds.

IV. Analyzing Judge Fortunato's Grounds for Granting the New Trial

When Judge Fortunato granted Dunn a new trial on his own particular grounds, he breached the confines of his judicial power. But assuming arguendo that Judge Fortunato was within his power in granting Dunn a new trial, both of his grounds for doing so were meritless. Judge Fortunato's two particular grounds were (1) newly discovered evidence, e.g., letters he received after trial, and (2) "in the interest of justice," ineffectiveness of counsel.[220] In *Dunn*, the evidence was not newly discovered. Moreover, Vealey's performance satisfied Dunn's constitutional right to assistance of counsel because a judge may not retrospectively question a defense counsel's reasonable strategic decisions at trial.

A. *Newly-Discovered Evidence*

In Rhode Island, a defense attorney may introduce evidence of his client's good character.[221] However, such introduction "opens the door" for the prosecution to introduce rebuttal evidence of the defendant's bad character.[222] With some exceptions, a defense attorney introduces character evidence in the form of reputation or opinion testimony.[223] In certain circumstances, the prosecution, in

220. *See supra* section I.C.

221. Rhode Island Rule of Evidence 404(a)(1) provides that:

> (a) Evidence of a pertinent trait of a person's character or a trait of the person's character is not admissible for the purpose of proving that he or she acted in conformity therewith on a particular occasion, except:
> (1) Evidence of a pertinent trait of the accused's character offered by an accused, or by the prosecution to rebut the same; . . .

Id.; *see also* State v. Speaks, 691 A.2d 547, 550 (R.I. 1997) ("It is true that evidence of a pertinent character trait of the accused may be admissible when offered by the defendant to show that he or she acted in conformity therewith on a particular occasion.").

222. *See* R.I. R. Evid. 404(a)(1); *State v. Quattrocchi*, 681 A.2d 879, 887 (R.I. 1996) (stating that character evidence was improperly admitted because defendant did not place his character in issue).

223. Rhode Island Rule of Evidence 405 provides that:

> (a) . . . In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation

response, may introduce evidence of a defendant's other crimes, wrongs or acts.[224] In *Dunn*, Judge Fortunato claimed that he discovered new evidence of Dunn's good character after his initial verdict, thus justifying a new trial.[225]

In order to grant a new trial based on newly-discovered character evidence, a defendant must satisfy a two-prong test:

> The first prong is a four-part inquiry that requires that the evidence be (1) newly-discovered since trial, (2) not discoverable prior to trial with the exercise of due diligence, (3) not merely cumulative or impeaching but rather material to the issue upon which it is admissible, (4) of the type which would probably change the verdict at trial. Once this first prong is satisfied, the second prong calls for the hearing justice to determine if the evidence presented is "credible enough to warrant a new trial."[226]

The Rhode Island Supreme Court has further elucidated this test—the defendant must show that, if he or she could have used and developed the evidence discovered post-trial, then a "significant chance" exists that such evidence would have raised enough reasonable doubt in the jurors' minds to avoid conviction.[227]

> or by testimony in the form of an opinion. *On cross-examination, inquiry is allowable into relevant specific instances of conduct.*
>
> (b) . . . In cases in which character or trait [of] character of a person is an essential element of a charge, claim, or defense, or when evidence is offered under Rule 404(b), proof may also be made of specific instances of his conduct.

Id. (emphasis added).

224. Rhode Island Rule of Evidence 404(b) provides that:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or to prove that defendant feared imminent bodily harm and that the fear was reasonable.

Id.

225. Opinion Granting Motion for a New Trial at 5-7 app. at 319-20, State v. Dunn (R.I. Super. Ct. Aug. 6, 1997) (No. 96-1005A); *see also supra* notes 44-45 and accompanying text (discussing the letters depicting Dunn's good character which Judge Fortunato received post-trial).

226. State v. Gomes, 690 A.2d 310, 321 (R.I. 1997) (quoting State v. Hernandez, 641 A.2d 62, 72 (R.I. 1994)); *see also* State v. Morejon, 603 A.2d 730, 736 (R.I. 1992) (applying the same two-prong test); State v. Brown, 528 A.2d 1098, 1104 (R.I. 1987) (same).

227. Mastracchio v. Moran, 698 A.2d 706, 719 (R.I. 1997).

1. *The First Prong of the Newly-Discovered Evidence Test*

The potential character evidence represented by the post-trial letters does not satisfy the first prong of the Newly-Discovered Evidence test.[228] With respect to the first inquiry of the first prong, the post-trial letters were not newly discovered since trial. Although the actual character letters sent to Judge Fortunato after the verdict were newly discovered since trial, the letter writers themselves, who would have been the potential character witnesses for the defense at trial, were known to the defense before trial.[229] Defense counsel was aware that these witnesses could testify at trial as to Dunn's character.[230] One of the letter writers actually did testify, although not to the contents of her letter, at trial.[231] Thus, the potential character evidence was available and

228. *See supra* note 226.

229. *See* Opinion Granting Motion for a New Trial at 14 app. at 323-24, *Dunn* (No. 96-1005A). *But see* State's Memorandum in Support of Petition for Writ of Certiorari at 40, State v. Dunn (R.I. Nov. 18, 1997) (No. 97-414 M.P.) ("[T]he letters referred to by the court did not constitute admissible trial evidence in any way, shape, or form, but rank hearsay brought to the court's attention after the verdict. Insofar as he relied upon this unsworn, unauthenticated material as a basis for his ruling, Justice Fortunato again stepped outside the parameters of judicial authority vested in him by Rule 33."). Rhode Island Rule of Evidence 801(c) declares that "'[h]earsay' is a statement [an oral or written assertion], other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." R.I. R. Evid. 801(c). *But see* R.I. R. Evid. 803(21) (providing a hearsay exception for evidence of reputation of a person's character in the community); Respondent's Memorandum in Support of Objection to Petition for Certiorari, State v. Dunn (R.I. Feb. 16, 1998) (No. 97-414 M.P.) (supporting Judge Fortunato's claim that Vealey did not adequately investigate the potential value of good-character evidence).

230. *See* Opinion Granting Motion for a New Trial at 16 app. at 323-24, *Dunn* (No. 96-1005A) ("[Judge Fortunato's] question was, 'Did you discuss with them, his reputation within the community for nonviolence or peacefulness?' Answer [by Vealey]: 'I don't believe I directly asked that question of the persons I was interviewing, but there was some indications from those persons as to what kind of person he was and his character.'"); *see also* State's Memorandum in Support of Petition for Writ of Certiorari at 20, *Dunn* (No. 97-414 M.P.) ("Vealey related that he informed Monsignor Dunn of his right to place before the court his reputation for peacefulness along with specific instances of peaceful or non-violent behavior. He also spoke with persons acquainted for a number of years with the complainant and Monsignor Dunn, though the discussions did not include specific instances where the respondent exhibited a reluctance to employ violence."). *But see* Respondent's Memorandum in Support of Objection to Petition for Certiorari at 20, *Dunn* (No. 97-414 M.P.) (arguing that Vealey failed to investigate properly potential character witnesses).

231. *See* Opinion Granting Motion for a New Trial at 8 app. at 320-21, *Dunn* (No. 96-1005A).

known by the defendant and defense counsel, and could have been developed by them for their use during the trial.[232]

The potential character evidence does not satisfy the first prong's second inquiry because the evidence was indeed discoverable prior to trial with the exercise of due diligence. The information revealed by the letters was readily available to Dunn and Vealey.[233] The State provided Vealey with a list of potential State witnesses.[234] Vealey also interviewed members of the community, some of whom were interviewed on Dunn's behalf.[235] Moreover, Vealey was aware that these individuals could testify to Dunn's good character. Good-character evidence, it is conceded, could change the verdict at trial, provided it was directly connected to the issue of the charge.[236] However, Vealey consciously made a strategic choice to forego such character evidence so as not to open the door to the State's potential bad-character witnesses.[237] Nev-

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232. *See* State v. Hernandez, 641 A.2d 62, 74 (R.I. 1994).

233. *See* Opinion Granting Motion for a New Trial at 14 app. at 324, *Dunn* (No. 96-1005A).

234. *See id.* at 16 app. at 325.

235. *See id.*

> Defense counsel failed to interview [a potential witness] in the nine months after [defendant's] arrest, nor did he interview her during the remaining twelve or so months before trial. Defense counsel was not diligent in attempting to discover this evidence for use at trial . . . . The trial justice correctly concluded that the land-evidence records had been available to [defendant] before trial and could have been developed by her for her use during the original trial.

Hernandez, 641 A.2d at 73-74. *See generally* Defendant's Motion in Limine, State v. Dunn (R.I. Super. Ct. June 12, 1997) (No. 96-1005A) (illustrating Vealey's attempt to block the State's 404(b) witnesses). In *Dunn*, if Vealey had used or developed the potential good-character evidence to which Judge Fortunato refers, then he would have opened the door to the State's bad-character evidence, thus nullifying his efforts, via his motion in limine, to keep such evidence out.

236. *See* Opinion Granting Motion for a New Trial at 12 app. at 322-23, *Dunn* (No. 96-1005A) ("The circumstances may be such that an established reputation for good character, if it is relevant to the issue, would alone create a reasonable doubt, although without it the other evidence would be convincing.") (quoting Edgington v. United States, 164 U.S. 361, 366 (1896)). *Edgington* involved a charge of making a false deposition in aid of a fraudulent pension claim. If character evidence could introduce reasonable doubt under circumstances involving a charge of making a false deposition, then such evidence would be at least equally as powerful where the charge is second-degree sexual assault.

237. *See, e.g.*, Testimony of Lucille Farr at 37-39, State v. Dunn (R.I. Super. Ct. June 12-13, 1997) (No. 96-1005A) (describing Vealey's efforts to keep out the State's 404(b) witnesses). *See generally* Defendant's Motion in Limine, *Dunn* (No. 96-1005A) (depicting Vealey's investigation of the State's bad-character evidence);

ertheless, this character evidence was discoverable pre-trial with the exercise of due diligence.

The potential character evidence fails the third inquiry of the first prong because it was not material to the issue to which it would have been admissible, e.g., whether Dunn used force on one occasion to cause sexual penetration.[238] In evaluating newly-discovered evidence claims, the Rhode Island Supreme Court has defined "material evidence" as evidence having a reasonable probability of denying the defendant a fair trial by undermining confidence in the original verdict and producing a different result.[239] Concededly, the letters describing Dunn as kind, gentle and generous and "not a person to use force and violence,"[240] represent evidence of reputation and opinion of a pertinent trait of the defendant's character which tend to negate an essential element of the charge, e.g., the use of force. However, based on the aforementioned definition of material, the evidence cannot be defined as such. Thus, the evidence fails the third inquiry for the same reasons that it fails the fourth. The character evidence, therefore, is

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Defendant's Motion to Suppress/Motion for Preliminary Evidentiary Hearing, State v. Dunn (R.I. Super. Ct. June 12, 1997) (No. 96-1005A) (same); Defendant's Motion to Suppress/Motion for Preliminary Evidentiary Hearing, State v. Dunn (R.I. Super. Ct. Nov. 18, 1996) (No. 96-1005A) (same); Defendant's Motion to Compel More Responsive Answer to Defendant's Motion for Bill of Particulars, State v. Dunn (R.I. Super. Ct. Nov. 18, 1996) (No. 96-1005A) (same); *see also* Vealey Interview, *supra note* 39 ("We had filed extensive motions in limine to exclude a number of . . . bad-character witnesses that the State was looking to have testify . . . . all the 404(b) witnesses the State looked to introduce were kept out based upon our motion . . . . Well it seems to me . . . that it would be a little unusual to close the door on the bad-character evidence and have the State bring in all the people that you fought to keep out in the first place."); State's Memorandum in Support of Petition for Writ of Certiorari at 20, State v. Dunn (R.I. Nov. 18, 1997) (No. 97-414 M.P.) ("Through discovery, he [Vealey] had been made aware of a number of individuals other than Ms. Ryan available to the State as rebuttal witnesses should he 'open the door' by presenting character evidence on behalf of his client."). *But see* Respondent's Memorandum in Support of Objection to Petition for Certiorari at 20, State v. Dunn (R.I. Feb. 16, 1998) (No. 97-414 M.P.) (arguing that Vealey's failure to investigate potential character witnesses adversely affected the defense).

238. *See* Opinion Granting Motion for a New Trial at 9-10 app. at 321, *Dunn* (No. 96-1005A).

239. Broccoli v. Moran, 698 A.2d 720, 726 (R.I. 1997) (quoting Kyles v. Whitley, 514 U.S. 419, 434-35 (1995)).

240. Opinion Granting Motion for a New Trial at 5-6, 10 app. at 319, 321-22, *Dunn* (No. 96-1005A).

not material because it does not create a reasonable probability of a different result.[241]

Finally, the potential character evidence fails the fourth inquiry of the first prong. If Vealey had introduced the character evidence, the State would have rebutted that proffer by introducing its bad-character evidence. The effect of the bad-character evidence would have either negated the effect of the good-character evidence or further damaged Dunn's case.[242] Therefore, introduction of the character evidence, at the least, would not have benefitted Dunn's case. At the worst, introducing the character evidence would have irreparably damaged Dunn's case. In any event, however, the character evidence would not have led to a different result.[243]

2. *The Second Prong of the Newly-Discovered Evidence Test*

If the first prong's four inquiries are satisfied, then the court may move to the second prong: whether the alleged "new" evi-

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241. *See Broccoli*, 698 A.2d at 726; State v. Charette, 688 A.2d 1286, 1289 (R.I. 1997). *But see* Opinion Granting Motion for a New Trial at 6-7 app. at 320, *Dunn* (No. 96-1005A) (stating that the newly-discovered character evidence created a reasonable probability of a different result). *See generally* Mastracchio v. Moran, 698 A.2d 706, 714-15 (R.I. 1997) (discussing the elements of materiality in relation to alleged newly-discovered evidence).

242. *See* State's Memorandum in Support of Petition for Writ of Certiorari at 20, *Dunn* (No. 97-414 M.P.) ("A number of other people had given statements indicating that Monsignor Dunn had used force or violence in order to obtain sex; some claimed that he had plied them with drugs and alcohol to lower their resistance. Other allegations against the respondent involved bestiality, satanic worship and other perverse behavior."). *But see generally* Respondent's Memorandum in Support of Objection to Petition for Certiorari at 24, *Dunn* (No. 97-414 M.P.) (claiming that Vealey did not properly investigate the State's potential bad-character witnesses).

243. *See generally* Record at 254, State v. Dunn (R.I. Super. Ct. June 24, 1997) (No. 96-1005A). In light of the State's case against Dunn, as well as evidence kept out through Vealey's decision to "close the door" to bad-character evidence, admitting this newly-discovered good-character evidence would not have created reasonable doubt in the jurors' minds to avoid conviction. *See, e.g.*, State's Memorandum in Support of Petition for Certiorari, *Dunn* (No. 97-414 M.P.) (reiterating Judge Fortunato's claim that Vealey did not properly investigate the potential value of good-character evidence); *Mastracchio*, 698 A.2d 706, 719 (R.I. 1997) (discussing the defense's burden of showing that newly-discovered evidence would create a significant chance of reasonable doubt in enough juror's minds to avoid conviction). *But see* Respondent's Memorandum in Support of Objection to Petition for Certiorari at 23, *Dunn* (No. 97-414 M.P.) (arguing that Vealey's failure to investigate bad-character witnesses caused him to forego potential good-character evidence that may have aided his client's case).

dence is credible enough to warrant a new trial.[244] In doing so, a judge must exercise independent judgment regarding a particular witness's credibility and what weight, if any, should be given to the witness's testimony.[245] Since the first prong of the test for newly-discovered evidence was not satisfied, analyzing the second prong is unnecessary.[246] However, assuming arguendo that the character evidence met the first prong, Judge Fortunato would still fail the second prong. In his August 6th opinion, Judge Fortunato did not attempt to discover whether the potential witnesses were credible to testify.[247] Without such a credibility determination from Judge Fortunato or Vealey, the character evidence cannot satisfy the second prong of the test.

3. *Hypothetically Speaking, It's Still Not Newly-Discovered Evidence*

Hypothetically, Judge Fortunato could make two arguments in support of his newly-discovered evidence claim. On further analysis, however, neither argument would withstand the newly-discovered evidence test.

a. *The Character Evidence: Newly Discovered by Whom?*

First, Judge Fortunato could postulate that the newly-discovered evidence test includes a loophole allowing him to raise successfully the ground of the newly-discovered character evidence. Specifically, although Vealey was personally aware of the potential

244. *See* State v. Gomes, 690 A.2d 310, 322 (R.I. 1997); *see also* State v. Hernandez, 641 A.2d 62, 72 (R.I. 1994) (quoting State v. Brown, 528 A.2d 1098, 1104 (R.I. 1987) (stating the need to evaluate whether newly-discovered evidence is credible enough to warrant a new trial)).

245. *See* State v. Morejon, 603 A.2d 730, 737 (R.I. 1992).

246. *See Hernandez*, 641A.2d at 72 ("If this four-pronged threshold analysis is satisfied, the trial judge must then determine whether the newly-discovered evidence is 'credible enough to warrant a new trial.'") (quoting *Brown*, 528 A.2d at 1104)); *see also* State v. Brown, 619 A.2d 828, 833 (R.I 1993) ("[I]n passing upon this motion [for new trial], the trial justice observed that this evidence could by reasonable diligence have been discovered . . . . This finding was conclusive. The evidence was not newly-discovered.").

247. *See* Opinion Granting Motion for a New Trial at 15 app. at 324, *Dunn* (No. 96-1005A) ("Whether people in possession of such information would be credible at trial, and would withstand cross-examination is, of course, another question, but this was not appropriately investigated."). *But see* Vealey Interview, *supra* note 39 (recognizing that in order to avoid the State's bad-character evidence, Vealey chose not to place his client's character in issue).

character evidence found in the letters, Judge Fortunato was not so personally aware until he received the letters after judgment.[248] Thus, with no knowledge of the letters until after judgment, he satisfied the first inquiry of the first prong.[249] However, if Judge Fortunato could grant the motion sua sponte on the grounds of newly-discovered evidence, then he still must satisfy not only the remaining inquiries of the first prong of the test but the second prong as well.[250] If one views the test from either Vealey's or Judge Fortunato's perspective, the above arguments regarding materiality, whether the evidence would change the verdict and whether it was credible enough to warrant a new trial remain the same.[251] Thus, the only part of the test that one must analyze from Judge Fortunato's perspective is the second inquiry of the first prong: whether the evidence was discoverable prior to trial with due diligence.

Judge Fortunato was not diligent in discovering potential character evidence on Dunn's behalf, thus failing the second inquiry of the first prong. Significantly, he granted Vealey's motions in limine to keep out the State's bad-character evidence.[252] Vealey based his motion in limine in part on *State v. Quattrocchi*.[253] In *Quattrocchi*, the supreme court held that character evidence was improperly admitted into evidence, in violation of Rule 404(b), because the defendant did not place his character in issue.[254] Thus, it would be incongruous for Vealey to make a motion in limine to keep out 404(b) bad-character evidence and yet open the door to such evidence by making Dunn's good character an issue under

248. *See* Opinion Granting Motion for a New Trial at 5 app. at 319, *Dunn* (No. 96-1005A).

249. *See supra* note 226.

250. *See supra* note 226 and accompanying text.

251. *See supra* section IV.A.1 & 2.

252. *See* Defendant's Motion in Limine, *Dunn* (No. 96-1005A); *see also* Vealey Interview, *supra* note 39 ("We had extensive hearing and argument on our motion in limine and we made the motion based on *State v. Quattrocchi* and a number of other cases about the issue of the admissibility of bad character . . . . [T]he judge granted our motion to exclude all those witnesses.").

253. 681 A.2d 879 (R.I. 1996).

254. *See id.* at 887 ("Even though defendant testified in this case, after learning that the other-crimes evidence would be admitted, he did not purport to place his character in issue. Consequently we believe that the devastating evidence relating to the sexual incidents . . . was improperly admitted in violation of Rule 404(b).").

404(a)(1).[255] Considering the motion in limine and the State's potential for introducing bad-character evidence, if Judge Fortunato, or Vealey, for that matter, conducted a further search for good-character evidence, then such a search would have been illogical.

b. *Grasping at Straws: Is Ineffective Assistance Also Newly-Discovered Evidence?*

As a second hypothetical argument, Judge Fortunato could argue that evidence of Vealey's ineffectiveness was only brought to his attention post-trial.[256] Thus, he could argue that the evidence of Vealey's ineffectiveness was newly discovered and the ineffectiveness claim could be brought under the rubric of newly-discovered evidence.[257] This reasoning would fail, however, for two reasons. First, Judge Fortunato, based on his reasoning in the August 6th opinion, could have discovered this "evidence," e.g., Vealey's alleged lack of experience, with due diligence by inquiring into Vealey's background either pre-trial or during trial.[258] Second, the evidence of Vealey's ineffectiveness would not have changed the verdict at trial for the very fact that he was not ineffective.[259]

Based on the foregoing analysis, Judge Fortunato's potential character evidence does not withstand the newly-discovered evidence test. In addition, the two hypothetical arguments posited above do not offer support for his claim that newly-discovered evidence justified a new trial. Therefore, Judge Fortunato cannot base his decision to grant Dunn a new trial on the ground of newly-discovered evidence.

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255. *See supra* notes 221, 242. *See generally* Defendant's Motion in Limine, *Dunn* (No. 96-1005A) (referring to the State's potential 404(b) witnesses).

256. *See* Opinion Granting Motion for a New Trial at 4-5 app. 319, State v. Dunn (R.I. Super. Ct. Aug. 6, 1997) (No. 96-1005A).

257. *See* United States v. Garcia, 19 F.3d 1123, 1126 (6th Cir. 1994) (stating that "evidence of ineffective assistance of counsel 'is not newly-discovered evidence for purposes of a motion for a new trial where the facts supporting the claim were within the defendant's knowledge at the time of trial'") (quoting United States v. Seago, 930 F.2d 482, 489 (6th Cir. 1991)).

258. *See* Opinion Granting Motion for a New Trial at 19-22, app. at 326-28, *Dunn* (No. 96-1005A) (relying on Chief Justice Weisberger's executive order to evaluate Vealey's experience).

259. *See supra* section IV.B.

B. *Ineffective Assistance of Counsel (In the Interest of Justice)*

Applying Rhode Island and United States Supreme Court precedent, Judge Fortunato's second ground for granting Dunn a new trial, e.g., ineffective assistance of counsel, fails to support his decision.

1. *The Defendant Must Raise the Ineffectiveness Argument*

Both the Sixth Amendment of the United States Constitution and Article 1, section 10 of the Rhode Island Constitution provide the right to assistance of counsel to accused persons only.[260] Judge Fortunato, a superior court judge, may not assert this right on Dunn's behalf. Since a claim of ineffective assistance of counsel involves the *defendant's* constitutional rights, it is only appropriate that the defendant, and not the trial judge, raise the claim.[261]

When evaluating whether defense counsel has rendered effective assistance to a defendant, the Rhode Island Supreme Court, in *State v. Brennan*,[262] adopted the test set forth in *Strickland v. Washington*.[263] The *Strickland* test provides that the defendant must raise the ineffectiveness argument:[264]

> First, the *defendant* must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the *defendant* must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable . . . . The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.[265]

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260. U.S. Const. amend. VI; R.I. Const. art. 1, § 10.

261. *But see* section III.D. (discussing the Rhode Island Supreme Court's power to recognize errors affecting constitutional rights even if not raised by the defendant).

262. 627 A.2d 842 (R.I. 1993).

263. 466 U.S. 668 (1984).

264. *See* State v. Brennan, 627 A.2d 842, 845 (R.I. 1993) (quoting *Strickland*, 466 U.S. at 687).

265. *Id.* (emphasis added)

At the time he motioned the court for a new trial, Dunn did not assert a violation of his Sixth Amendment right to counsel.[266] Therefore, Judge Fortunato overstepped his authority by asserting this right to counsel on Dunn's behalf. Moreover, even if Dunn had asserted that his right to counsel had been violated, Vealey acted within the scope of representation guaranteed all accused persons—his assistance was effective.

2. *The Ineffectiveness Claim Fails the First Prong of the* Strickland *Test*

Judge Fortunato's claim that Vealey was ineffective is meritless because courts shall not deem attorneys ineffective for making reasonable strategic trial choices: "[T]he defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy'. . . . The first part of the *Strickland* test can be met only if a party shows 'that counsel's representation fell below an objective standard of reasonableness.'"[267] To assess fairly an attorney's performance, a judge must accord substantial deference to the ambit of the attorney's decision-making.[268] Accordingly, he must make every effort to avoid the "distorting effects of hindsight,"[269] to reconstruct the circumstances of the challenged conduct and to analyze that conduct from the attorney's perspective at that time.[270]

Vealey's performance does not satisfy the first part of the *Strickland* ineffectiveness test because his performance was not deficient. Vealey's decision not to raise character evidence because of the possibility of opening the door to bad-character evidence was a strategic choice.[271] Like the attorney in *Jacques v. State*,[272]

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266. *See* Defendant's Motion for a New Trial, *Dunn* (No. 96-1005A); *see also* Vealey Interview, *supra* note 39 (emphasizing Dunn's want of claiming that Vealey's assistance violated his Sixth Amendment rights).

267. *Brennan*, 627 A.2d at 845 ("The proper measure of attorney performance remains simply reasonableness under prevailing professional norms . . . . [T]he performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances.") (quoting *Strickland*, 466 U.S. at 688).

268. *See* Brown v. Moran, 534 A.2d 180, 182 (R.I. 1987) (quoting *Strickland*, 466 U.S. at 689).

269. *Id.*

270. *See id.*; LaChappelle v. State, 686 A.2d 924, 927 (R.I. 1996); *Brennan*, 627 A.2d at 852.

271. *See Brown*, 534 A.2d at 182-83 (holding that a strategic choice to withhold character evidence, after reasonable investigation, does not rise to the level of inef-

Vealey considered the likelihood that the State would put on counterweight character witnesses.[273] In addition, Vealey's pretrial discovery evinces an awareness of the State's potential bad-character witnesses.[274] Although Vealey did not contact these potential bad-character witnesses, he knew the subject of their testimony and their availability to the State.[275] He simply made a strategic choice not to place Dunn's character in issue, thereby denying the State an opportunity to present these bad-character witnesses. In doing so, Vealey strategically pursued his client's best interests by minimizing the risk that the State would exploit such testi-

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fectiveness). "The trial justice determined that trial counsel was aware of the witnesses and evidence available concerning petitioner's alleged intoxication. He further determined that trial counsel, after reasonable investigation, made a strategic choice that his testimony would not be helpful to petitioner." *Id.*; *see also* Jacques v. State, 669 A.2d 1124, 1149 (R.I. 1995) ("'[A] tactical decision which later proves to be a less feasible choice than the one made will not in and of itself be a basis for a claim of deprivation of the right to effective counsel.' The decision to not call witnesses was such a 'tactical decision' the defendant would have to live with.") (quoting State v. Welch, 330 A.2d 400, 401-02 (R.I. 1975)); *Brennan*, 627 A.2d 842, 852 (R.I. 1993) (holding that the court will not second guess trial counsel's strategic choices which are "clearly reasonable and within the bounds of representation").

272. 669 A.2d 1124 (R.I. 1995).

273. *See id.* at 1148-49 (describing the defense attorney's use of only one character witness, after he assessed the likelihood that the State would use counterweight witnesses in rebuttal, as representing a tactical choice reasonable under the circumstances).

274. *See supra* note 238.

275. *See* Letters from Phyllis Hutnack to the Attorney General (Oct. 10, 1995; Mar. 5, 1996; Dec. 6, 1996) (on file at the Rhode Island Superior Court (No. 96-1005A)); Letter from Kathleen Moriarty Crist to the Attorney General (May 6, 1997) (on file at the Rhode Island Superior Court (No. 96-1005A)); Defendant's Motion in Limine, State v. Dunn (R.I. Super. Ct. June 12, 1997) (No. 96-1005A); State's Memorandum in Support of Petition for Writ of Certiorari at 50, State v. Dunn (R.I. Nov. 18, 1997) (No. 97-414 M.P.). *But see* Respondent's Memorandum in Support of Objection to Petition for Certiorari, State v. Dunn (R.I. Feb. 16, 1998) (No. 97-414 M.P.) (alleging that Vealey's failure to investigate potential character witnesses impaired his judgment).

mony.[276] Thus, he made a reasonable strategic decision to avoid the State's potential bad-character evidence.[277]

a. *Vealey Performed According to Professional Norms*

In evaluating attorney performance, the *Strickland* test requires an inquiry into professional norms.[278] Judge Fortunato cited American Bar Association Standard 4-4.1-1 as an appropriate touchstone for an attorney's performance: "[i]t is the duty of the lawyer to . . . explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction."[279] However, Vealey had no need to investigate further potential good-character evidence if his trial strategy, evident from his motion in limine and his decision not to question defense witnesses about Dunn's character, was to keep out the State's bad-character evidence.[280] Expecting Vealey to investigate evidence that, by virtue of his motion in limine, would not factor into the trial is tantamount to superfluous work. The American Bar Association standard does not require such extra work, but rather requires an attorney to explore all matters relevant to the case and its potential penalty.

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276. *See* Defendant's Motion in Limine, *Dunn* (No. 96-1005A); State's Memorandum in Support of Petition for Writ of Certiorari at 50, *Dunn* (No. 97-414 M.P.); *see also* Emerson v. Gramley, 91 F.3d 898, 902 (7th Cir. 1996), *rehearing and suggestion for rehearing denied, certiorari denied* 117 S. Ct. 1260 (1997), *certiorari denied* Gilmore v. Emerson, 117 S. Ct. 1289 (1997) ("[The defense attorney] could have refused to call the witnesses, . . because the decision whether or not to call a witness is a lawyer's tactical decision on which consultation with the client is not required . . . . This is provided that the decision rests on an adequate foundation. . . ."). In the present case, Vealey did discuss with Dunn his right to place his reputation before the court. *But see* Respondent's Memorandum in Support of Objection to Petition for Certiorari, *Dunn* (No. 97-414 M.P.) (alleging that Vealey performed deficiently and thus, prejudiced the defense).

277. *See* Brown v. Moran, 534 A.2d 180, 182 (R.I. 1982) (quoting Strickland v. Washington, 466 U.S. 668, 689 (1984)).

278. *Strickland*, 477 U.S. at 686-87 (stating that "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms").

279. 1 A.B.A. Standards for Criminal Justice § 4-4.1 (2d ed. 1980); *see also* Opinion Granting Motion for a New Trial at 15 app. at 324, State v. Dunn (R.I. Super. Ct. Aug. 6, 1997) (No. 96-1005A) (comparing § 4-4.1 to Vealey's performance).

280. *See* Defendant's Motion in Limine, *Dunn* (No. 96-1005A); Opinion Granting Motion for a New Trial at 8 app. at 320-21, *Dunn* (No. 96-1005A).

In his August 6th opinion, Judge Fortunato mentioned that a letter writer who testified at trial was not asked about Dunn's character "for some reason."[281] It seems logical to infer that, in order to keep the door closed to the State's bad-character evidence, Vealey did not ask this witness about Dunn's good character. Vealey thus foreclosed the State's ability to present rebuttal bad-character evidence by choosing not to put Dunn's character in issue.[282] Therefore, it was unnecessary for Vealey to investigate further good-character witnesses because they were not going to testify. In *Kimmelman v. Morrison*,[283] the Supreme Court declared that, in order to afford a defendant an ample opportunity to meet the prosecution's case, an attorney must either investigate or make a reasonable decision not to investigate the prosecution's case.[284] Vealey reasonably investigated the State's case through his discovery motions, thus complying with *Kimmelman*'s mandate.[285] From this information he gathered through discovery as well as information provided by his client, Vealey used his discretion and made a reasonable decision not to investigate further character evidence.[286]

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281. Opinion Granting Motion for a New Trial at 8 app. at 321, *Dunn* (No. 96-1005A).

282. *See* State's Memorandum in Support of Petition for Writ of Certiorari at 49, State v. Dunn (R.I. Nov. 18, 1997) (No. 97-414 M.P.) (Had Vealey chosen to place character witnesses on the stand to testify to Monsignor Dunn's gentle, non-forceful nature, the State had the option of presenting evidence that he was capable of exerting the force necessary to commit sexual assault."); *see also* R.I. R. Evid. 404(a)(1) (allowing the State to rebut a defendant's good-character evidence). *But see* Respondent's Memorandum in Support of Objection to Petition for Certiorari, State v. Dunn (R.I. Feb. 16, 1998) (No. 97-414 M.P.) (arguing that Vealey's failure to investigate the State's bad-character evidence caused Dunn to forego valuable good-character evidence).

283. 477 U.S. 365 (1986).

284. *See id.* at 385 ("Respondent's lawyer neither investigated, nor made a reasonable decision not to investigate, the State's case through discovery. Such a complete lack of pretrial preparation puts at risk . . . the defendant's right to an 'ample opportunity to meet the case of the prosecution.'"); Strickland v. Washington, 466 U.S. 668, 691 (1984) ("[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.").

285. *See supra* notes 274-76.

286. *See* State's Memorandum in Support of Petition for Writ of Certiorari at 20 app. at 20, *Dunn* (No. 97-414 M.P.) (referring to discovery); Vealey Interview, *supra* note 39 ("[T]he judge doesn't know everything about . . . this case, my client,

b. *The Alleged Conflict of Interest Is Irrelevant*

As an additional basis for his ineffectiveness claim, Judge Fortunato raised a conflict-of-interest argument involving a potential State witness.[287] Vealey did not contact this State witness because she was also a plaintiff in a civil lawsuit against Dunn; as such, Vealey was prohibited from approaching her.[288] Judge Fortunato concluded that failure to investigate because of an actual conflict, acknowledged by defense counsel, raises a dilemma that impacts the constitutional right to have the *assistance* of counsel.[289] Vealey's decision, however, was not unreasonable under the circumstances. Concededly, Vealey could have contacted the State witness's attorney. This action was unnecessary, however, because Vealey already knew, through lengthy, periodically updated letters that she had written to the prosecutor describing her allegations, whether her testimony at the criminal trial would rebut possible character evidence.[290] Since contacting this witness was unnecessary, the fact that she filed a civil suit against Dunn does not create a conflict of interest for Vealey in the criminal trial. Thus, he had no need to investigate this witness further on behalf of his client.

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in terms of . . . other pending civil cases against him, other people that . . . I may know, I may know of in terms of . . . my information that I received from my client."). *But see* Respondent's Memorandum in Support of Objection to Petition for Certiorari, *Dunn* (No. 97-414 M.P.) (arguing that the alleged conflict of interest crippled the defense).

287. *See* Opinion Granting Motion for a New Trial at 16-17 app. at 324, State v. Dunn (R.I. Super. Ct. Aug. 6, 1997) (No. 96-1005A).

288. *See* R.I. Rules of Professional Conduct, Rule 4.2 (providing that "[i]n representing a client, a lawyer shall not communicate about the subject of the representation with a party a lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so"); Opinion Granting Motion for a New Trial at 17 app. at 325, *Dunn* (No. 96-1005A).

289. *See* Opinion Granting Motion for a New Trial at 17 app. at 325, *Dunn* (No. 96-1005A) (quoting Culyer v. Sullivan, 446 U.S. 335, 350 (1980)); *see also* U.S. Const. amend. VI (providing the right to assistance of counsel to accused persons); R.I. Const. art 1, § 10 (same).

290. *See, e.g.*, Letters from Phyllis Hutnack to the Attorney General (Oct. 10, 1995; Mar. 5, 1996; Dec. 6, 1996) (on file at the Rhode Island Superior Court (No. 96-1005A)); *see also* Vealey Interview, *supra* note 39 ("[I]t's not the situation where we have someone's name and we don't know what they're [sic] going to testify to . . . .We had every indication of what she was going to say when she testified. In fact, we used that information in our 404(b) . . . motion in limine.").

c. State v. Franklin *and the Waiver of a Jury Trial*

Judge Fortunato stated that Vealey's inexperience tainted Dunn's waiver of a jury trial.[291] However, advising Dunn to waive his right to a jury trial represents sound trial strategy. *State v. Franklin*,[292] read in conjunction with the Rhode Island and federal Constitutions, provides the basis for two counter-arguments to Judge Fortunato's claim. First, the right to a jury trial, like the right to assistance of counsel, is the defendant's right under the Rhode Island and United States Constitutions.[293] *Franklin* provides that "[u]nquestionably, defendant, in the exercise of his free choice, had the right to dispense with his basic constitutional right to a jury trial."[294] Since the *defendant* possesses not only the right to a jury trial but also the concomitant right to dispense with it, Judge Fortunato, a superior court judge, cannot claim a violation of this right on Dunn's behalf.[295] The second counter-argument draws from the *Franklin* test for the improper waiving of the right to a jury trial. *Franklin* requires that a defendant, in order to show that his right to a jury trial was improperly waived, must satisfy three elements. First, a defendant must make a plain showing that his waiver was not freely and intelligently waived.[296] Second, he must sustain the burden of proving essential unfairness resulting from waiver of a jury trial.[297] Third, the defendant must sustain that burden not as a matter of speculation but as a "demonstrable reality."[298] In addition, *Franklin* implicitly provides that the defendant, not a superior court judge, must satisfy these

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291. *See supra* section I.C.

292. 241 A.2d 219 (R.I. 1968).

293. U.S. Const. amend. VI; R.I. Const. art 1, § 10; *see also* State v. Moran, 605 A.2d 494, 496 (R.I. 1992) (stating that "Rhode Island law is well settled that a criminally accused defendant has an absolute right to waive a trial by jury if the waiver is knowing, intelligent, and voluntary"). *But see Moran*, 605 A.2d at 496 (providing that "there is no Federal Constitutional right to a jury waived trial") (citing Singer v. United States, 380 U.S. 24, 85 (1965)).

294. *Franklin*, 241 A.2d at 222 (R.I. 1968) (citing Adams v. United States *ex rel.* McCann, 317 U.S. 269 (1942); Patton v. United States, 281 U.S. 276 (1930)); *see generally Moran*, 605 A.2d at 496 (acknowledging a defendant's right to waive a trial and the trial court's role in determining whether a defendant knowingly, intelligently and voluntarily waived that right).

295. *See supra* section III.D.

296. *See Franklin*, 241 A.2d at 223 (citing Adams v. United States *ex rel.* McCann, 317 U.S. 269 (1942)).

297. *See id.*

298. *Id.*

elements.[299] Thus, Judge Fortunato may not rely on Dunn's waiver of jury trial to support his ineffectiveness argument.

Even assuming that Judge Fortunato could use Dunn's waiver of a jury trial to support his ineffectiveness claim, his argument would fail the first prong of the *Franklin* test. Dunn's waiver of a jury trial is recorded proof that his waiver was freely and intelligently made.[300] According to Rhode Island Superior Court Rule of Criminal Procedure 23, a party must waive his right to a jury trial in writing, in open court and with the approval of the court.[301] In addition, the party must knowingly, intelligently and voluntarily waive that right.[302] Here, Dunn satisfied these requirements—he knowingly, intelligently and voluntarily waived his right to a jury trial in writing, in open court and with the approval of the court.[303] Moreover, Judge Fortunato was at liberty to conduct as extensive an inquiry as he deemed necessary to discern whether Dunn understood the consequences of this action.[304] Nonetheless, Judge

299. *Id.*

300. *See* Defendant's Waiver of Jury Trial, State v. Dunn (R.I. Super. Ct. June 23, 1997) (No. 96-1005A); State v. Moran, 605 A.2d 494, 496 (R.I. 1992) ("[The] substantive right to invoke a bench trial belongs to the defendant and is subject only to the procedural requirement that a trial justice determine that the defendant understands and accepts the consequences of executing a waiver."); State v. DiStefano, 593 A.2d 1351 (R.I. 1991) ("The purpose of requiring a defendant to execute a written waiver is both to ensure that the defendant is aware of the importance and the significance of the right he or she is waiving and to provide evidence of the defendant's consent.").

301. R.I. Super. Ct. R. Crim. P. 23.

302. *See Moran*, 605 A.2d 494, 496 (R.I. 1992). Rule 23 accomplishes two objectives. First, it ensures that the defendant is aware of the importance and significance of his decision by allowing the court to monitor the waiver and to intervene if necessary. Second, Rule 23's "in writing" requirement creates a record that provides evidence of the defendant's consent. *See Moran*, 605 A.2d at 496 (discussing Rule 23's procedural safeguards); State v. DiStefano, 593 A.2d 1351, 1352 (R.I. 1991); State v. Cruz, 517 A.2d 237, 243-44 (R.I. 1986). *See generally* R.I. Gen. Laws § 12-17-3 (1956) (1994 Reenactment) (discussing the judge's special findings and rulings required in a bench trial); MacFadyen & Hurst, *supra* note 67, § 23.3, at 224 (stating that Rule 23 in effect allows the court to (1) monitor the waiver and (2) intervene if necessary, and creates "a presumptively conclusive written record" upon which to evaluate possible future claims that the waiver failed to meet the stringent standards for waiving a constitutional right); Vealey Interview, *supra* note 39 ("[S]o there was an open inquiry in the court regarding that mental capacity. And its required by the rules for the court to inquire of the defendant.").

303. *See* Defendant's Waiver of Jury Trial, *Dunn* (No. 96-1005A).

304. *See* State v. Feng, 421 A.2d 1258, 1267 (R.I. 1980); *see also* MacFadyen & Hurst, *supra* note 67, § 23.3, at 224 (discussing the in-court procedure for waiving one's right to a jury trial).

Fortunato granted the waiver, thereby evincing his satisfaction that Rule 23 procedure was observed.[305] Therefore, he cannot assert a post-hoc claim that Dunn's waiver was not freely or intelligently made after he tacitly found that Dunn's waiver was freely and intelligently made at trial.

Judge Fortunato also fails the second prong of the *Franklin* test because the waiver did not cause Dunn essential unfairness. In light of the difficulty in obtaining an untainted jury for Count One of the indictment, Vealey made a strategic choice, reasonable under the circumstances, that Dunn should waive his right to a jury trial for Count Two.[306] In cases where the jury pool may be tainted, Rule 21(a) provides the defense attorney with the option of making a motion to transfer the proceeding to another county within the state.[307] Theoretically, by moving the proceeding to a different county, the defendant will then obtain a jury pool unexposed to negative publicity.[308] Unfortunately for Dunn, such a transfer would be useless because the negative publicity permeated the entire state of Rhode Island.[309]

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305. *See* Defendant's Waiver of Jury Trial, *Dunn* (No. 96-1005A).

306. *See id.*

307. *See* R.I. Super. Ct. R. Crim. P. 21(a) (stating that "[t]he court on motion of the defendant shall transfer the proceedings as to the defendant *to another county* whether or not such county is specified in the defendant's motion if the court is satisfied that there exists in the county where the prosecution is pending so great a prejudice against the defendant that he or she cannot obtain a fair and impartial trial in that county") (emphasis added).

308. *See* State v. Burns, 84 A.2d 801, 802 (R.I. 1951).

309. *See* State v. Hightower, 661 A.2d 948, 956 (R.I. 1995).

> It is conceded by counsel for defendant . . . that the entire State of Rhode Island had been covered by the Providence Journal and also by reports of other elements of the media that blanketed this state. Consequently it was extremely unlikely that any county outside the counties of Providence and Bristol which are combined for purposes of juror selection) would have produced an array of persons who would be less likely to have been exposed to publicity than those of the most populated area from which the jurors were actually selected.

Id.; Doane Hulick, *Retired Priest, 75, Is Charged with Raping Girl in 1965*, Prov. J. Bull., Mar. 29, 1996, at B1, *available in* 1996 WL 9377811; Bob Kerr, *Personal Agonies Painfully Revealed, Eagerly Consumed*, Prov. J. Bull., May 23, 1997, at B1, *available in* 1997 WL 10833583; Mike Stanton, *Woman Sues Priest, Says He Fathered Child*, Prov. J. Bull., May 23, 1997, at A1, *available in* 1997 WL 10833639. *See generally* Vealey Interview, *supra* note 39 ("We had . . . I think probably twenty [or] twenty two [potential jurors] that were dismissed because they heard either the T.V. coverage, Mary Ann Sorrentino, had read the paper . . . and then once the trial ended and the motion for acquittal [was granted] we had

Judge Fortunato fails the third prong of the *Franklin* test. The Rule 23 and Rule 21 arguments rebut Judge Fortunato's claim that, because of Vealey's inexperience, the waiver of a jury trial caused Dunn injustice. Judge Fortunato's claim therefore is not a demonstrable reality. Rather, it is purely speculative.[310] Thus, Judge Fortunato fails all three prongs of the *Franklin* test.

d. *Dunn's Right to Testify*

Dunn waived his right to testify in his own defense after discussing the consequences with Vealey.[311] When counseling Dunn concerning whether he would testify, Vealey considered such factors as the strengths and weaknesses of the State's case and whether Dunn's testimony would help the State's case or Dunn's case.[312] Concededly, a decision to waive testifying in one's own defense is fraught with unexpected side-effects.[313] However, if an attorney reasonably concludes that it would not be in his client's best interest to testify, then whether or not that decision is erroneous in hindsight should not create a justiciable issue.

State v. Welch[314] is illustrative of this point. In *Welch*, the supreme court, supporting its decision that Welch's attorney had not been ineffective, held that:

> Trial counsel must make decisions of an almost infinite variety in the course of a criminal trial: whether to advise a plea to a lesser offense; whether to object; whether to offer a witness of possible doubtful credibility[;] . . whether to advise the

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extensive coverage for about two or three days . . . . So with all that kind of [publicity] it was tough enough to pick a jury for count number one.").

310. *See* State v. Franklin, 241 A.2d 219, 223 (R.I. 1968).

311. *See* State's Memorandum in Support of Petition for Writ of Certiorari at 47, State v. Dunn (R.I. Nov. 18, 1997) (No. 97-414 M.P.) ("Defense counsel is, of course, obliged to inform his client of his right to take the stand. He may offer his opinion on whether or not it would be wise to do so; so long as the final decision is the client's, no basis for an ineffectiveness claim exists.") (citing State v. Camacho, 40 F.3d 349, 355 (11th Cir. 1994)). *But see generally* Respondent's Memorandum in Support of Objection to Petition for Certiorari at 24, State v. Dunn (R.I. Feb. 16, 1998) (No. 97-414 M.P.) (stating that Vealey's alleged conflict of interest impaired his ability to conduct an adequate defense).

312. *See* Vealey Interview, *supra* note 39 ("[T]he general kinds of things you would consider is the strengths or weaknesses of the state's case and are you going to help the state or help yourself in terms of having your client testify.").

313. *See* State v. Welch, 330 A.2d 400, 401 (R.I. 1975) (citing Mitchell v. United States, 259 F.2d 787 (D.C. Cir. 1958)).

314. 330 A.2d 400.

> defendant to take the stand and subject himself to cross-examination . . . . All these and more are practical questions and very real questions. Bad judgment, or even good but erroneous judgment, may result in adverse effects. These are simple facts of trial; they are not justiciable issues.[315]

Assuming arguendo that Vealey provided Dunn with erroneous advice regarding whether to waive his right to testify on his own behalf, Vealey's reasoning does not rise to the level of a justiciable issue under *Welch* because such potential erroneous judgment is simply a function of the unpredictability of a trial. Thus, Judge Fortunato cannot use Dunn's right not to testify as a justification for his ineffectiveness claim.[316]

e. *Vealey's Experience: There's a First Time for Everything*

Judge Fortunato claimed that Vealey's inexperience resulted in the failure to present character evidence supporting a recognized defense and influenced Vealey's advice to Dunn on whether to waive a jury trial and take the stand.[317] Judge Fortunato determined that while Vealey participated in a felony case in the 1980s, he had never represented a person accused of a felony in a superior court trial: "a capital case is simply no place for on-the-job training."[318] The United States Supreme Court, however, disagrees with this assertion. In *United States v. Cronic*,[319] the court held that an attorney's experience is relevant only if it provides insight when a court evaluates his *actual* performance for ineffectiveness. However, such experience does not justify a presumption that the attorney was ineffective unless a court evaluates his actual per-

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315. *Welch*, 330 A.2d at 401 (citing Mitchell v. United States, 259 F.2d 787 (D.C. Cir. 1958)).

316. *See* U.S. Const. amend V. The right not to be compelled to be a witness against oneself is the *defendant's* constitutional right. Thus, any violation of that right must be raised by the defendant at the trial level. Judge Fortunato cannot claim a violation of the *defendant's* right on the defendant's behalf. *See supra* section III.D. *See generally* McMann v. Richardson, 397 U.S. 759, 770 (1970) (stating that "a defendant's plea of guilty based on reasonably competent advice is an intelligent plea not open to attack on the ground that counsel may have misjudged the admissibility of the defendant's confession").

317. *See* Opinion Granting Motion for a New Trial at 23 app. at 328, State v. Dunn (R.I. Super. Ct. Aug. 6, 1997) (No. 96-1005A).

318. *Id.* at 5 app. at 319.

319. 466 U.S. 648 (1984).

formance.[320] *Cronic* takes the view that a capital case *is* an appropriate place for on-the-job training absent court rules that state otherwise.[321] Judge Fortunato therefore cannot deem Vealey ineffective per se simply because this was his first capital trial.

f. *The Court's Supervisory Powers: You Can't Always Get What You Want*

In order to ensure that defendants receive qualified legal representation in serious criminal cases, *Cronic* allows courts to use their supervisory powers to create better safeguards.[322] Rhode Island's legislature, through section 8-6-2 of the Rhode Island General Laws, provided the appropriate means by which the superior court may create better safeguards.[323] Thus, a majority of the superior court may amend or create a rule providing added safeguards for criminal defendants. In addition, the legislature, by enacting section 10-9.1-1 of the Rhode Island General Laws, created the post-conviction relief proceeding. This statute provides criminal defendants with an opportunity to redress constitutional violations. A majority of the superior court has yet to create better safeguards than those provided by the legislature in section 10-9.1-1. Until such time as a majority of the court drafts such changes, Dunn may seek redress for ineffective assistance by seeking new representation and pursuing a motion for post-conviction relief.

3. *The Ineffectiveness Claim Fails the Second Prong of the* Strickland *Test*

Even if the first component of the *Strickland* test is satisfied, a party must satisfy the second component to set aside a judgement: "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[324]

320. *See id.* at 665 ("[Ineffectiveness does not arise necessarily because the] respondent's lawyer was young, that his principle practice was in real estate, or that this was his first jury trial. Every experienced criminal defense attorney once tried his first criminal case. . . . The character of a particular lawyer's experience may shed light in an evaluation of his actual performance, but it does not justify a presumption of ineffectiveness in the absence of such an evaluation.").

321. *See id.* at 665 & n.38.

322. *See id.*

323. *See* R.I. Gen. Laws § 8-6-2 (1956) (1997 Reenactment).

324. Brown v. Moran, 534 A.2d 180, 182 (R.I. 1987) (quoting *Strickland*, 466 U.S. at 694). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*; *see also* State v. Brennan, 627 A.2d 842, 848 (R.I.

Discovering Vealey's alleged lack of experience undermined Judge Fortunato's confidence in his earlier verdict.[325] Concededly, an attorney's ineffectiveness affects a defendant's ability to present character evidence and effectively waive his constitutional rights: "'[o]f all the rights that an accused person has, the right to be represented by counsel is by far the most persuasive, for it affects his ability to assert any other rights he may have."[326] Only after an intelligent waiver of a defendant's rights, with assistance from counsel, is a defendant like Dunn provided with a fair trial.[327] In the present case, however, Vealey did not perform deficiently so as to prejudice the defense.[328] His decisions were not unprofessional errors, but rather represented strategic choices reasonable under the circumstances. Such choices do not create a reasonable probability that, in their absence, the result of the proceeding would have been different[329] because opening the door to bad-character evidence, asking for a jury trial and testifying in his own defense would very likely have left Dunn in a more precarious situation.

The facts of *Dunn* do not support Judge Fortunato's two grounds for granting a new trial. Applying the newly-discovered evidence test to *Dunn*, the alleged evidence of Dunn's good character, evidenced by the post-trial letters, was not newly discovered. Additionally, Vealey performed effectively as required by both the Rhode Island and federal constitutions. His performance passed both prongs of the *Strickland* test and, as such, Judge Fortunato

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1993) (stating that "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment").

325. *See* Opinion Granting Motion for a New Trial at 30 app. at 331-32, State v. Dunn (R.I. Super. Ct. Aug. 6, 1997) (No. 96-1005A).

326. *Brennan*, 627 A.2d at 844 (quoting Kimmelman v. Morrison, 477 U.S. 365, 377 (1986)).

327. *See generally* Clark v. Ellerthorpe, 552 A.2d 1186, 1188 (R.I. 1989) (stating that counsel's performance must be so deficient as to deprive the defendant of a fair trial); Barboza v. State, 484 A.2d 881, 883 (R.I. 1989) (placing on the defendant the burden of proving that his counsel's deficient performance deprived him of his constitutional rights).

328. This is not a case where "some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture." *Strickland*, 466 U.S. at 695-96.

329. *See Clark*, 552 A.2d at 1188 ("'Effective' does not mean successful. It means conscientious, meaningful representation wherein the accused is advised of his rights and honest, learned and able counsel is given reasonable opportunity to perform the tasks assigned to him.") (quoting State v. Desroches, 293 A.2d 913, 916 (R.I. 1972)).

should not have stamped Vealey with the label of ineffectiveness. Therefore, neither ground warranted granting Dunn a new trial.

CONCLUSION

With the foregoing analysis as his shield, a textualist strikes back against Judge Fortunato's public-policy interpretations. This particular skirmish, however, will not settle the matter. Within this country's courtrooms and law schools, judges, lawyers and law students will continue the battle, defending their positions, whether rooted in textualism or more policy-based interpretations. Despite the fact that this Note and Judge Fortunato's August 6th opinion differ in their respective positions, Judge Fortunato invites public criticism of the reasoning given in support of his decision.[330]

Accepting this invitation, this Note draws the following conclusions. Judge Fortunato should have denied Dunn's motion for a new trial on the original grounds, and either request that Vealey resubmit a motion with amended grounds or suggest post-conviction relief. Doing so would preserve the sanctity of Rhode Island's statutes, the Rhode Island Rules of Criminal Procedure, specifically Rule 33, as well as the balance of power between Rhode Island's judicial and legislative branches. Unfortunately for Judge Fortunato, not only is he without power to grant a new trial sua sponte but his substituted grounds for doing so are meritless. Accordingly, a motion for post-conviction relief will provide the defendant, the accused attorney and the prosecutor with particular

330. Judge Stephen J. Fortunato Jr., *We Need An Independent Judiciary*, Prov. J. Bull., Feb. 5, 1998, at B6.

> Of importance equal to the principle of judicial branch independence is the guarantee of the First Amendment that people have the right to criticize judges and their decisions. The tradition of criticizing judges is a long one, and anyone reading Thomas Jefferson's criticisms of Chief Justice John Marshall and the early federal bench will see that his language was anything but benign.
>
> Public criticism of a judge's reasoning given in support of his or her decision is not only lawful but healthy for democracy. Vicious, factually unsupported attacks on the integrity of a judge are a different matter. Whatever legal protection such comments may enjoy, the orderly and independent processes of a justice suffer because not only has an individual judge's reputation been smeared, but the public has been deceived regarding the behavior of the people it expects to perform a fair and impartial way. Put another way, public confidence, the foundation on which judicial independence rests, is eroded.

Id.

rights which will allow them to develop a full record for appellate review.

Whether one defends textualism or advances public-policy interpretations, rules of criminal procedure remain an important device of our legal system. If the rules too heavily constrict a judge's ability to ensure the integrity of the trial process, then they must be amended not by a single judge, but rather by a majority of the Rhode Island Superior Court.

Neal R. Pandozzi

APPENDIX

Decision on Motion for a New Trial
Heard Before The Honorable
Mr. Justice Stephen J. Fortunato, Jr.
On August 6, 1997

Wednesday, August 6, 1997
Afternoon Session.

THE COURT: Let me begin with an observation, picking up from what Mr. Prior's concluding remarks were relative to the ordeal of the victim and her family. I have no doubt that the trial process, for her and for people in similar situations, is an ordeal; and I know of no one who is capable, so long as we preserve the adversarial process, of eliminating some of that.

I do think what is lost in the discussions, sometimes in Court and sometimes beyond the Courthouse, is what a trial is all about. In the first place, when a trial gets under way, there is, in a legal sense, no victim and there is no criminal; that's why a trial is conducted, to find out whether seated in the defendant's chair there is, in fact, someone who engaged in criminal conduct.

A criminal trial has a limited objective and that is to determine whether the State produced enough credible evidence to satisfy the high burden of proof imposed by law. That burden of proof is, of course, proof beyond a reasonable doubt which is also defined as proof that satisfies the trier of fact to a near certitude that the defendant committed the crime of which he or she is charged. See, the United States Supreme Court decision *In re Winship*, 397 U.S. 358, where the Supreme Court referred to a "subjective state of certitude," and *Jackson v. Virginia,* 433 U.S. 307, where the Supreme Court stated that for a conviction, the fact finder needs to "reach a subjective state of near certitude of the guilt of the accused."

The Supreme Court has never deviated from this standard, and the Rhode Island Supreme Court has spoken in these terms, as well, in *Parker v. Parker* at 103 R.I. 435, page 442, a 1968 decision authored by Justice Kelleher.

The A.B.A. Standards Relating to the Administration of Criminal Justice, The Function of the Trial Judge, Standard 6-1.1 (a) submits a narrow definition regarding the objective of a criminal

trial: "The only purpose of a criminal trial is to determine whether the prosecution has established the guilt of the accused as required by law, and the trial Judge should not allow the proceedings to be used for any other purpose." While this provision was still in draft form, it was approved in the U.S. Supreme Court, case of *Taylor v. Kentucky*, 436 U.S. 478, in footnote 17. Not only is the objective of a criminal trial a narrow one, the need for fairness in order to reach a just outcome is overriding.

The United States Supreme Court spoke succinctly and eloquently on this point in *Addington v. Texas*, 434 U.S. 418 at pages 423 and 24: "In a criminal case," said the Supreme Court of the United States, "the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment. In the administration of criminal justice, our society imposes almost the entire risk of error upon itself."

Our society's concern for a fair trial in order to reach a just determination, one that is free of being a mistaken outcome, has been so great, it is better to have ten guilty go free, than one innocent person be convicted. This is not some proverb that is tossed around lightly. First found in *Blackstone's Commentaries,* an eighteenth century law book used by the framers of our Constitution, more recently it was quoted in 1995, by our United States Supreme Court in *Schlup v. Delo* at 115 S.Ct. 851, page 856, quoting: "The maxim of the law is, that it is better that 99 offenders escape, than one innocent man be condemned."

In his concurring opinion in *In re Winship*, Justice Harlan referred to the maxim; and in our own Supreme Court, Justice Murray referenced it in *State v. Paster*, 524 A.2d 587. Justice Murray wrote: "As John Adams pointed out over two centuries ago, under our system of justice, it is far better to have many guilty persons go free than to have one innocent person be wrongfully convicted."

She cited the Legal Papers of John Adams being his argument for the defense in *Rex versus Wemms*, tried in 1770.

Thus, it can be seen that there is a narrow objective of a criminal trial, and that is to be adhered to so that a just result can be achieved. That's the goal of the Court.

The narrow issue here, of course, was whether force was used against Mary Ryan on one particular instance. The issue is not by

any stretch of the imagination whether the defendant violated his priestly vow of celibacy, nor was this criminal trial remotely connected to any civil dispute that may exist between the complaining witness and the defendant, his Church superiors, the diocese of Rhode Island, its Bishop, or any other person. What the Roman Catholic Church should or should not do about priests engaging in sexual conduct, criminal or otherwise, was not before this Court.

At the time I rendered my judgment of conviction, I learned that counsel for the defendant had never before defended a person accused of a felony in a Superior Court trial. I am not speaking simply of capital cases; I'm speaking of all felonies. I explored this matter further and can say unequivocally that defense counsel has never defended anyone accused of a felony, in either a jury or a nonjury case. He did, as we learned in the chamber's colloquies, which were put on the record, participate in a felony case in the early 1980's when he sat at counsel table for the Attorney General in a trial. A capital case is simply no place for on-the-job training, whatever the experience of the counsel may be in prior matters or in other noncriminal matters, such as domestic cases, or civil cases.

Shortly after the judgment was entered, I began receiving numerous letters submitted on behalf of Father Dunn. These letters break roughly into several categories. In some of them, the writers say they cannot believe that Father Dunn committed the crime. Most of them, however, make a plea for leniency in sentencing, citing many praiseworthy and helpful things, according to them, that he has done for his parish, the parishioners, and other people.

A number of letters, and these are the ones that raised concern with myself, refer to specific character traits of Father Dunn, saying that he was gentle and kind, not a person to use force and violence, and some of these letters gave specific instances relative to this trait.

I also received letters not favorable to Father Dunn. These said, in effect, that he should be sentenced to the maximum allowed by law which, of course, is life in prison; that no consideration should be given to either his age or any redeeming qualities he has, because in the view of these writers, he has none; that he was a monster, and so on. One letter likened him to a Nazi war criminal that had finally been tracked down near the end of his life.

All of these letters have been made available to both the State and the defendant, with the exception of a few letters that have trickled in over the pass few days. Judges regularly receive letters prior to sentencing an individual, but the volume in this case is certainly unique. I believe ninety to a hundred have been received, thus far.

Some of the letters in support of Father Dunn provoke a serious and substantial legal concern, when it is also considered that Father Dunn's trial attorney had no prior criminal defense experience in felony matters; and, indeed, this is not just any felony, this is a complex case involving an incident from June of 1982, with no reporting of the incident until some 12 or 13 years later; no corroborating medical evidence and so on, not that any is necessarily required in such a case, but it boiled down to two people in a particular room at a particular time and that was it.

I say that there was a concern, when you couple the letters and their content with the inexperience, because the letters contain a treasure trove of material of a type that could be placed before a Court as evidence going to the presence or absence of force. As an example, and again these letters have been made available to both parties to this litigation, the State and to Father Dunn, I'm going to refer to the letters simply by the initials of the author; these letters will be put in a sealed envelope at the conclusion of this proceeding and will be available as part of the record if, indeed, this matter proceeds to the Supreme Court.

One letter authored by someone with the initials M.B., the full name was, of course, put in the letter, indicates that this individual, herself, is the parent of a sexual assault victim of some other person. Quoting this person: "The defendant here is not a forceful man. J.M. writes, June 25th, '97 letter, saying: "He's gentle, kind, and generous." 6/25/97, R. and B.L., say: "Humble, kind, and very generous." Our children grew up with him. Another woman wrote indicating that she and her sisters, as teenage girls, worked at the rectory with Father Dunn, quote: "He's nothing but a fine gentleman, always treating us with the utmost respect and consideration." P.B. wrote, "He helped me through a very difficult divorce and series of other problems and has always been a complete gentleman. S.R. wrote: "Always respectful, loving, kind, and caring," and further, "In my years as a young widow, he never once made

an attempt to seduce me or treat me with any disrespect in any way."

I also received a letter from one of the witnesses who did testify in the case on behalf of Father Dunn, who, and this person who has already made her presence public, Catherine Vincent wrote in a July 17th, 1997 letter which was also turned over to the parties, that she had hoped to have testified about the material I'm about to read, but for some reason, wasn't asked about it, quoting, from her letter: "In late autumn of 1993 when Mary," meaning Ryan, "Mary first called me to tell me that she had been intimate with Father Dunn, I didn't believe her because she had previously told me that two other priests had sexually abused her. One of the priests was in the Blue Army of Our Lady of Fatima. She told me Father Dunn knew of this, that he knew the priest's name. The second priest was her pastor at the time."

Now, I make no finding at this point whether that was — whether that is true or not, but it is also well established that prior, false accusations by a complainant in a matter like this can also be brought before the Court. So my concern is: Why was this not explored? Why was this not developed? Why was this not presented or even considered for presentation? At the chamber's conferences, ample opportunity was afforded the Attorney General, defense counsel, and at one of the chamber's conferences, Mr. Famiglietti, to make such representations or to ask such questions of Mr. Vealey as they wished.

To elaborate further, the central question before the Court was not whether Mary Ryan and Father Dunn ever had sexual intercourse, nor was the central question whether Father Dunn seduced Mary Ryan into having sexual relations with him by using his priestly role, his knowledge of her past problems, his age, and wit, or any other means. Whether he was a rogue and a scoundrel betraying his priestly vow of celibacy, was never a determinative issue in this case. The central issue was: Whether on one occasion he used force to bring about sexual penetration? And the context, of course, was that this incident occurred after three or four years of consensual sexual activity between Mary Ryan and Louis Dunn.

This sexual activity occurred several times a week; in fact, I think some of the testimony may have been four or five times a week, involving consensual oral sex and consensual digital penetration of the complainant by the defendant.

With this as the factual background, I note that it has long been an established principle of criminal law that a defendant can introduce evidence of his character that would tend to contradict or negate an element of a crime brought against him; or to put it another way, to indicate that given a particular character trait, it would be improbable that the accused committed the crime with which he or she was charged. Thus, someone accused of forgery or embezzlement would introduce evidence of his or her nonviolent and pacific disposition. The leading United States Supreme Court on this point is *Michelson v. United States*, 335 U.S. 409, authored by Justice Robert Jackson, a former United States Attorney General and United States prosecutor in the Neuremberg war crimes trials. He wrote that this type of evidence is, "Sometimes valuable to a defendant for this Court has held that such testimony alone, in some circumstances, may be enough to raise a reasonable doubt of guilt and that in the Federal Courts, a jury in a proper case should be so instructed."

At the time *Michelson* was decided, only reputation evidence was permitted, but the modern Rules of Evidence permits specific act or instances showing the character trait, in addition to reputation.

Rule 404(a) permits, quote, evidence of a "pertinent trait" of the accused's character to be offered by the defendant. Of course, if this is done, the prosecution is permitted to offer rebuttal testimony. Rule 405(b) permits reference to specific instances of a person's conduct as part of a defense in a criminal trial.

Our Supreme Court has expanded on the word "pertinent" and said, quoting, "That for character evidence to be pertinent, some nexus should exist between the particular evidence offered and the crime charged." *State v. Oliveira*, 534 A.2d 867. In a case more than 100 years old, the United States Supreme Court expounded upon the proposition that the defendant could attack the State's case by presenting character evidence of a pertinent trait. In *Edgington v. United States,* 164 U.S. 361, at pages 366 and 367, the Court adopted the language of an Illinois Supreme Court case: "The more modern decisions go to the extent that in all criminal cases, whether the case is doubtful or not, evidence of good character is admissible on the part of the prisoner. It is not proof of innocence, although it may be sufficient to raise a question of, or to raise a doubt of guilt."

In *Edgington,* the charge involved the making of a false statement in order to gain a benefit from the United States Government. The trial Judge excluded the defendant's proffer of evidence calculated to show that the defendant had a reputation for truthfulness and veracity. The Supreme Court said that such evidence must be permitted, regardless of whether the defendant himself testified. And the Supreme Court also emphasized that the evidence must be permitted, regardless of whether the other evidence in the case was strong or weak. The Court said, quoting, "The circumstances may be such that an established reputation for good character, if it is relevant to the issue, would alone create a reasonable doubt, although without it the other evidence would be convincing." That's at page 471. The same may be said here, relevant to available evidence on the issue of specific instances of nonviolence, or of a reputation for a gentle, nonviolent character.

What are the important facts here? We have a consensual sexual relationship for three or four years prior to the one incident in question. We have a time span of more than 10 years between the incident and it first being reported to law enforcement officials. On the question of force, in addition to the incidents giving rise to the criminal charge, Ms. Ryan had said the defendant had acted in a forceful manner toward her on several other occasions.

At the trial, the defendant did not take the stand but presented three witnesses on his behalf, each of whom testified approximately five minutes, conveying essentially the same message. Taken all together, these three witnesses presented evidence that Mary Ryan indicated she had a sexual relationship with Father Dunn at sometime, but never indicated that any force had been involved; that Mary Ryan was bold or flirtatious around Father Dunn at the rectory; that she was friendly and affectionate towards Father Dunn; and that she, as she herself had testified, used Father Dunn as her priest at her wedding some years after the incident and, indeed, Father Dunn had given her away during that ceremony.

The defense did not present any evidence whatsoever to rebut the contention of the use of force during the incidents in question. I referenced that in some detail during my decision referring to the Rhode Island Supreme Court case of *State v. Gabriau.*

As I developed and explained in my decision at the conclusion of the trial, Mary Ryan's testimony regarding the use of force on

the evening in question, stood uncontradicted and unimpeached. It was not for me to say that a woman who had engaged in consensual oral sex for a three-year period, could not decline vaginal intercourse on the evening in question; similarly, on a theoretical basis, one could argue that a person with a reputation for being gentle and kind, which reputation was bolstered by specific instances of demonstrations of this character trait, would be unlikely to use force in any encounter, including a sexual one, especially when his sexual activities with the complaining witness had been consensual for so long and on such a regular basis. However, the operative word here is "theoretical," because the defendant failed to produce this evidence, which evidence as I indicated, was readily available to him and to his defense counsel. Whether people in possession of such information would be credible at trial, and would withstand cross-examination is, of course, another question, but this was not appropriately investigated.

The A.B.A. standards to which I referred earlier, standard 4-4.1, speaks of the duty to investigate on the part of defense counsel: "It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of the conviction . . . The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty." This is an obligation imposed on people who would undertake to represent someone accused of a crime, especially a capital crime. There was no such investigation in this case.

At one point during our colloquy in chambers, and the reason why that colloquy was in chambers, although on the record and will now have a sealed record, is that the questions and answers come close to having an effect on the absolute lawyer-client privilege. So it was necessary for all persons, including myself as the Judge, and the attorneys, to be extremely circumspect; nonetheless, some of the answers are telling, and they do not have any impact upon the privilege.

One question that was put to defense counsel, was, "Did you discuss with them," meaning people in the community, who, some of whom were being interviewed on behalf of the defendant, my question was, "Did you discuss with them, his reputation within the community for nonviolence or peacefulness?" Answer: "I don't

believe I directly asked that question of the persons I was interviewing, but there was some indications from those persons as to what the kind of person he was and his character." "Did you discuss with these people, any particular instances that they knew of, regarding Father Dunn, relative to his being a pacific, kindly, gentle type of individual?" The answer: "I don't believe we had discussions of particular instances. No."

There was also colloquy about whether the defense, at the time of trial, on the eve of trial, involving Mary Ryan as the complaining witness, and also at the conclusion of the State's case, whether the defense was in the possession of any information that they believed the State could use to contradict character witnesses.

It turned out that during the course of discovery, several names had been provided to the defense. No effort was made to contact these people. There was no investigation. And in one case, a further problem of considerable magnitude surfaces, and that is, the problem of a conflict of interest on the part of defense counsel. The Court asked defense counsel: "Did you ever contact any of the people, the names of whom were given to you by the State, such as Phyllis Huttnack?" I mention her name in these proceedings because she has been referred to in open Court during other aspects of this matter by the State and the defense and came forward to offer herself as a witness. In any event, the question was: "Did you ever contact any of the people, the names of whom were given to you by the State, such as Phyllis Huttnack?" The answer: "No, I didn't. She is also a plaintiff in a civil lawsuit against Monsignor Dunn, so I wouldn't be able to contact her."

There is a conflict of interest in which the attorney is putting his concerns, albeit legitimate ones, that he conduct himself in a fair and professional way in a civil trial, above the interests of the defendant in this criminal trial, to have every possible avenue, reasonable avenue, explored and investigated.

The Supreme Court of the United States said, in *Culyer v. Sullivan* at 446 U.S. 335, page 350, that an "actual conflict," and here we have a conflict that is acknowledged by defense counsel, "that has an adverse effect on the performance," — here we have the failure to investigate — "creates a problem of constitutional magnitude and has an impact relative to rights secured by the Sixth Amendment to the United States Constitution."

It would also have an impact relative to Article 1 Section 10 of the Rhode Island Constitution, which addresses the same problem, the right to assistance of counsel. It's not just the right counsel. It's the right to have the assistance of counsel. Counsel has to be doing something not only at the trial, but prior to the trial during the investigative phase. And while it is true that defense counsel here did consult with a seasoned defense attorney during the course of this trial, as I understand the representations of both Mr. Vealey and Mr. Famiglietti, that can cut two ways: On the one hand, it's good to talk about — for counsel to talk about cases and to explore ideas as one goes forward; on the other hand, a trial by remote, is not acceptable relative to the integrity of the process. It may be all well and good for a movie star to fly a plane, listening to information — who has never flown a disabled plane before, getting signals from and advice from somebody back at the tower, but that is not the way to conduct a criminal trial.

In *United States v. Cronic*, at 466 U.S. 648, United States Supreme Court said, as I believe Mr. Prior earlier referenced, that the lack of experience by itself does not lead irresistibly to the conclusion that the defendant has been deprived of the effective assistance of counsel in the constitutional sense. This seems to be logical in an elementary sense, in that, just as inexperience does not necessarily lead to ineffectiveness, experience does not always mean that the defense will be effective.

Although it is interesting to think of Justice Holmes' famed aphorism that, to paraphrase, the lifeblood of the law is not logic, but experience. The Supreme Court, however, in *Cronic* made it very clear, that all it was concerned about in that case was the Sixth Amendment effectiveness claim. And it deferred to the states to set appropriate standards, should they so choose, designed to improve the administration of justice, which put another way, of course, means a design to bring about as many just results as possible and to eliminate as much error and mistaken decisions as possible. That's at page 65 of the *Cronic* case.

Toward that end, our judicial system, through Executive Order No. 95-02, issued by Chief Justice Joseph Weisberger on April 7th, 1995, makes it very clear that there are minimum criteria an attorney must have if he or she is to undertake a representation of a person in a capital or major felony case. The standards were promulgated in order to ensure that indigent defendants who, for

some reason, were not entitled to the services of the Public Defender, would receive appointed counsel who had experience with the type of matters which they were called upon to serve.

At page 2 of that Executive Order, as a prerequisite, the Chief Justice declared that there must be an annual completion of six hours of Continuing Legal Education in Criminal Law and Procedure, a criteria not met by defense counsel here; must be a member of the Rhode Island bar for at least three years, which of course, defense counsel meets; and then, prior representation of any party in at least three Class 1 felony trials, that is cases carrying with them penalties of more than 10 years in jail, all the way to verdict; or, prior representation of any party in at least three Class 1 felony trials to verdict, as an associate counsel under the supervision of a mentor attorney.

What does this failure to meet this criminal criteria mean in a practical sense? And I'm well aware that it was designed to deal with the problem referenced; that is, the indigent person who doesn't qualify for representation by the Public Defender. What does this failure mean in this case? It meant that when Father Dunn was confronted with the question of whether to proceed to trial in front of a jury or waive that historic right, he was counselled by an attorney who had no experience whatsoever in making that decision, and indeed, no experience, whatsoever, in presenting a felony criminal case in front of either a Judge or a jury.

It meant that when Father Dunn was called upon to make the decision that many commentators considered to be one of the most important decisions of a person accused of a crime, whether to take the witness stand or not, Father Dunn was counselled by someone who had no experience, whatsoever, in assessing such a situation, and it also means that when the State finished the presentation of his case, and the testimony of Mary Ryan stood, essentially, uncontradicted and unimpeached, the defendant did nothing to undermine any of the material elements of the State's case. As I previously indicated, there existed a considerable amount of material that could have been marshaled for the record against the element of force. And we heard the representation of Mr. Famiglietti, which confirmed what counsel said yesterday in chambers: Mr. Vealey, that is, that on these points, he was essentially at the controls himself.

The oath a Judge takes requires the Judge to be no respecter of persons to dispense justice fairly and evenly, regardless of whether the person is rich or poor. And that's what the oath says: Rich or poor. You could apply black or white, a priest, an atheist, college professor, or an unemployed migrant worker.

Here, there is an anomaly. The poor person receives the institutional solicitude of the Court but the nonindigent, though, of course, not necessarily rich, gets no such protection. It is not my prerogative to amend the Executive Order, but I do have an obligation to make further inquiry when the information I have discussed is brought to my attention; that is what I have attempted to do here.

I know that an argument was made, a vigorous argument by Mr. Prior, that this is an inappropriate time to raise this issue. He argues that our statute on postconviction relief creates, if I understand his argument correctly, the only possible vehicle for raising the ineffective counsel issue and that a Judge cannot do it on his or her own; clearly, this, as a general proposition, cannot be true. If an attorney came into this courtroom and was floundering around because of some sickness, or perhaps the abuse of some substance, alcohol, or drugs, the Court, to protect the integrity of the process, would be duty bound to intervene.

I will discuss that in greater detail, or at least give a cite to a thorough discussion of this problem in a moment.

So what is a trial Judge to do if it becomes apparent to him that the defense counsel has had no prior experience in representing people accused of felonies, let alone capital ones, and that this experience caused the defendant to forego the presentation of evidence supporting a long-recognized defense, and that this inexperience also infused advice given on two strategic points: The waiver of a jury, and a decision not to take the stand. See pages 11 and 12 of the transcript developed yesterday.

The United States Supreme Court said nearly three decades ago, "That Judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their Courts." If I understood — that's *McMann v. Richardson*, 397 U.S. 759, 771, decided in 1970. If I understood Mr. Prior's argument, no matter what I observe in the domain of "ineffective," I am to sit by, passively. I do not believe that is the role of a trial Judge.

The tenor of the remark I just read from *McMann v. Richardson*, found its way into A.B.A. Standard 6-1.1, quoting, "The adversary nature of the proceeding does not relieve the trial Judge of the obligation of raising on his or her initiative at all appropriate times and in an appropriate manner, matters which may significantly promote a just determination of the trial."

The entire question of judicial intervention to ensure a fair trial and a just outcome, was insightfully discussed in a law review article by a distinguished Federal Judge who wrote from a concern that a number of the defendants appearing before him, were not properly represented. The article is entitled *Dealing With Incompetent Counsel — The Trial Judge's Role*, by Judge William Schwarzer at 93 Harv. L. Rev. 663; that article, by the way, was cited in *Cronic*, by the United States Supreme Court.

I'm aware, as I said, that claims of ineffective counsel are generally to be raised in an application for postconviction relief brought under Rhode Island's controlling statutes on that topic. See Rhode Island General Law 10-9.1-1. I'm also mindful of the authorities I've cited thus far, and I am not aware of any authority which directs that a trial Judge should not raise a matter that has a significant impact on the integrity of the trial process and calls into question the reliability of the verdict. The contrary is true. The Judge's overriding responsibility is to ensure the integrity of the trial process.

The reason for having this claim raised generally in postconviction relief motions is to enable the trial judge to conduct a hearing. More often than not, on direct appeal, there would not be a sufficient — there would not be sufficient evidence on the record to allow the Appellate Court to responsibly consider an ineffectiveness claim. There are, of course, exceptions to this. Sometimes the record is abundantly clear and the postconviction relief vehicle need not be employed. This is true in a number of the Federal Circuits, including the First Circuit, the circuit in which we are. See, *United States v. Natanel* at 938 F.2d 302, decided in 1991. Where as here, a trial Judge learns of the total inexperience of the attorney in criminal felony trials, and also becomes aware of the readily available material that could have been used as evidence, but was not presented, or even reasonably investigated or considered to be presented, on behalf of the defendant, the trial Judge can intervene *sua sponte*, so long as a record is developed that can inform

the Appellate Court, if that becomes necessary, as to why the trial Judge acted the way he or she did. And that is why we have a record in this case, as to the background and the concerns of the Court regarding this, at which time the attorneys involved could, where appropriate, be questioned or where appropriate, ask questions.

This having been said, what standards should be applied in determining whether the verdict should be set aside? On more than one occasion, our Supreme Court has provided guidance in this area and its doctrinal declarations have been refined as recently as last month. In *Mastracchio v. Moran,* decided July 22nd, 1997, our Supreme Court referred once again to the, "significant-chance doctrine," and determined that when post-trial evidence surfaces, quoting: "In order to obtain relief from the jury's verdict" — just a moment, please — (Pause) — Their quote is that "In order to obtain relief from the jury's verdict, although not required to show the probability of a different verdict upon retrial, the defendant is required to show that there would be a significant chance that the use and development of the post-trial discovered evidence would have produced a reasonable doubt in the minds of enough jurors to avoid conviction."

In *Mastracchio,* the Supreme Court said that another inquiry that must be determined is whether the previously undisclosed facts, "Would in any legal sense, be sufficient and material so as to serve to undermine the confidence in the jury trial's verdict or raise any reasonable probability that the verdict would have been different." Seven days after its decision in *Mastracchio,* the Supreme Court in *Broccoli v. Moran,* phrased the question as: "A trial justice called upon to review the evidence on an application for post-conviction relief, need not determine whether there was sufficient evidence to convict absent the discounted evidence, but must, instead, determine whether the previously undisclosed favorable evidence puts the case in such a different light as to undermine confidence in the verdict"; page 13. This approach dovetails with the thinking of the United States Supreme Court in the *Edgington* case that I discussed earlier, and also, in the more recent case of *Kyles v. Whitley,* decided in 1995, which by the way, was referenced in at least one of the Supreme Court cases of Rhode Island I just referred to. At page — *Kyles v. Whitley* is at 131 L Ed 2d, 490 page 506: The Court cites *Strickland v. Washington,* the leading case on

effectiveness of counsel. *Kyles v. Whitley* dealt with the improper holding back of evidence by the prosecution. There's absolutely nothing like that in this case. That's not what this case is about; however, the standards used are the exact same. The standard, if the evidence has either been withheld improperly by the prosecution, or if it has not been presented because of the ineffectiveness of counsel, the standards are the same.

The Supreme Court quoted other cases for its general proposition, quoted the *Agurs* case, which it said quoting, "rejected a standard that the evidence if disclosed probably would have resulted in acquittal."

The Court went on to say, "The question is not whether the defendant would have more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." That is the issue here. Can I, as the fact finder, have confidence in this verdict, under the Supreme Court standards and the authorities in both Rhode Island and the United States that I have quoted. Related to this doctrine is our Supreme Court's awareness that the trial counsel, in order to effectively use the evidence to even be aware of its value, must have some skills in the area.

Less than a year ago, on November 4 the, 1996, in the Supreme Court decision of *State v. Toro,* 95-622, Supreme Court number, the Supreme Court said: "The defendant must show there is a significant chance that the use and development of the withheld evidence by skilled counsel at trial would have produced a reasonable doubt in the minds of enough jurors to avoid a conviction." Here, of course, we do not have a jury but the reference, of course, is to skilled trial — skilled counsel. Some indication that the attorney involved should have some skills with the matter at hand. This issue, let me stress, is not whether Mr. Vealey is a fine and excellent lawyer in Family Court matters or in civil cases. The issue here is: What about a criminal case? Indeed, a capital criminal case? There are fine eye doctors, ophthalmologists who operate on the eye with great success, but they are not utilized to perform open heart surgery, and one does not call the TV expert to repair the refrigerator.

In referencing *State v. Toro,* the Supreme Court of Rhode Island was citing the earlier cases of *State v. Burke,* and *In re*

Ouimette. Here, as the fact finder in this case, my confidence in the verdict I earlier rendered has been undermined by the discovery that inexperienced counsel failed to present readily obtainable evidence on the issue of force, in defense of a charge where force is a material element.

He also presumed to counsel the defendant relative to waiving fundamental Constitutional rights without having any significant prior experience in the practical application of these rights, indeed, any experience whatsoever. I speak, of course, of the right to a jury trial and the right to testify and the concomitant right to remain silent. The undermining of this confidence must be placed in context. Charge was brought more than a decade after the incident occurred. For three or four years prior to the incidents, the complaining witness and the defendant regularly engaged in intimate sexual activity, including oral-genital contact and digital penetration of the female. After the incident, the complaining witness invited the defendant to perform her marriage ceremony and to give her away during that ceremony.

For that reason, and as I have stated and want to emphasize, the only vehicle for considering this issue was not postconviction relief, but for the reasons stated above may be done at this juncture of the proceedings. I think, logically, it must be asked: How can the trier of fact impose a sentence if confidence in the verdict has been undermined?

Rule 33, which is the rule that brings us before the Court, permits the trial Judge who has conducted a trial without a jury, to set aside the verdict and then take new evidence; however, the context of this case makes that solution to the problem not an apt one, if the goal, as I said, is and must be, the conduct of a fair trial that reaches a just result.

So for that reason, I am granting the motion. I am awarding a new trial, and in the meanwhile, or at this moment, will now hear counsel on the question of bail.