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1997 Survey of Rhode Island Law: Cases: Criminal Procedure

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Criminal Procedure. *State v. Bjerke*, 697 A.2d 1069 (R.I. 1997). As long as probable cause exists to justify a detention, the subjective intentions of the police in executing a stop are immaterial.

Prior to *State v. Bjerke*, the Rhode Island Supreme Court had never addressed the validity of pretextual stops. Under the rule adopted in *Bjerke*, a police detention is valid as long as probable cause exists to execute the stop, regardless of whether the motive of the police for stopping the suspect was to investigate some other crime for which the requisite level of suspicion was lacking.

FACTS AND TRAVEL

On April 27, 1995, an anonymous caller reported to the Warwick Police Department that the driver of a tan Oldsmobile with license plate number TV-536 was possibly intoxicated.[1] An officer investigated while the dispatcher ran a vehicle registration check and discovered that the registration had been suspended. The dispatcher relayed this information to the responding officer.[2]

The officer located and stopped the vehicle in the Post Road area of Warwick, Rhode Island. The officer approached the driver, Robert Bjerke (Bjerke) and asked for Bjerke's license, registration and proof of insurance.[3] A license check revealed that it was suspended. The officer noticed an odor of alcohol and Bjerke's words were slurred and confused. The officer asked Bjerke to step out of the car in order to perform some field sobriety tests, which Bjerke failed.[4] Bjerke was arrested and brought to the Warwick police station, where he refused to submit to a chemical breath test.[5] He was then charged with operating a motor vehicle with a suspended

1. *See* State v. Bjerke, 697 A.2d 1069, 1070 (R.I. 1997).
2. *See id.*
3. *See id.*
4. *See id.*
5. *See id.*

license,[6] operating a motor vehicle with a suspended registration[7] and refusing to submit to a chemical test.[8]

At an Administrative Adjudicative Court (AAC) hearing on November 15, 1995, the trial judge found Bjerke guilty of driving a vehicle with a suspended license, but dismissed the chemical-test charge.[9] The judge reasoned that reasonable suspicion existed to stop Bjerke for operating the vehicle because of the suspended registration.[10] However, the officer lacked reasonable suspicion to stop the car to investigate possible drunk driving. Therefore, anything discovered after the stop relating to drunk driving was inadmissable.[11]

The State appealed the dismissal of the chemical-test charge, and Bjerke appealed his conviction on the suspended-registration charge.[12] The AAC Appeals Panel affirmed the trial judge's decision.[13] The panel concluded that an anonymous phone tip alone was insufficient to trigger reasonable suspicion. The State petitioned the Rhode Island Supreme Court for a writ of certiorari, which was granted on June 27, 1996.[14]

State v. Bjerke, a case of first impression, asked the Rhode Island Supreme Court to consider the validity of pretextual stops. A pretextual stop occurs when a police officer pulls over a vehicle because of one infraction, generally a minor traffic-code violation, while the underlying reason for the stop is to investigate suspi-

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6. *See id.* The pertinent section of the law reads "[a]ny person who drives a motor vehicle on any highway of this state after his or her application for a license has been refused, or at a time when his or her license to operate is suspended, revoked, or canceled . . . shall be guilty of a misdemeanor." R.I. Gen. Laws § 31-11-18(a) (1996).

7. *See Bjerke*, 697 A.2d at 1070. The law with respect to suspended registrations reads "[n]o person shall operate, nor shall an owner knowingly permit to be operated, upon any highway, a motor vehicle the registration of which has been canceled, suspended, or revoked. Any violation of this section is a misdemeanor." R.I. Gen. Laws § 31-8-2 (1996).

8. *See Bjerke*, 697 A.2d at 1070; *see also* R.I. Gen. Laws § 31-27-2.1 (1996) (refusal to submit to a chemical test).

9. *See Bjerke*, 697 A.2d at 1070. These were the only two charges over which the AAC retained jurisdiction. *See id.* The driving on a suspended license charge was handled by district court.

10. *See id.*

11. *See id.*

12. *See id.* at 1071.

13. *See id.*

14. *See id.*

cions of other criminal activity for which the police lack reasonable suspicion or probable cause to execute a stop.[15]

Justice Bourcier delivered the unanimous opinion of the court.[16] This case centers on the validity of the police stopping an automobile.[17] Accordingly, the court sketched the framework of the Fourth Amendment of the United States Constitution[18] and Article 1, section 6 of the Rhode Island Constitution,[19] which this case implicates.[20] The court explained, consistent with a long line of United States Supreme Court precedent, that "reasonableness is the touchstone for distinguishing lawful from unlawful seizures."[21] The court reviewed the levels of suspicion necessary to support various forms of government intrusion.[22] If probable cause exists—"where a reasonable man of caution would believe a suspect had committed or is committing an offense"—then the police can make an arrest.[23] Reasonable suspicion justifying a brief detention exists when authorities "can 'point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.'"[24]

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15. *See* Whren v. United States, 116 S. Ct. 1769, 1772 (1996). *Whren* presents the classic pretextual stop scenario. In *Whren*, plain-clothes police officers executed a stop to enforce traffic regulations. The police had observed a truck filled with youths in a high drug use area which made them suspicious. The truck's driver made a right hand turn without using the turn signal. The plain-clothes policemen then pulled the truck over for the traffic violation and noticed two bags of crack cocaine inside. *Id.*

16. *See Bjerke*, 697 A.2d at 1070 (noting that Justice Goldberg did not participate).

17. *See id.*

18. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

19. The right of the people to be secure in their persons, papers and possessions, against unreasonable searches and seizures, shall not be violated: and no warrant shall issue, but on complaint in writing, upon probable cause, supported by oath or affirmation, and describing as nearly as may be, the place to be searched and the persons or things to be seized.

R.I. Const. art. 1, § 6.

20. *See Bjerke*, 697 A.2d at 1071.

21. *See id.*

22. *See id.*

23. *See id.*

24. *Id.* (quoting Terry v. Ohio, 392 U.S. 1, 21 (1968)).

The court corrected the AAC Appeals Panel's misapplication of the law.[25] The panel had found that lack of reasonable suspicion of drunken driving doomed Bjerke's arrest.[26] The court pointed out that at the time of the stop, the officer had probable cause to stop the vehicle and arrest Bjerke for driving a car with a suspended registration.[27] Once the automobile was legally stopped, all indicia of drunk driving was in plain view.[28] Thus, the lack of reasonable suspicion of drunken driving attached to an anonymous tip was of no importance because probable cause of another crime existed.[29] The court summed up its position by saying:

> To conclude piecemeal, as the panel did, that the probable cause that justified the stop was irrelevant, would have the perverse effect of permitting an intoxicated driver to escape prosecution merely because he was stopped for a separate and different motor vehicle violation. Common sense militates against such disparate analysis.[30]

Next, the court addressed the defendant's claim that the stop was really a pretext to investigate criminal behavior for which the officer could not otherwise stop him.[31] The court, adopting *Whren v. United States*, rejected the notion that the pretextual nature of a stop is fatal.[32] Instead, the court held that "[a]ny subjective motivation in effecting a traffic stop based upon probable cause does not alter our Fourth Amendment analysis."[33] Therefore, as long as police have the requisite level of suspicion to intrude upon a privacy interest, the fact that the intrusion is really to investigate another matter entirely is of no import.

The court then turned to the defendant's contention that the computer check of his license plate was a search.[34] Bjerke argued that because police lacked the requisite amount of suspicion to support the search, the evidence collected was inadmissable.[35] The court firmly rejected this idea. It reasoned that no search occurred

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25. *See id.*
26. *See id.* at 1071-72.
27. *See id.* at 1072.
28. *See id.*
29. *See id.*
30. *Id.*
31. *See id.*
32. *See id.* (adopting Whren v. United States, 116 S. Ct. 1769, 1774 (1996)).
33. *Id.* at 1073.
34. *See id.*
35. *See id.*

because there was no reasonable expectation of privacy since registration information is within the control of the State.[36] The defendant also urged the court to find that the police officer's reading of the license plate was also a search.[37] The court rejected this request, stating "there can be no expectation of privacy in one's license plate when it hangs from the front and rear of one's vehicle for all the world to see."[38]

Finally, the court declined to offer greater protection under the Rhode Island Constitution than is afforded under the United States Constitution because "a decision declaring the police activity in this case unconstitutional would be unprincipled and unwarranted."[39]

CONCLUSION

The importance of this case is unmistakable—police have broad discretion to stop anyone suspected of criminal activity so long as the police can forward some "technical violation" which supports the stop. The court will not analyze the subjective intent of the police so long as probable cause is present.

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36. *See id.*
37. *See id.*
38. *Id.*
39. *Id.*

Criminal Procedure. *State v. Dellay*, 687 A.2d 435 (R.I. 1996). When a defendant asserts self-defense in a murder case, evidence of the victim's prior specific acts of violent or aggressive behavior is admissible if the defendant was aware of these acts during the confrontation, and based on that knowledge, the defendant reasonably feared imminent bodily harm by the victim.

In *State v. Dellay*,[1] the Rhode Island Supreme Court was asked to extend its holding in *State v. Tribble*,[2] which set out the rule governing the admissibility of specific prior bad acts of a victim when a murder defendant argues self-defense.[3] The supreme court in *Dellay* declined to allow the introduction of such evidence if the defendant had no knowledge of these acts at the time of the killing, thereby leaving *Tribble* intact and solidifying the rationale underlying the rule.[4]

FACTS AND TRAVEL

On June 26, 1992, the defendant, Lance Dellay (Dellay), murdered Todd Ricci (Ricci) by beating him to death with a baseball bat.[5] Ricci shared an apartment with Dellay and Ricci's girlfriend, Stacey Lonsdale (Lonsdale), in Pawtucket, Rhode Island. Dellay also collected and delivered drugs on Ricci's behalf in return for free rent and $200 per week.[6] On the morning of June 26, 1992, all three roommates were in the apartment, along with Keith Allard (Allard), a friend who had spent the night.[7] At trial, Lonsdale and Dellay testified to two different versions of the events leading to the killing of Ricci.[8]

Lonsdale testified that on the morning of the murder, she heard Ricci crying in another room in the apartment, but assumed that he was just "joking around."[9] Lonsdale then noticed Ricci and Dellay were gone, the apartment door was open and Allard was

1. 687 A.2d 435 (R.I. 1996).
2. 428 A.2d 1079 (R.I. 1981).
3. *See Dellay*, 687 A.2d at 438.
4. *Id.* at 438-39.
5. *See id.* at 436.
6. *See id.* at 435.
7. *See id.* at 436.
8. *See id.*
9. *Id.*

cleaning up blood in the living room.[10] Lonsdale further testified that soon thereafter Dellay came upstairs to the apartment "covered in blood and carrying a baseball bat."[11] Lonsdale stated that she then ran down the basement stairs where she found Ricci mumbling for help—he was "covered in blood" and had "a big bump on his head."[12] At this point, Ricci was still "conscious and muttering for help."[13] According to Lonsdale, Dellay then came down the stairs and hit Ricci in the head and ribs with the bat. After witnessing this, Lonsdale ran upstairs.[14] Lonsdale testified that when Dellay re-entered the apartment, he had Ricci's wallet, from which he took $1500, giving $100 to Lonsdale.[15]

Dellay's version of the circumstances surrounding Ricci's death was markedly dissimilar. Dellay testified that on the morning of the murder, he asked Ricci for money, which Dellay said Ricci had withheld from him from the drug collections and deliveries.[16] According to Dellay, Ricci became upset at this, threatened to kill Dellay and then "came at" Dellay with a baseball bat.[17] Somehow Ricci lost possession of the bat and Dellay retrieved it.[18] Dellay testified that he swung the bat at Ricci when Ricci came at him a second time with a milk crate. Believing Ricci was dead, Dellay dragged Ricci's body to the basement. Contrary to Lonsdale's testimony, Dellay denied hitting Ricci while Ricci was on the stairs.[19]

Later in the afternoon, Dellay and Allard dropped Lonsdale off at her parents' home in North Attleboro, Massachusetts.[20] Dellay and Allard took to the task of disposing of Ricci's body. Two days later, on June 28, 1992, Lonsdale gave a statement to the North Attleboro Police Department regarding the circumstances of Ricci's death.[21]

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10. *See id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *See id.*
15. *See id.*
16. *See id.*
17. *Id.*
18. *See id.*
19. *See id.*
20. *See id.*
21. *See id.*

At trial, Carrie Bestwick (Bestwick) testified that she had spoken with Dellay in late June of 1992 outside a North Attleboro doughnut shop.[22] Dellay told Bestwick that he had killed Ricci with a baseball bat because Ricci had "pissed [him] off so much [he] just couldn't stop."[23] Bestwick and two friends eventually drove Dellay and Allard to a Montreal hotel.[24]

Dellay was arrested in Montreal on July 1, 1992, and gave a statement to the Montreal Police Department indicating that he had hit Ricci in self-defense.[25] Extradition was waived and Dellay was returned to the United States. On October 30, 1992, Dellay was formally charged by indictment with Ricci's murder, felony larceny and failure to report a death.[26]

In support of his self-defense claim, Dellay sought to introduce evidence of Ricci's violent reputation, as well as evidence of Ricci's previous violent acts, to establish that Ricci was indeed the initial aggressor on the morning of June 26, 1992.[27] The State responded with a motion in limine to exclude the "specific-act" evidence unless Dellay could demonstrate that he "was aware of those acts at the time he struck [Ricci]."[28]

Dellay argued that specific acts are admissible under Rule 405(b) of the Rhode Island Rules of Evidence, regardless of Dellay's knowledge of those acts.[29] The trial judge ruled that specific acts "could be inquired into on cross-examination" pursuant to Rule 405(a).[30] Furthermore, the trial judge ruled that, if the specific facts offered under Rule 404(b) show "that [Dellay] feared imminent bodily harm, and that fear was reasonable based on" knowledge of prior instances of bad conduct, then such prior acts could be

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22. *See id.*

23. *Id.*

24. *See id.*

25. *See id.*

26. *See id.* (noting that pursuant to Rhode Island Superior Court Rules of Criminal Procedure Rule 48(a), the third charge was dismissed).

27. *See id.* at 436-37.

28. *Id.* at 437.

29. *See id.* Rule 405(b) provides in pertinent part: "(b) Specific Instances of Conduct. In cases in which character or a 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 the person's conduct. R.I. R. Evid. 405(b)."

30. *Dellay*, 687 A.2d at 437.

admitted under Rule 405(b).[31] However, evidence of "specific instances of bad conduct not known to [Dellay] at the time of confrontation would not be admissible under either Rule 404 or Rule 405."[32]

During trial, defense witnesses who testified as to Ricci's reputation as an aggressive and volatile individual were not allowed to testify about specific acts by Ricci which helped those witnesses form their opinions of his character.[33] Dellay cited the trial judge's exclusion of evidence of Ricci's prior specific bad acts as error.[34]

BACKGROUND

In Rhode Island prior to the 1981 case of *State v. Tribble*,[35] if self-defense was asserted, then prior specific acts of violence by the victim against third persons were not admissible to prove the victim's bad character.[36] However, in 1981, the Rhode Island Supreme Court re-examined and altered this rule when it held in *Tribble* that a defendant who pleads self-defense is entitled to offer relevant evidence of a victim's specific acts of violence "against third parties, *provided however, that the defendant was aware of these acts at the time of his encounter with the victim.*"[37]

The *Tribble* court further noted that this newly espoused rule had limited application.[38] Specifically, the court commanded that

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31. *Id.* Rule 404(b) provides:

> (b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person 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 fear was reasonable.

R.I. R. Evid. 404(b).

32. *Dellay*, 687 A.2d at 437.

33. *See id.*

34. *See id.*

35. 428 A.2d 1079 (1981).

36. *See, e.g.*, State v. Baker, 417 A.2d 906, 911 (R.I. 1980) (reaffirming the rule that proof of bad character is limited to general reputation evidence).

37. *Tribble*, 428 A.2d at 1085 (emphasis added). The court rationalized its position by articulating the purpose of the rules of evidence that the fact-finder "will have before it all relevant, reliable, and probative evidence on the issues in dispute. Evidence of specific acts of violence committed by the victim against third parties of which acts the defendant was aware would enlighten the jury on the defendant's state of mind at the time of the confrontation." *Id.*

38. *See id.*

when such evidence is introduced at trial, the jury must be warned that it can "only . . . be considered with regard to the reasonableness of the defendant's fear that the victim was about to inflict bodily harm upon him."[39] Furthermore, this evidence cannot be considered in establishing whether the victim acted in conformity with those prior violent acts on the occasion in question.[40]

ANALYSIS AND HOLDING

The *Dellay* court first addressed the defendant's contention that, when read together, Rules 404(a)(2) and 405(b) allow the introduction of the victim's specific acts, regardless of the defendant's knowledge of those acts, to show that the victim was the aggressor in the incident in question.[41] The court briefly described the historical progression of the common-law rule governing the admissibility of specific acts.[42] Specifically, the court noted "that proof of bad character [of the victim could] be shown only by general reputation and not by specific acts of misconduct."[43] The court noted its reconsideration of this rule in *Tribble* and proceeded to set out its holding.[44]

The *Dellay* court noted that Dellay had asked for an extension of *Tribble*, which would require dispensing with the requirement that the defendant must have knowledge of the victim's prior aggressive or violent acts.[45] The court agreed with Dellay's position that a defendant's awareness of the victim's violent character is irrelevant in determining who was the aggressor.[46] The court disagreed, however, with the argument that the tandem of Rules 404(a)(2) and 405(b) combined to allow introduction of specific instances of violence because the victim's character is an essential element of self-defense.[47]

The court stated that in Rhode Island, self-defense "does not require proof that the victim was the initial aggressor" in order to

39. *Id.*
40. *See id.*
41. *Dellay*, 687 A.2d at 437. Dellay claimed that this position was supported by the fact that a victim's character "is an essential element of . . . self-defense." *Id.*
42. *See id.* at 437-48.
43. *Id.* at 438 (quoting State v. Baker, 417 A.2d 906, 911 (R.I. 1980)).
44. *See id.*
45. *See id.*
46. *See id.*
47. *See id.*

be sustained.[48] Quoting *State v. D'Amario*,[49] the court stated that a person is not required to wait for the other to strike the first blow so long as that person reasonably believes there is an "imminent danger of bodily harm" from the other.[50] The court thereby concluded that, "because the character of the victim is not an essential element of the defense of self-defense, evidence of the victim's character is appropriately limited to reputation or opinion testimony."[51]

CONCLUSION

The holding in *Dellay* firmly cemented the bounds within which a defendant can introduce character evidence of his murder victim in order to support his self-defense argument. This rule can best be summarized as a two-prong test. Evidence of specific prior bad acts of aggressive or violent behavior of the victim are admissible only when (1) the defendant was aware of these acts at the time of the confrontation and (2) based on this knowledge, the defendant reasonably feared imminent bodily harm by the victim.[52] Hence, where the defendant claims self-defense, he cannot look backward in time to justify the killing on the basis of the victim's prior violent acts, about which the defendant knew nothing at the time of the killing. As Justice Murray stated in *Tribble:*

> It is only logical to conclude that when the defendant is unaware of the victim's specific acts of violence at the time of the incident such evidence sheds no light whatsoever on whether the defendant harbored a reasonable fear of imminent bodily harm at the hands of the victim. However, when the defendant is aware, at the time of the confrontation, of prior specific acts of violence committed by the victim against a third party, as in the instant case, evidence of such awareness may be highly relevant to the question of the reasonableness of the defendant's fear of imminent bodily injury at the hands of the victim.[53]

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48. *Id.*
49. 568 A.2d 1383 (R.I. 1990).
50. *Dellay*, 687 A.2d at 438.
51. *Id.* Dellay's final argument, that Rule 404(b) permitted evidence of Ricci's prior violent acts, was refuted by the court's invocation of *Tribble* as the "controlling" rule of law, a rule that the court once again declined to expand. *Id.* at 438-39.
52. *See id.*
53. *Tribble*, 428 A.2d at 1083.

In *Dellay*, the lack of any knowledge by Dellay of Ricci's prior specific acts of aggressive behavior failed to satisfy the two-prong test, as well as Justice Murray's poignantly worded rationale.

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Criminal Procedure. *State v. Gabriau*, 696 A.2d 290 (R.I. 1997). In determining the admissibility of deoxyribonucleic (DNA) evidence to show the probability of a match between a criminal defendant's DNA and the DNA of various racial groups, the burden of showing a genuine issue of dispute as to the defendant's race lies with the defendant once the trial judge has notified defense counsel of the judge's perception of the defendant's apparent racial group.

In *State v. Gabriau*,[1] the Rhode Island Supreme Court was asked to set aside the rape conviction of a defendant whose conviction was obtained with the assistance of DNA evidence.[2] The defendant contended that the DNA evidence offered was irrelevant, and therefore inadmissible, because it only included match probabilities for Caucasian, African-American and Hispanic populations, while excluding Native American and Asian populations.[3] The supreme court, noting that the trial judge had notified defense counsel that the defendant did not "appear to be anything other than Caucasian,"[4] held that once defense counsel is so notified, the burden then shifts to the defense to show that the defendant's race is a genuine issue of dispute.[5]

FACTS AND TRAVEL

On Memorial Day Weekend in 1991, seventeen-year old Claudia Doe (Claudia) completed classes at the Newport Hairdressing School and planned for Tracy Green, her friend, to stop by after school.[6] Tracy arrived at approximately 3:45 p.m. accompanied by Jessica Brown (Jessica) and Jessica's "Uncle Ed."[7] Claudia estimated Jessica's age at about sixteen, and Uncle Ed's age to be between thirty-five and forty-years old.[8]

The four went to Jessica's father's home located in West Warwick.[9] They entered through the kitchen where they encountered

1. 696 A.2d 290 (R.I. 1997).
2. *See id.* at 291-93.
3. *See id.* at 293.
4. *Id.*
5. *See id.* at 295.
6. *See id.* at 291.
7. *Id.*
8. *See id.*
9. *See id.*

Uncle Ed's father (also named Ed) and Joseph Gabriau (Gabriau)—Jessica's father and the defendant in this case.[10] The elder Ed and Gabriau were drinking beer, and after the girls took a seat at the table, Jessica made a drink for Claudia at Gabriau's request.[11] Claudia testified that she had at least two drinks. Thereafter, Gabriau recommended that they go to a liquor store to purchase additional alcohol. On the drive back, Claudia had Gabriau stop driving so she could vomit.[12]

After returning to Gabriau's home, Jessica and Tracy "told Claudia that Claudia's boyfriend had kissed Jessica."[13] Upon hearing this, Claudia telephoned her boyfriend to verify the story. Claudia stated that she passed out at the kitchen table after this phone call and that Jessica and Gabriau later helped her to a fold-out chair which was set up in the living room.[14] At that point, according to Claudia, "she either passed out or fell asleep."[15]

When Claudia awoke, Gabriau was holding her down. Her pants and underwear were off and her shirt and bra were pushed up.[16] Claudia testified that she screamed and unsuccessfully tried to push Gabriau off of her.[17] Gabriau then forced Claudia to have vaginal and anal intercourse until someone entered from the adjoining room.[18] At that point, Gabriau left the room and Claudia put her underwear and shorts on. She then ran out of the home through the kitchen to a nearby house where she called the police. Claudia testified that she heard people laughing as she fled Gabriau's home.[19]

When West Warwick police officers arrived, they found Claudia crying hysterically on the side of the road.[20] She had no shoes on, her bra was pushed up over her breasts and her shorts were unzipped.[21] Claudia indicated to the officers that Gabriau had just

10. *See id.*
11. *See id.*
12. *See id.*
13. *Id.*
14. *See id.*
15. *Id.*
16. *See id.*
17. *See id.*
18. *See id.*
19. *See id.*
20. *See id.*
21. *See id.* at 291-92.

raped her.[22] The officers then took her to Kent County Hospital for a rape examination where it was noted that she had abrasions on her "knees, forearms, neck, and the left side of her head."[23] Evidence swabs were taken from Claudia as part of the examination and then sent to the Forensic Serology Laboratory at the Department of Health. Tests indicated the presence of sperm on the vaginal and rectal swabs. Gabriau's blood—acquired pursuant to a warrant—was sent along with the swabs to the Federal Bureau of Investigation laboratory for DNA analysis.[24] The trial judge conducted a preliminary hearing to decide the admissibility of the DNA analysis results and determined that these results could be admitted at trial.[25]

While executing a search and arrest warrant the following Monday, police officers arrested Gabriau, who was hiding in the cellar of his building.[26] They also seized a sweater and a shoe, both identified as Claudia's during the trial, as well as the fold-out chair where the alleged rape had occurred.[27]

During the trial, FBI Special Agent Linda Harrison was qualified as an expert.[28] She testified that there was a DNA match at two genetic loci of Gabriau's blood sample and the sperm in the evidence swabs taken from Claudia. She also testified that the tests were inconclusive at two other loci.[29] Agent Harrison used the product rule[30] to calculate "the probability that a random, unrelated person might have a DNA profile matching that of Gabriau."[31] Harrison testified that based on her calculations, the probability that an African American person would share Gabriau's genetic profile was about 1 in 3300; a Caucasian person—about 1 in 780; and a Hispanic person—about 1 in 520.[32] Fi-

22. *See id.* at 292.
23. *Id.*
24. *See id.*
25. *See id.* The supreme court noted that the trial in this case occurred prior to the court's decision in *State v. Morel*, 676 A.2d 1374 (R.I. 1996). *See Gabriau*, 696 A.2d at 290 at n.2. For a discussion of the DNA testing procedure and general test for admissibility of this evidence as set out in *Morel*, see *infra* p. 3.
26. *See Gabriau*, 696 A.2d at 292.
27. *See id.*
28. *See id.*
29. *See id.*
30. For a discussion of the product rule, see *infra* p. 6.
31. *Gabriau*, 696 A.2d at 293.
32. *See id.*

nally, Harrison testified that when encompassing all three populations using the ceiling principle, "the probability that an unrelated individual would share a profile with Mr. Gabriau . . . [was] approximately 1 in 297."[33]

After the DNA testimony had been admitted linking Gabriau to the rape, Gabriau testified that the sex had been consensual and that he had not had anal intercourse with Claudia.[34] Defense counsel hinted in closing arguments that Claudia had sex with Gabriau because she was angry with her boyfriend. A jury found Gabriau guilty on three counts of first-degree sexual assault. Gabriau subsequently appealed, arguing that Agent Harrison's testimony on the random match probability among racial groups should have been excluded.[35]

BACKGROUND

In the 1996 case *State v. Morel*,[36] the Rhode Island Supreme Court confronted the issue of the admissibility of DNA evidence in a criminal case involving the rape of a teen aged girl.[37] Although the admissibility of the type of DNA evidence involved in *Gabriau* was not at issue, the *Morel* court's discussion of the product rule and the ceiling principle sets out the parameters to measure Gabriau's argument that the DNA evidence was irrelevant.[38] Gabriau put forth that argument on the ground that Agent Harrison, in conducting her testing using both the product rule and ceiling principle, failed to include either Native Americans or Asians in her population database.[39]

The *Morel* court detailed the scientific background of the performance of DNA testing as well as the general rules and methods for determining the statistical application for matching DNA sam-

33. *Id.* For a discussion of the ceiling principle, see *infra* p.6.

34. *See Gabriau*, 696 A.2d at 293.

35. *See id.* Gabriau also raised a second issue on appeal concerning the trial judge's refusal to allow admission of Claudia's prior vague statements regarding her hearing of laughter in the kitchen as past recollection recorded. *See id.* at 295. The court ultimately dismissed this argument on the ground that Rhode Island Rule of Evidence 803 did not allow "a defendant to transform a prior inconsistent statement into a memorandum of past recollection recorded." *Id.* at 298 (quoting R.I. R. Evid. 803).

36. 676 A.2d 1347 (R.I. 1996).

37. *See id.* at 1349.

38. *See id.* at 1352-55.

39. *See Gabriau*, 696 A.2d at 293.

ples.[40] After this comprehensive description of the technicalities of DNA testing, the *Morel* court discussed the application of the product rule and the ceiling principle as methods for computing match probabilities.[41] As the *Morel* court pointed out, the computation of "the probability that a person selected at random from a comparison population would have a DNA profile that matches that of the crime sample" is one of the most controversial aspects of the use of DNA for forensic purposes.[42]

Prior to a discussion on the use of the product rule and the ceiling principle, a short description of the mechanics of DNA testing is necessary. Essentially, DNA analysis is conducted by comparing the size of genetic fragments, known as alleles.[43] These fragments are obtained through a process known as electrophoresis, which is conducted on the DNA specimens.[44] The result of this process is a separation of the fragments by their various lengths. Next, the array of DNA fragments goes though a procedure referred to as Southern blotting, where the fragments are transferred to a sheet of nylon for manageability.[45] Following this procedure, the DNA is heated to denature it and separate "the hydrogen linked double helix into single DNA strands."[46] A radioactive probe is then applied to the membrane which allows testing for alleles at different loci. Finally, the nylon sheet is inserted between sheets of photographic film.[47] The probe's radioactivity eventually exposes, or draws out, the DNA fragments which can be seen in a "visual pattern of bands."[48] This visual result is called an autorad.[49]

After an autorad is obtained, the probe material is removed and the entire process is repeated three to five times with different probes, depending on the amount of DNA available for testing from

40. *See Morel*, 676 A.2d 1350-52.

41. *See id.* at 1352-53.

42. *Id.* at 1352.

43. *See id.* at 1350 (noting that a characteristic DNA sequence is situated at a specific position, or locus, on a specific chromosome, while the various forms of a gene at a specied locus are known as alleles).

44. *See id.* at 1351.

45. *See id.*

46. *Id.*

47. *See id.*

48. *Id.*

49. *See id.* (noting that autorad is the short form for autoradiograph).

the sample.[50] From this procedure a set of autorads is produced, each the result of a single probe.[51] When considered together, these autorads constitute a DNA fingerprint.[52]

For comparison purposes, if DNA bands for the suspect appear to be aligned on the autorad with DNA from the forensic sample, then computer verification is performed to check the measurement.[53] A "match" is proclaimed if the two bands fall within a specific length, meaning that "the band patterns are consistent with the conclusion that the two DNA samples had the same source."[54] A calculation is then performed to determine the statistical likelihood that someone else in the population would randomly have the same DNA profile. It is the method of this calculation that is often the basis for controversy.[55] The two methods discussed in *Morel*, the product rule and the ceiling principle, are discussed briefly below.

The Product Rule

The *Morel* court described the product rule method of DNA match probability computation as the most straightforward method.[56] Basically, in order to obtain "the probability of a random occurrence of a specific pattern of alleles . . . separate estimated probabilities of the random occurrence of each allele in the comparison population are multiplied."[57] A risk exists in this calculation that the true probability of a match could be overestimated or underestimated, depending on whether the individual allele frequencies are independent—that is "likely to occur together in a person."[58] As a result, the calculation could "misstate the incriminating value of the evidence."[59]

Some critics of the product rule contend that "members of subgroups tend to mate within their own subgroup."[60] This mating,

50. *See id.*
51. *See id* at 1351-52.
52. *See id.* at 1352.
53. *See id.*
54. *Id.*
55. *See id.*
56. *See id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*

they argue, results in population substructuring, altering the gene frequencies and rendering the results obtained via the product rule defective.[61]

The Ceiling Principle

The ceiling principle addresses the substructure problem raised by critics of the product rule.[62] This method assumes that substructures may exist and accounts for this in its population estimating procedure.[63] In employing the ceiling principle probability match calculation, "the 95 percent upper confidence limit . . . is first computed for each of the existing population samples"[64] Next, a "joint probability of a coincidental match" is calculated.[65] The probabilities are then multiplied under the same method as the product rule. This method of calculation yields a probability that is conservative in favor of the defendant.[66]

In *Morel*, the State provided two expert witnesses who testified at a voir dire hearing on the issue of admissibility of DNA evidence.[67] The State's first expert, FBI Special Agent Lawrence Presley (Presley) testified as to the probability of a random match of the defendant's DNA to that of a person within the Caucasian population.[68] According to Presley, under the product rule, there was a one in one-thousand chance that defendant's DNA matched a random person in the population, essentially "excluding 99.9 percent of the Caucasian population unrelated to [the] defendant."[69] Using the ceiling principle, 99.8 percent of the population would be excluded, according to Presley.[70]

The State's second expert, Kenneth Kidd, Ph.D. (Kidd), an expert in population genetics and molecular biology, testified that the product rule "was the generally accepted procedure in the field of population genetics."[71] Kidd further testified that the ultraconser-

61. *See id.*
62. *See id.*
63. *See id.* at 1353.
64. *Id.* (noting that these populations may include Caucasian, Hispanic, African American and Native American).
65. *Id.*
66. *See id.*
67. *See id.*
68. *See id.* at 1353.
69. *Id.*
70. *See id.* at 1353-54.
71. *Id.* at 1354.

vative nature of the ceiling principle had a tendency "to obscure the truth."[72]

When the hearing was concluded, the trial judge declared that the product rule would be the method of DNA probability testing that would be used at trial.[73] At trial, Agent Presley testified to the DNA evidence under the product rule.[74] On appeal from his conviction, the defendant in *Morel* contended that the trial judge erred by allowing the jury to hear testimony of DNA matching evidence under the product rule since that method, according to the defendant, was "inherently unreliable."[75] The supreme court dismissed this argument on the grounds that admission of DNA evidence under the product rule was within the discretion of the trial judge, who must consider whether such evidence will assist the jury in making a decision.[76] Furthermore, the court noted that the method under which the FBI conducts its DNA testing yields conservative results that give "a defendant the benefit of any doubt about the data."[77] The *Morel* court concluded that the admissibility of such evidence was proper so long as the defendant had the opportunity to cross-examine experts in order to expose weaknesses in the DNA analysis.[78]

ANALYSIS AND HOLDING

In *Gabriau*, defense counsel cross-examined Agent Harrison during a preliminary hearing concerning her testimony on the random match probabilities.[79] Harrison testified to the probability of matches in African American, Caucasian and Hispanic populations. She conceded under defense examination that she had not calculated probabilities for Native American or Asian populations under either the product rule or ceiling principle methods of probability calculation.[80] The defense used this testimony to argue that the DNA evidence might not include defendant's racial group

72. *Id.*
73. *See id.*
74. *See id.*
75. *Id.*
76. *See id.* 1354-55.
77. *Id.* at 1356.
78. *Id.*
79. *Gabriau*, 696 A.2d at 293.
80. *See id.*

and was therefore inadmissible as irrelevant.[81] The trial judge responded to this argument by stating that defendant did not "appear to be anything other than Caucasian."[82]

As in *Morel*, the *Gabriau* court indicated that the admissibility of evidence is within the trial judge's sound discretion.[83] The court stated that once the trial judge had informed the defense of his impression of the defendant's evident racial group, the burden then fell upon the defendant to show that there existed an issue of dispute as to defendant's race.[84] Citing *Morrison v. California*,[85] the court noted that "where the ability to challenge the trial justice's observation was uniquely within defendant's knowledge and ability, it is especially appropriate to shift the burden of going forward to defendant to lay the foundation for exclusion."[86]

The court noted that Gabriau made no effort to show that his race was an issue in dispute.[87] Gabriau's failure to introduce evidence concerning his racial origin relieved the trial judge from considering defense counsel's argument that the DNA evidence was irrelevant.[88] As the court concluded: "For us to rule otherwise would be to elevate every naked assertion by counsel into an issue requiring proof by the state."[89] Gabriau's appeal was denied and his conviction affirmed.[90]

CONCLUSION

In *Gabriau*, the issue of admissibility of DNA evidence was tied, not to the reliability of such evidence as a forensic tool, but rather to the method of matching the defendant's DNA to that of a particular racial population.[91] In this case, the defendant, Gabriau, had argued that, since the DNA matching evidence had only been provided for three racial groups, African American, Caucasian and Hispanic, the probabilities relating to a potential match

81. *See id.*
82. *Id.*
83. *Id.* at 294.
84. *See id.*
85. 291 U.S. 82 (1934).
86. *Gabriau*, 696 A.2d at 295 (citing *Morrison*, 291 U.S. at 88-89).
87. *See id.*
88. *See id.*
89. *Id.*
90. *See id.* at 298.
91. *Id.* 293-95.

in the two excluded groups, Native American and Asian, prevented the results from being relevant, since Gabriau may have belonged to one of those groups.[92] However, once the trial judge commented to defense counsel that Gabriau appeared to belong to the Caucasian race, it then became the defense's burden to show that Gabriau may have indeed belonged to the Asian or Native-American race.[93] Without this evidence, the trial judge exercised his discretion to allow the DNA evidence to be offered.[94]

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92. *See id.* at 293.
93. *See id.* at 294.
94. *See id.*

Criminal Procedure. *State v. Guido*, 698 A.2d 729 (R.I. 1997). Although state action is invoked when a grand jury authorizes a subpoena for medical records, no legitimate Fourth Amendment privacy expectation exists in those records. Conversely, no state action is involved concerning the withdrawal and testing of a defendant's blood by hospital personnel and, therefore, no Fourth Amendment concerns are triggered. Additionally, judicial access to medical records cannot be constitutionally prohibited by the Confidentiality of Health-Care Information Act. Finally, the secrecy of the grand-jury proceeding is not violated, nor is the grand jury's role entirely usurped, if the medical records are turned over to the Attorney General's office.

In *State v. Guido*,[1] the Rhode Island Supreme Court was confronted with a triad of issues on a defendant's appeal from a conviction for driving under the influence of alcohol.[2] In affirming the conviction, the supreme court found that: (1) blood tests performed pursuant to hospital protocol did not constitute state action and, therefore, no Fourth Amendment protections arose;[3] (2) the Confidentiality of Health-Care Information Act was not intended to prevent judicial access to medical records[4] and (3) no reversible error existed where medical records obtained via a grand-jury subpoena were provided directly to the Attorney General's office rather than to the grand jury.[5]

FACTS AND TRAVEL

At approximately 10:30 p.m. on May 15, 1993, Salvatore Guido (Guido), and sixteen-year old Sarah Anderson (Anderson) collided head-on as each operated their vehicles on Airport Road in Westerly, Rhode Island.[6] After pinned inside her vehicle for more than an hour, Anderson was removed with the assistance of the "jaws of life" and flown to Rhode Island Hospital by medical helicopter.[7]

1. 698 A.2d 729 (R.I. 1997).
2. *See id.* at 731.
3. *See id.* at 733.
4. *See id.* at 734.
5. *See id.* at 737.
6. *See id.* at 732.
7. *See id.*

Anderson sustained broken ribs, bruised lungs, a fractured ankle and wrist, and a dislocated hip.[8]

Police found Guido "unconscious [and] slumped across the front seat of his vehicle."[9] Guido was also flown to Rhode Island Hospital where he was diagnosed in critical condition.[10] He had suffered two fractured legs and was severely bleeding. During his emergency room treatment, a blood sample was drawn from Guido to test for the presence of alcohol in accordance with hospital protocol.[11] The results of the blood test indicated that Guido's blood contained an alcohol level of 0.203 percent, which is more than twice the limit allowed under section 31-27-2(b)(1) of the Rhode Island General Laws.[12]

At first, police did not know the cause of the accident.[13] Anderson was found pinned in her car and hysterical. She indicated to police that she might have crossed the yellow line.[14] Later, police discovered that Guido had been on his way home from a bachelor party "where he had been seen drinking."[15] Also, one rescue

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8. *See id.*

9. *Id.*

10. *See id.*

11. *See id.*

12. *See id.* Rhode Island General Laws § 31-27-2 (1996) states in relevant part:

> (a) Whoever operates or otherwise drives any vehicle in the state while under the influence of any intoxicating liquor, drugs, toluene, or any controlled substance as defined in chapter 28 of title 21, or any combination thereof, shall be guilty of a misdemeanor and shall be punished as provided in subsection (d) of this section.
>
> (b)(1) Any person charged under subsection (a) of this section whose blood alcohol concentration *is one-tenth of one percent (.1%) or more* by weight as shown by a chemical analysis of blood, breath, or urine sample shall be guilty of violating subsection (a) of this section. This provision shall not preclude a conviction based on other admissible evidence. Proof of guilt under this section may also be based on evidence that the person charged was under the influence of intoxicating liquor, drugs, toluene, or any controlled substance defined in chapter 28 of title 21, or any combination thereof, to a degree which rendered such person incapable of safely operating a vehicle. The fact that any person charged with violating this section is or has been legally entitled to use alcohol or a drug shall not constitute a defense against any charge of violating this section.

Id. (emphasis added).

13. *See Guido*, 698 A.2d at 732.

14. *See id.*

15. *Id.*

worker noticed "a slight odor of alcohol" coming from Guido.[16] Another rescue worker found an "open, partially filled bottle of beer on the front floor of [Guido's] car."[17]

On May 18, 1993, three days after the accident, Sergeant Larry Gwaltney (Gwaltney) of the Westerly Police Department requested subpoenas from a statewide grand jury sitting in Kent County.[18] The subpoenas were needed to obtain Rhode Island Hospital's medical records documenting the blood-alcohol levels of both Anderson and Guido.[19] Gwaltney requested that he "be made an agent of the grand jury for return of service."[20] He indicated that he needed the medical records to assist in the investigation of a serious motor-vehicle accident. The grand jury granted Gwaltney's requests. The subpoenas authorized Gwaltney to receive the records rather than compel the hospital's record keeper to appear in court.[21]

Gwaltney served the hospital, which made no objection. Gwaltney obtained the medical records, which contained the information on Guido's blood-alcohol level.[22] Guido never consented to the release of his medical records.[23] Rather than submit the records to the grand jury, Gwaltney handed them over to the Attorney General's office, which used the records to determine "probable cause for the filing of a criminal information in June of 1993."[24] By filing the criminal information, the Attorney General pre-empted any indictment by the grand jury that had issued the subpoenas.[25]

Guido filed several motions prior to trial to suppress the hospital records.[26] He argued that his Fourth Amendment rights had been violated because the blood-alcohol evidence contained in the medical records was privileged medical information.[27] Guido also contended that the grand jury had been misused by the Attorney

16. *Id.*
17. *Id.*
18. *See id.*
19. *See id.*
20. *Id.*
21. *See id.*
22. *See id.*
23. *See id.*
24. *Id.*
25. *See id.*
26. *See id.*
27. *See id.*

General's office.[28] He moved for dismissal due to lack of probable cause.[29] The Rhode Island Superior Court denied Guido's motions, and he was tried before a jury.[30]

At trial, both the State and Guido offered expert testimony by accident-reconstruction experts.[31] Joseph Cosentino (Cosentino) of the Westerly Police Department, the State's expert, based his opinions on "firsthand observations of the evidence at the scene."[32] He testified that "the point of impact occurred on Anderson's side of the roadway."[33] Yau Wu, Ph.D., Guido's expert, opined that the impact took place on Guido's side of the road.[34] Dr. Wu's opinion was not based on firsthand observation. Guido was subsequently convicted and appealed from that conviction.[35]

BACKGROUND

In 1996, the Rhode Island Supreme Court decided *State v. Collins*,[36] a case which bears a close factual resemblance to the *Guido* case.[37] *Collins* presented the court with the issue of admissibility of blood-alcohol test results performed independently by hospital personnel in the course of their procedural protocol.[38] The *Collins* court performed an in-depth analysis of the "drunk driving statute" and the requirements for the admissibility of blood-alcohol test results.[39] In *Collins*, the defendant had been involved in an auto accident and was suspected by police of being under the influ-

28. *See id.* at 732-33.
29. *See id.* at 733.
30. *See id.*
31. *See id.*
32. *Id.*
33. *Id.*
34. *See id.*
35. *See id.*
36. 679 A.2d 862 (R.I. 1996).
37. *See generally id.*
38. *See id.* at 864.
39. *See id.* Rhode Island General Laws § 31-27-2 (1996) details the conditions under which such tests will be admissible:

> (c) In any criminal prosecution for a violation of subsection (a) of this section, evidence as to the amount of intoxicating liquor, toluene, or any controlled substance as defined in chapter 28 of title 21, or any combination thereof in the defendant's blood at the time alleged as shown by a chemical analysis of the defendant's breath, blood, or urine or any other bodily substance shall be admissible and competent, provided that evidence is presented that the following conditions have been complied with:

ence of alcohol.[40] The arresting officer told the defendant of "his right to an attorney and his right to refuse chemical testing."[41] At the hospital, the "defendant indicated that he did wish to speak with an attorney before submitting to a chemical test."[42] Unable to reach his lawyers, the defendant refused to speak with the police or submit to chemical testing.[43]

At trial, the results of a blood-serum alcohol analysis were admitted into evidence.[44] Hospital personnel performed this test on

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(1) The defendant has consented to the taking of the test upon which the analysis is made. Evidence that the defendant had refused to submit to the test shall not be admissible unless defendant elects to testify.

(2) A true copy of the report of the test result was mailed within seventy-two (72) hours of the taking of the test to the person submitting to a breath test.

(3) Any person submitting to a chemical test of blood, urine, or other body fluids shall have a true copy of the report of the test result mailed to him or her within thirty (30) days following the taking of the test.

(4) The test was performed according to methods and with equipment approved by the director of the department of health of the state of Rhode Island and by an authorized individual.

(5) Equipment used for the conduct of the tests by means of breath analysis had been tested for accuracy within thirty (30) days preceding the test by personnel qualified as hereinbefore provided, and breathalyzer operators shall be qualified and certified by the department of health within three hundred sixty-five (365) days of the test.

(6) The person arrested and charged with operating a motor vehicle while under the influence of intoxicating liquor, toluene, or any controlled substance as defined in chapter 28 of title 21, or, any combination thereof in violation of subsection (a) of this section was afforded the opportunity to have an additional chemical test and the officer arresting or so charging the person informed the person of this right and afforded him or her a reasonable opportunity to exercise the same, and a notation to this effect is made in the official records of the case in the police department. Refusal to permit an additional chemical test shall render incompetent and inadmissible in evidence the original report.

Id.

40. *See Collins*, 679 A.2d at 863.

41. *Id.*

42. *Id.*

43. *See id.*

44. *See id.* at 864. On average, blood-serum alcohol levels measure roughly 16 percent higher than blood-alcohol levels. Hence, for legal purposes, defendant's blood-alcohol level was 0.242 percent, rather than 0.281 percent, as the doctor in charge of the Rhode Island Hospital trauma unit on the night of the accident testified at trial. *See id.*

the night of the accident.[45] In addressing the defendant's claim that such evidence should have been suppressed by the trial court, the *Collins* court referred to its holding in *State v. Lussier*,[46] in which the court developed a bright-line distinction between tests resulting from law-enforcement activity and those done by hospital personnel.[47] The *Collins* court concluded that the drunk-driving "statute [was] inapplicable to the facts in [this] case in which chemical tests were administered by hospital personnel in the ordinary course of administering medical treatment."[48]

ANALYSIS AND HOLDING

The Rhode Island Supreme Court divided its opinion into three sections to address directly the three points raised on appeal by the defendant: (1) the search, (2) the privilege and (3) the grand jury. Each will be discussed accordingly below.

The Search

The court first addressed Guido's argument that the acquisition of the medical records amounted to a search requiring a warrant under the Fourth Amendment.[49] The court agreed with the trial court's conclusion that no state action was taken when the blood tests were performed, since this was a matter of hospital protocol "rather than at the command of law enforcement."[50] However, the court believed that state action was involved when the grand jury authorized the subpoenas.[51] Nevertheless, the court concluded that no Fourth Amendment protections were required.[52]

The court detailed the use of the Fourth Amendment exclusionary rule in similar cases.[53] Quoting *State v. Pailon*,[54] the court stated that that the exclusionary rule is targeted at police or prosecutorial actions, and "is not triggered by the actions of private

45. *See id.*
46. 511 A.2d 958 (R.I. 1986).
47. *See Collins*, 679 A.2d at 865 (citing State v. Lussier, 511 A.2d at 961).
48. *Id.*
49. *See Guido*, 698 A.2d at 733.
50. *Id.*
51. *See id.*
52. *See id.*
53. *See id.*
54. 590 A.2d 858, 861 (R.I. 1991).

persons."[55] The *Guido* court stressed that the withdrawal of blood here was performed by hospital personnel according to procedures developed "to assist hospital personnel in electing medical prescription and treatment rather than at the direction of state authorities."[56] As a result, the court concluded, there was no state action and, therefore, "no Fourth Amendment concern."[57]

The court acknowledged Guido's argument regarding the distinction between the hospital procedure and Sergeant Gwaltney's obtaining medical records by state action via the grand jury process.[58] In addressing this argument, the court asserted that Guido "had no legitimate Fourth Amendment expectation of privacy in [the hospital's] medical records relating to his emergency treatment."[59] The court set out the general rule regarding the circumstances under which an expectation of privacy arises.[60] Citing *State v. Bjerke*,[61] the court made it clear that the expectation of privacy protected by the Fourth Amendment must be "one that society at large would recognize as reasonable."[62] Building on this, the court concluded that Guido had no legitimate expectation of privacy in his medical records.[63] Therefore, if no privacy interest was invaded, then the seized evidence could be introduced.[64]

The Privilege

Next, the court addressed Guido's argument that his medical records were privileged under the Confidentiality of Health-Care Information Act (Act).[65] After briefly setting out the general rule

55. *Guido*, 698 A.2d at 733 (quoting *Pailon*, 590 A.2d at 861).
56. *Id.* at 733.
57. *Id.*
58. *See id.*
59. *Id.*
60. *See id.*
61. 697 A.2d 1069 (R.I. 1997).
62. *Guido*, 698 A.2d at 733.
63. *See id.* at 734.
64. *See id.*
65. *See id.* The Confidentiality of Health-Care Information Act, section 5-37.3-4 of the Rhode Island General Laws provides in pertinent part:

> (a) Except as provided in subsection (b) or as otherwise specifically provided by law, a patient's confidential health care information shall not be released or transferred without the written consent of such patient or his or her authorized representative, on a consent form meeting the requirements of subsection (d), a copy of any notice used pursuant to subsection

of the statute as expressed in *Bartlett v. Danti*,[66] the court rejected Guido's argument.[67]

In supporting its conclusion, the *Guido* court opined that the statute could not preclude access to the types of medical records at issue in this case.[68] The court referred to its conclusion in *Bartlett* which stated that section 5-37.3-6 of the Rhode Island General Laws,[69] when read together with section 5-37.3-4(a), allows the patient to "decide with impunity whether to permit access to" relevant medical records.[70] The *Bartlett* court found the statute unconstitutional in that it removed from the courts the ultimate decision of admissibility.[71] The *Guido* court concluded that there was an equally violative aspect of section 5-37.3-4, which would allow a defendant to conceal evidence of intoxication at his discretion.[72] Guido's reading of the statute would result in "a serious impediment to the Judiciary's ability to carry out its function in a large variety of criminal cases."[73] Therefore, the court rejected Guido's argument.[74]

(d), and of any signed consent shall upon request, be provided to the patient prior to his or her signing a consent form.

Provided however, that any and all managed care entities and managed care contractors writing policies in the state are hereby prohibited from providing any information related to enrollees which is personal in nature and could reasonably lead to identification of an individual and is not essential for the compilation of statistical data related to enrollees, to any international, national, regional or local medical information data base. Provided further however, that this provision would not restrict or otherwise prohibit the transfer of information to the department of health to carry out its statutory duties and responsibilities.

R.I. Gen. Laws § 5-37.3-4 (Supp. 1997).

66. 503 A.2d 515 (R.I. 1986). Essentially, *Bartlett* held that pursuant to the statute, a patient's confidential health-care information could not be released without the patient's written consent. *See id.* at 517.

67. *Guido*, 698 A.2d at 734.

68. *See id.*

69. This statute is a sister provision of the Act and is concerned with court proceedings related to confidential health-care information. *See id.*

70. *Guido*, 698 A.2d at 734 (quoting *Bartlett*, 503 A.2d at 517).

71. *See Bartlett*, 503 A.2d at 517.

72. *Guido*, 698 A.2d at 734.

73. *Id.*

74. *See id.*

The Grand Jury

Guido's final argument was that the Attorney General abused the grand-jury system.[75] He argued that Gwaltney, in his temporary role as a grand-jury agent, compromised the secrecy of the process when he presented the medical records to the Attorney General.[76] Guido further asserted that the grand jury's power was usurped when the subpoenaed records were used to prepare the criminal information without the grand jury's involvement.[77] Guido argued that such action constituted a violation of his rights under the Confidentiality of Health-Care Information Act as well as the state and federal Constitutions.[78]

The court began its discussion by placing the grand jury's role in perspective.[79] After setting out the text of Article I, section 7 of the Rhode Island Constitution,[80] the court distinguished the state-charging process from that of the federal process.[81] The state provides for a defendant to be charged by an attorney general's information *in addition to* a grand jury indictment.[82] The court has traditionally recognized the state grand jury's powers as those that existed at common law.[83]

Citing an advisory opinion,[84] the *Guido* court made clear that the protections afforded at common law were codified by the framers of the Rhode Island Constitution, specifically the language of section 7.[85] The court then explained the two functions of the

75. *See id.*

76. *See id.*

77. *See id.* at 734-35.

78. *See id.* at 735.

79. *See id.* The court noted that the grand jury serves a dual role in its capacity to indict, as well in its investigative capacity. *See id.* (quoting United States v. Calandra, 414 U.S. 338, 343 (1974)). The court concluded that the grand jury, when acting in its investigative capacity, is generally not restrained by technical rules of evidence and procedure when compelling the production of evidence. *See id.*

80. *See id.* Article I, section 7 provides in relevant part: "[N]o person shall be held to answer for any . . . felony unless on presentment of indictment by a grand jury or on information in writing signed by the attorney-general . . . ." R.I. Const. art. I, § 7.

81. *See Guido*, 698 A.2d at 735.

82. *See id.*

83. *See id.*

84. *See Guido*, 698 A.2d at 735 (citing Opinion to the Governor, 62 R.I. 20, 4 A.2d 487 (1939)).

85. *See id.*

grand jury, investigating and indicting.[86] In its indicting capacity, the grand jury acts as a shield, evaluating the sufficiency of evidence to support holding an accused for trial.[87] The court concluded that the grand jury's investigative function acts as a sword in uncovering criminal conduct.[88]

Recognizing the investigative function that was at issue in this case, the court stated that such authority was broad.[89] The court clarified this role of the grand jury by reference to the United States Supreme Court case of *Branzburg v. Hayes*,[90] which stated that "the scope of [grand jury] inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation."[91] The *Guido* court drove home this philosophy by stating that a grand jury is typically not restrained by the types of evidentiary rules that dictate the conduct of criminal trials.[92]

Moreover, the *Guido* court stated that grand juries often work with the assistance of the Attorney General's office as well as police investigators.[93] Subsequently, it would "continue to recognize the validity of [the] relationship between the Office of the Attorney General and [the] state grand juries."[94] Therefore, the court rejected Guido's argument that the secrecy of the grand-jury proceedings was compromised when medical records subpoenaed by the grand jury were given to the Attorney General's office.[95]

CONCLUSION

In *Guido*, the Rhode Island Supreme Court was faced with a number of issues relating to the admissibility of medical records in a criminal case. Although the court took pains to explain fully the essential relationship between the Attorney General and grand juries,[96] the major point of this case involves the admissibility of the medical records as evidence in a driving-under-the-influence case.

86. *See id.*
87. *See id.*
88. *See id.*
89. *See id.*
90. 408 U.S. 665 (1972).
91. *Guido*, 698 A.2d at 735 (quoting *Branzburg*, 408 U.S. at 688).
92. *Id.* (quoting United States v. Calandra, 414 U.S. 338. 343 (1974)).
93. *See id.* at 736.
94. *Id.*
95. *See id.*
96. *Id.*

To that end, the court has made it clear that, if a blood test is performed on an individual while receiving emergency medical treatment in accordance with hospital protocol, then the results of that test will not be shielded by the Fourth Amendment[97] or the state's Confidentiality of Health-Care Information Act.[98]

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97. *See id.* at 733
98. *See id.* at 734.

Criminal Procedure. *State v. Johnson*, 688 A.2d 285 (R.I. 1997). The reliability of a witness's in-court identification is determined by examining all the facts and circumstances surrounding the identification to establish an independent basis of reliability, so as to not violate the defendant's due-process rights.

In *State v. Johnson*,[1] the Rhode Island Supreme Court held that, for a witness's in-court identification of a defendant to be considered reliable, and therefore not violative of defendant's due-process rights, the identification must pass an independent-reliability test.[2] The independent-reliability test requires the trial court to determine if the witness's identification has a basis for reliability considering all the facts and circumstances.[3] In *Johnson*, the supreme court affirmed the trial court's denial of the defendant's motion to suppress a witness's in-court identification, which the defendant argued lacked reliability due to the witness's admitted drug addiction.[4]

FACTS AND TRAVEL

On April 6, 1993, the defendant, Wilfret Johnson (Johnson) visited Ivonne Otero (Otero) and her common-law husband, Wilson Velasquez (Velasquez), at their third-floor apartment.[5] Johnson had supplied Otero with cocaine which she sold on his behalf.[6] Johnson had come to collect the proceeds from the sale.[7] However, Velasquez had apparently spent the drug-sale proceeds.[8] Johnson, upon learning this, took Velasquez down to the ground floor.[9] Once there, Johnson proceeded to beat and strike Velasquez in the face and head, while Otero watched the beating from the third-floor window.[10] After Johnson had finished battering Velasquez,

1. 688 A.2d 285 (R.I. 1997) (per curiam).
2. *See id.* at 287; *see, e.g.*, State v. Andrade, 657 A.2d 538 (R.I. 1995); State v. Mastracchio, 612 A.2d 698 (R.I. 1992); State v. Gomes, 604 A.2d 1249 (R.I. 1992); *In re* Richard L., 479 A.2d 103 (R.I. 1984).
3. *See Johnson*, 688 A.2d at 287; *see also* State v. Camirand, 572 A.2d 290 (R.I. 1990).
4. *Johnson*, 688 A.2d at 287.
5. *See id.*
6. *See id.* at 286-87.
7. *See id.* at 287.
8. *See id.* at 286.
9. *See id.* at 287.
10. *See id.*

he called up to Otero to "come down and see how pretty [he] left [Velasquez]."[11] Upon reaching Velasquez, Otero found him bleeding and unconscious with his forehead and neck badly swollen. Velasquez was taken to Rhode Island Hospital where he remained for six months until he was transferred to Zambarano Hospital and later moved to a New York nursing home.[12] As a result of the assault, Velasquez must be fed through a feeding tube and cannot communicate.[13]

Police obtained a warrant and arrested Johnson after Otero identified Velasquez's assailant as "Will from Putnam Street."[14] At trial in superior court, a jury found Johnson guilty of assault with a dangerous weapon resulting in serious bodily injuries.[15] On appeal, Johnson argued that Otero's in-court identification should have been suppressed by the trial judge because Otero was an admitted drug addict.[16] The trial judge had denied the defendant's

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11. *Id.*

12. *See id.*

13. *See id.*

14. *Id.*

15. *See id.* at 286.

16. *See id.* at 287. In addition to the identification issue, the defendant also presented three additional grounds for appeal. First, he argued that it was an error for the trial judge to allow Otero to testify about her husband's medical condition. *See id.* The supreme court held that Otero could testify as to her personal observations and that she was not offering a medical diagnosis. *See id.* Second, the defendant claimed that the trial judge erred in failing to dismiss the charge against him pursuant to his Sixth Amendment right to a speedy trial since 14 months had elapsed from the filing of the information to the trial. *See id.* at 288. Applying the test set forth in *Barker v. Wingo*, 407 U.S. 514 (1972), the supreme court concluded that the trial judge was not in error because the defendant had failed to vigorously assert his speedy trial right, and he was not prejudiced by the 14-month time span. *See id.* Third, the defendant argued that the trial judge had erred by failing to pass the case after the defendant indicated his lack of confidence in his appointed counsel. *See id.* Defendant had filed a pro se motion to have his attorney dismissed and the appointed attorney also filed a motion to withdraw prior to the commencement of trial. A superior court judge, other than the trial judge, denied the attorney's motion. *See id.* The supreme court held that there was no error and the trial judge had not abused his discretion for failure to abort the trial sua sponte on the last day of trial—when defendant once again asserted his apprehensions regarding his appointed counsel—since defendant had not moved for a mistrial. *See id.* Additionally, the supreme court indicated that, had the trial judge declared a mistrial, double-jeopardy issues would have been implicated. *See id.*

motion to suppress because, in his view, Otero's identification "had an independent basis of reliability."[17]

BACKGROUND

In *State v. Camirand*,[18] the Rhode Island Supreme Court held that in order to determine whether identification procedures violated a defendant's due-process rights, a court should employ a two-step procedure.[19] First, the trial court must determine if "the procedures used in the identification were unnecessarily suggestive."[20] Second, if any of these procedures are deemed suggestive, then it must be determined "whether the identification lacks independent reliability despite the suggestive nature of the identification procedure."[21] In determining the independent reliability of witness identification, the *Camirand* court listed five factors to be considered: (1) the opportunity of the witness to view the criminal; (2) the witness's degree of attention; (3) the accuracy of the witness's descriptions of the criminal; (4) the level of the witness's certainty at the confrontation and (5) the time interval between the crime and the confrontation.[22]

ANALYSIS AND HOLDING

In *Johnson*, the first issue addressed by the court was the defendant's argument that the in-court identification by Otero should have been suppressed because of her admitted drug addiction.[23] The court held that the trial judge's decision that Otero's in-court identification of Johnson had an independent basis of reliability

17. *Id.* at 287. At trial, a second witness to the beating, Tonia Heyder, testified that on April 6, 1993, she had looked out her window and saw a "taller man stomping or kicking a person on the ground." *Id.* The defendant presented two cousins as alibi witnesses who testified that the defendant was with them the night of the beating until eleven p.m. making plans for a birthday party. *See id.*

18. 572 A.2d 290 (R.I. 1990).

19. *See id.* at 293. This two-step procedure was first formally articulated by the Rhode Island Supreme Court in *State v. Nicoletti*, 471 A.2d 613 (R.I. 1984). The supreme court adopted the procedure from the United States Supreme Court decision in *Manson v. Brathwaite*, 432 U.S. 98 (1977), which, in turn, had formalized this test from its prior holding in *Neil v. Biggers*, 409 U.S. 188 (1972).

20. *Camirand*, 572 A.2d at 293.

21. *Id.*

22. *Id.* at 294.

23. *Johnson*, 688 A.2d at 287.

was "amply supported by the evidence."[24] The court then stated the general precept that "[r]eliability is the linchpin of admissibility-of-identification evidence."[25]

The *Johnson* court identified the factors which contributed to the reliability of the in-court identification.[26] The court noted that the trial judge observed that Otero had known Johnson for three months, and she had had frequent contacts with him. Furthermore, the court found that there was no evidence of a suggestive pretrial identification procedure. Also, Otero's competence to testify was, in the first instance, a factual matter for the trial judge to decide, while her credibility was a question of fact properly left to the jury.[27] In concluding its holding on the identification issue, the court stated that "the identification was certainly reliable enough to be admitted" based on the totality of the circumstances, and was also sufficiently credible.[28]

CONCLUSION

In its holding in *State v. Johnson*, the Rhode Island Supreme Court continued to reaffirm its adherence to the rules governing witness identification as established by the United States Supreme Court in *Neil v. Biggers* and *Manson v. Brathwaite*. Witness identification of a defendant will properly be admitted so long as the trial judge is satisfied that the identification has an independent basis of reliability considering the totality of the circumstances. By employing this independent-reliability test, the court will assure that the defendant's right to due process is not violated.

Michael F. Drywa, Jr.

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24. *Id.*

25. *Id.* The court references *Neil v. Biggers*, 409 U.S. 188 (1972) after this quote, which, although it is clearly supported in context by *Biggers*, must be properly credited to Justice Blackmun's majority opinion in *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977).

26. *Johnson*, 688 A.2d at 287.

27. *See id.*

28. *Id.*