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A Question of Prejudice: Rule 16 and Pre-Trial Dismissal in State v. DiPrete

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Notes and Comments

A Question of Prejudice: Rule 16 and Pre-Trial Dismissal in *State v. DiPrete*

An integral and indispensable part of the criminal justice system is an effective pretrial procedure designed to protect a defendant's right to due process. The procedure engaged in is what is commonly referred to as the discovery process, its primary purpose being to ensure that the adversary parties are adequately prepared for trial and the avoidance of surprise.

—The Honorable Judge Dominic Cresto[1]

INTRODUCTION

The question of whether a trial judge can order pre-trial dismissal of a criminal indictment as a sanction for failure to comply with discovery has received little direct treatment by the courts. This is primarily because of a policy favoring adjudication of criminal matters on their merits.[2] It is clear, however, that there are at least certain instances under which a trial judge can order dismis-

1. State v. DiPrete, Ind. P1 94-1000 A & B, 1997 WL 839899, at *5 (R.I. Super. Mar. 11, 1997).

2. *See* State v. DiPrete, 710 A.2d 1266, 1276 (R.I. 1998). The court stated that

> [w]e must bear in mind that when a grand jury returns an indictment, the people of the State of Rhode Island are entitled to have the issues of fact and the issues of guilt or innocence tried on their merits. The punishment of an errant prosecutor by dismissal of the charges is in effect a punishment imposed upon the people of this state. Only in the most extraordinary of circumstances should the people of Rhode Island be deprived of their right to a trial of these charges.

Id.; see also United States v. Blue, 384 U.S. 251, 255 (1966) (holding that dismissal of an indictment would "increase to an intolerable degree interference with the public interest in having the guilty brought to book").

sal.[3] In Rhode Island, the circumstances and conditions under which dismissal is appropriate have not been given any detailed treatment at all,[4] until only recently.[5] In May and August of 1998, the Rhode Island Supreme Court issued two decisions, back-to-back, that served to simultaneously clarify and confuse the state of the law regarding pre-trial dismissal.[6] In the wake of these opinions, a former governor of Rhode Island is serving a prison sentence at the Adult Correctional Institution (ACI) in Cranston, Rhode Island.[7]

On March 11, 1997, Superior Court Judge Dominic Cresto issued a well reasoned, 38 page decision that dismissed twenty-two counts of a criminal indictment against Edward D. DiPrete and his son, Dennis L. DiPrete.[8] That decision cast a significant shadow over the previously settled state of the law in Rhode Island regarding pre-trial dismissal for discovery violations. The dismissal of the charges, and their subsequent reinstatement by the Rhode Island Supreme Court, was part of the highest-profile prosecution and conviction of a politician in Rhode Island's history.[9]

It began on March 24, 1994, when a grand jury returned multiple indictments against the former governor and his son.[10] The charges consisted of racketeering, bribery and extortion that allegedly occurred between January 1, 1985 and December 31, 1990.[11] During the next three years, the parties engaged in discovery. The State eventually turned over more than 600 boxes of evidence to the defendants.[12] The State failed, however, to disclose critical ev-

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3. *See* United States v. Jacobs, 855 F.2d 652, 655 (9th Cir. 1988) ("A district court may dismiss an indictment on any of three grounds: 1) due process, 2) inherent supervisory powers (protecting the integrity of the judicial process), and 3) statutory grounds.").

4. *But see* State v. Rawlinson, (R.I. Oct. 16, 1986) (No. 85-261-C.A.); State v. Quintal, 479 A.2d 117 (R.I. 1984). *See* discussion *infra* Section III.B.1.

5. *See* State v. Musumeci, 717 A.2d 56 (R.I. 1998); *DiPrete*, 710 A.2d 1266.

6. *See id.*

7. *See* Mike Stanton, *Former Governor DiPrete Pleads Guilty To 18 Charges of Corruption in Office: Surprise Deal Includes a Year to Serve at ACI*, Prov. J. Bull., Dec. 12, 1998, at A1.

8. *See* State v. DiPrete, Ind. P1 94-1000 A & B, 1997 WL 839899 (R.I. Super. Mar. 11, 1997).

9. *See* Tracy Breton et al., *Rhode Island on Trial: Prologue*, Prov. J. Bull., Aug. 9, 1998, at S1, *available in* 1998 WL 12199718.

10. *See DiPrete*, 1997 WL 839899, at *1.

11. *See id.*

12. *See id.* at *2.

idence which would have severely impeached the credibility of several of its key witnesses.[13]

On August 26, 1996, the defendants filed a motion seeking remedial sanctions.[14] They alleged that they could no longer receive a fair trial because the prosecution (1) failed to comply with a discovery order of the court issued pursuant to Rule 16 of the Rhode Island Rules of Criminal Procedure, (2) violated a stipulation between the parties and (3) violated the principles of *Brady v. Maryland*[15] and its progeny.[16] After an extraordinary thirty-two days of evidentiary hearings on the matter, Judge Cresto determined that the State had deliberately withheld potentially exculpatory evidence from the DiPretes and that the defendants had suffered substantial prejudice. Thus, he dismissed the charges.[17] This Note addresses whether Judge Cresto had the power to do so.

On appeal to the Rhode Island Supreme Court, two of the justices recused themselves.[18] Chief Justice Joseph R. Weisberger, Justices John P. Bourcier, Victoria S. Lederberg and two retired Supreme Court Justices, Florence K. Murray and Donald F. Shea, decided the case. The court (Weisberger, Shea and Murray for the majority) determined that neither the principles of *Brady v. Maryland*, Rule 16(i), nor the court's general supervisory powers permit a trial judge to order dismissal as a remedial sanction under circumstances such as those present in *DiPrete*.[19]

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13. *See id.* at *3.

14. *See id.*

15. 373 U.S. 83 (1963) (holding that it can be a violation of a defendant's right to due process when the prosecution withholds potentially exculpatory evidence); *see* discussion *infra* Section II.A.

16. *See DiPrete*, 1997 WL 839899, at *6 (noting that *Brady* held that it can be a violation of due process to withhold exculpatory information).

17. *See id.* at *21; Tracy Breton et al., *Rhode Island on Trial, Ch. 14: Stroke of a Pen*, Prov. J. Bull., Aug. 16, 1998, at S11, *available in* 1998 WL 12200557 ("He [Judge Cresto] had written his decision in long hand, and then asked a court secretary to type it up . . . . And with the stroke of a pen, Judge Cresto threw out the case.").

18. *See* Tracy Breton et al., *Rhode Island On Trial, Ch. 15: Teachings: Through Turmoil and Tragedy, the State's Case Moves Ahead*, Prov. J. Bull., Aug. 16, 1998, at S15, *available in* 1998 WL 12200558 ("Robert Flanders had briefly served as Governor DiPrete's part-time legal counsel . . . . Maureen McKenna Goldberg had been appointed to the bench by DiPrete.").

19. State v. DiPrete, 710 A.2d 1266, 1270-77 (R.I. 1998).

This Note argues that the majority ruled correctly on the *Brady* issue, but erred in holding that Rule 16(i)[20] does not permit dismissal, in light of the text, purpose and case treatment of the rule. Part I of this Note traces the factual and procedural background of the criminal proceedings against Rhode Island's former governor and his son, including Judge Cresto's dismissal of the charges as a sanction for prosecutorial misconduct and the reinstatement of the charges by the Rhode Island Supreme Court. Part II analyzes the question of whether *Brady v. Maryland* can create a pre-trial remedy, with an eye toward determining whether a *Brady* violation may be grounds for dismissal independent of Rule 16. Part III examines the text, purpose and case treatment of Rule 16(i) and concludes that dismissal is in fact within the contemplation of the rule, and within the discretion of the trial judge. Part IV discusses *State v. Musumeci*,[21] decided just three months after *DiPrete*, in which the sitting supreme court (without the retired justices and with Chief Justice Weisberger vigorously protesting) overruled *DiPrete* to the extent that a trial judge has "no authority" to dismiss an indictment as a remedial sanction.[22] *Musumeci* held that, like the sanctions that are explicitly provided for in Rule 16(i), dismissal is to be reviewed for an abuse of discretion.[23] Finally, Part IV presents a policy-based argument as an alternative to the holdings of both *Musumeci* and *DiPrete* — that a trial judge should not be required to find substantial prejudice before dismissing a case if the conduct of the State is deliberate and if there are other factors that counsel dismissal. This Note concludes with the ultimate irony: although the Rhode Island Supreme Court reinstated the proper "abuse of discretion" standard in *Musumeci* only three months after the charges against the DiPretes were reinstated, and although the DiPretes themselves pled guilty to corruption charges only three weeks before their scheduled trial date,[24] they did so without having had the benefit of appellate review under the correct legal standard.

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20. R.I. Super. Ct. R. Crim. P. 16(i) (allowing a trial judge to sanction a party for failure to comply with discovery).

21. 717 A.2d 56 (R.I. 1998).

22. *Id.* at 66.

23. *Id.* at 65-66.

24. *See* W. Zachary Malinowski, *DiPrete's Corruption Trial is Set for January 4 "The Trial is Scheduled to Begin on the Eve of Atty. Gen. Jeffrey B. Pine's Depar-*

I. HISTORICAL AND PROCEDURAL BACKGROUND

A. *The Governor on Trial:* State v. DiPrete

On March 24, 1994, a Grand Jury returned a twenty-two count indictment alleging racketeering, bribery and extortion by Edward D. DiPrete and his son, Dennis L. DiPrete.[25] The former governor was accused of taking bribes for state contracts on such high-profile bids as the renovation of the Frank Licht Judicial Complex in Providence and the Adult Correctional Institution (ACI) complex in Cranston.[26] DiPrete and his son allegedly extorted illicit campaign "contributions" from prospective state workers, in exchange for lucrative state contracts.[27] Dennis DiPrete served as the governor's chief campaign fundraiser, allegedly engaging in "shaking down" potential contributors who were vying for State jobs.[28] Alleged co-conspirators included Rodney M. Brusini, Frank N. Zaino and Michael Piccoli.[29] Mathies Santos was also named as a witness in support of the State's case.[30]

On June 6, 1994, the parties stipulated that the State would provide the defense with the grand jury testimony of potential witnesses.[31] Additionally, the stipulation required disclosure of statements and/or summaries of statements made to investigators, regardless of whether the statements had been made by someone who was expected to be a witness at trial.[32] The State agreed to disclose any and all relevant documents that were not protected by the work-product doctrine or the attorney-client privilege.[33] Pur-

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ture from Office," Prov. J. Bull., July 8, 1998, at A1, *available in* 1998 WL 12194457; Mike Stanton, *supra* note 7, at A1.

25. *See* State v. DiPrete, Ind. P1 94-1000 A & B, 1997 WL 839899, at *1 (R.I. Super. Mar. 11, 1997).

26. *See* Tracy Breton et al., *Rhode Island On Trial; Ch. 5: Big Men on Campus*, Prov. J. Bull., Aug. 9, 1998, at S10, *available in* 1998 WL 12199725; *Ch. 3: Like Birds,* at S5, *available in* 1998 WL 12199723.

27. *See id.*

28. *See id.*

29. *See DiPrete*, 1997 WL 839899, at *1.

30. *See id.*

31. *See* State v. DiPrete, 710 A.2d 1266, 1267 (R.I. 1998). The information sought related to those who had appeared before a grand jury after 1991, and whose testimony related to the subject matter of the suit. *See id.*

32. *See id.*

33. *See id.*

suant to this stipulation, the State turned over 600 boxes of material to the defendants.[34]

On July 12, 1995, the defendants motioned the court for an order compelling discovery of any exculpatory evidence; on August 24, 1995 the trial judge ordered the State to disclose such evidence.[35] In his opinion dismissing the case, Judge Cresto later stated that "[n]one of the court's decisions were appealed by the State, thereby requiring it to comply with the provisions thereof. In any event, the State was unquestionably obliged to honor its obligations as agreed to in the earlier stipulation."[36] On November 10, 1995, counsel for the State erroneously represented to the trial court that all such evidence had already been turned over pursuant to the court's August orders.[37] However, on July 25, 1996, in response to a reference that certain materials had not been turned over because of privilege, the judge again ordered such documents disclosed.[38] The State then offered to allow the defense to view any materials that it had. On July 29, 1996, the State turned over thirty more boxes of material, which included over 68,000 pages containing exculpatory information.[39] The State had withheld evidence critical to the defense regarding the credibility of key State's witnesses and had denied knowledge of this material right up until the thirty-two day hearing.[40]

The defendants removed eighty-nine exhibits from the boxes relating to the credibility of the aforementioned witnesses, Rodney

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34. *See id.*

35. *See id.* Judge Cresto ordered:

> with respect to all unindicted coconspirators . . . a full and complete statement of all promises, rewards, and/or inducements made in order to secure their cooperation in the investigation; a full and complete statement of the State's knowledge of any and all criminal conduct of the unindicted coconspirators, including not only criminal convictions or pending criminal charges but also information on any known criminal conduct, whether or not that conduct had been the subject of a criminal charge; and any other information relating to a coconspirator's credibility as a witness such as prior inconsistent statements, admissions of a poor memory, or evidence of bias on the part of the witness.

State v. Diprete, Ind. P1 94-1000 A & B, 1997 WL 839899, at *2 (R.I. Super. Mar. 11, 1997).

36. *DiPrete*, 1997 WL 839899, at *2.

37. *See id.*

38. *See id.* at *3.

39. *See DiPrete*, 710 A.2d at 1268.

40. *See id.* at 1269.

M. Brusini, Frank N. Zaino, Michael W. Piccoli and Mathies Santos, all of whom had been granted either immunity or letters of non-prosecution from the State in return for their testimony at trial.[41] Judge Cresto stated:

> [t]his type of material, that is, evidence relating to the State's cooperating witnesses, is of great significance in this case because of the critical importance of those witnesses to the State's case against the defendants. The testimony of these cooperating witnesses and therefore, the credibility of each, particularly the three unindicted coconspirators upon which for all practical purposes the indictment itself was founded, is central to the State's case.[42]

The State argued that all of the information removed from the thirty boxes could have been discovered by the defense from the 600 boxes of material already disclosed.[43] Judge Cresto rejected this argument, stating that "the defendants . . . were not required

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41. *See id.* at 1268-69.

> [D]efendants alleged that the extracted materials showed that the State knew Brusini had committed perjury in March of 1992, that he had filed false documents with the State Ethics Commission, that he had committed tax fraud, that he had overbilled the State for work done, and that he had committed insurance fraud.
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> . . . that the State had withheld evidence of knowledge of tax fraud on the part of Zaino, that attorneys for the State assisted Zaino in amending a 1991 state tax return and were aware that Zaino had filed a false affidavit concerning his financial affairs with the Rhode Island Family Court during divorce proceedings, and that he had maintained a secret bank account at Rhode Island Hospital Trust Bank in order to hide money from his wife during the pendency of their divorce.
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> . . . that a representative of the Attorney General's office had sought lenient treatment at a sentencing hearing wherein Piccoli had pleaded guilty to defrauding the City of Cranston of an alleged sum exceeding $1 million . . . . that the State recommended that Piccoli receive no jail time and make a restitution payment of only $135,000, significantly less than the amount he had fraudulently obtained.
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> . . . defendants further claimed that the State's refraining from prosecution of Santos for bank fraud in connection with [a] loan application constituted a promise, reward, or inducement that should have been disclosed.

Id.

It was later revealed that the State had granted some 47 witnesses either immunity, or letters of non-prosecution. *See* Tracy Breton, *Immunity Offered to 47 in DiPrete Trial; The Attorney General's Office Had Said Last Year that 11 Witnesses Were Promised Freedom from Prosecution*, Prov. J. Bull., Oct. 29, 1996, at A1, *available in* 1996 WL 12471749.

42. *DiPrete*, 1997 WL 839899, at *3.

43. *See DiPrete*, 710 A.2d at 1269.

to search out this information, even if that were possible. Rather, the prosecutors were under an obligation to produce the requested information that they knew was in their possession or with due diligence should have discovered."[44] It had become evident that the State had engaged in significant misconduct.

Judge Cresto determined that, at that point, the defendants faced a dilemma.[45] They could proceed to trial uncertain if all of the material to which they were entitled had been disclosed, or they could run the risk of waiving their right to a speedy trial by pursuing sanctions against the State.[46] When the defendants selected the latter option, Judge Cresto presided over an evidentiary hearing which lasted thirty-two days.[47] At the conclusion of the hearing, the defendants argued that they had been substantially prejudiced by the need to divulge their trial strategy.[48] They maintained that they would have used the undisclosed material to impeach the credibility of Brusini, Santos, Zaino and Piccoli.[49] Judge Cresto specifically found that "the prosecutors in this case have engaged in a willful and deliberate course of misconduct contributed to by a lack of due diligence, resulting in repeated violations of Super. Ct. R. Crim. P. 16, *Brady* principles, the stipulation between the parties and, most egregious of all, the court's orders."[50] Judge Cresto also found "the pattern of misconduct to be so pervasive that the defendants have suffered substantive prejudice warranting a remedy beyond a mere continuance . . . ."[51] Therefore, on March 11, 1997, he held that all of the circumstances in the case warranted dismissal of the charges.[52]

Although he focused primarily on Rule 16(i), Judge Cresto also appeared to rely on *Brady v. Maryland*[53] to authorize dismissal of

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44. *DiPrete*, 1997 WL 839899, at *16.

45. *See id.*

46. *See id.* They were entitled to pursue the imposition of sanctions under Rule 16(i) of the Rhode Island Rules of Criminal Procedure. *See* discussion *infra* Section III.

47. *See DiPrete*, 710 A.2d at 1269.

48. *See id.*

49. *See id.*

50. *DiPrete*, 1997 WL 839899, at *19.

51. *Id.*

52. *See id* at *19-20.

53. 373 U.S. 83 (1963); *see supra* note 15; *see also infra* note 88 (explaining use of the word "appeared").

the indictments. Judge Cresto had broader fears, however; he revealed his *underlying* concerns at the end of the opinion:

> the prosecutorial misconduct found by the Court to exist in this case . . . has the effect of eroding confidence in the criminal justice system . . . . Of equal concern is that the situation also raises the alarming specter that the system works only if an accused has the financial resources to make independent investigation prior to trial to ferret out misconduct to ensure due process.[54]

Thus, Judge Cresto was concerned about the systemic implications of the prosecution's actions in the case. In dismissing the charges,[55] Judge Cresto set the stage for a legal debate that would see the Rhode Island Supreme Court announce an unusual new rule and then reverse itself on the issue just three months later.

B. *The Rhode Island Supreme Court Appeal: "No Authority"*[56]

When the State appealed the case to the Rhode Island Supreme Court,[57] the majority[58] held that, under the principles established in *Brady v. Maryland* and its progeny, Rule 16(i) of the Rhode Island Rules of Criminal Procedure and the court's general supervisory powers, Judge Cresto had no authority to dismiss the case pre-trial for the State's discovery violations.[59] Nevertheless, the supreme court agreed that the prosecution failed to comply with the court's discovery order regarding its knowledge of the

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54. *DiPrete*, 1997 WL 839899, at *20.

55. *See, e.g.*, Elliot Krieger, *The State vs. DiPrete Experts: Decision is 'Extreme': Several Law Professors Who Reviewed Judge Dominic Cresto's Dismissal of the DiPrete's Case Agreed it Was Well Within the Law, but One Suggested it Could Be Overturned by the Supreme Court*, Prov. J. Bull., Mar. 16, 1997, at B1, *available in* 1997 WL 7321466.

56. This comes from *State v. DiPrete*, 710 A.2d 1266, 1274 (R.I. 1998), and is a two-word summary of the majority's opinion as to the power a trial judge has to dismiss a criminal indictment under these circumstances.

57. *See* Tracy Breton, *The State vs. The DiPretes: High Court Hears Appeal; Prosecutors Ask Supreme Court to Reinstate Charges*, Prov. J. Bull., Nov. 13, 1997, at A1, *available in* 1997 WL 13869012; W. Zachary Malinowski, *Court Hearing Draws a Sundry Crowd with Diverse Motives*, Prov. J. Bull., Nov. 13, 1997, at A9, *available in* 1997 WL 13868998.

58. Justices Shea and Murray were brought out of retirement specifically for this case by Chief Justice Weisberger, pursuant to Section 8-3-8(c) of the Rhode Island General Laws, after Justices Flanders and Goldberg recused themselves. *See supra* note 18.

59. *See DiPrete*, 710 A.2d at 1274.

criminal activities of Brusini, Santos, Zaino and Piccoli.[60] The court also agreed with the trial court regarding the prosecution's failure to disclose the immunity deals with, or promises of non-prosecution to, these witnesses.[61] The court disagreed with the trial court, however, regarding the degree of prejudice accruing to the defendants.[62] Specifically, the court stated that this was "delayed discovery, not denied discovery,"[63] and that "prior to the conclusion of the sanction hearings, counsel for defendants had all the information that they had requested . . . ."[64] Additionally, the court held that the defense had brought whatever prejudice it had suffered upon itself by voluntarily seeking sanctions.[65] Regardless, the court held that because it should have been clear to any skilled counsel that the information would have been used to impeach the witnesses, divulging the trial strategy was not excessively prejudicial to the DiPretes.[66]

The court held that Rule 16(i), which provides several options to a trial judge when sanctioning a party for failure to comply with discovery, does not contemplate dismissal in the absence of both flagrant prosecutorial misconduct and substantial prejudice.[67] Since dismissal is not specifically mentioned in the text of Rule 16, and because the cases interpreting the rule do not address any criteria for dismissal, the court found that the sanction was unavailable, in the absence of these two predicates.[68] The court also found

60. *See id.* at 1273.
61. *See id.*
62. *See id.*
63. *Id.* at 1272.
64. *Id.* at 1273.
65. *See id.* at 1274.
66. *See id*; *see also infra* Section IV.A (discussing the issue of prejudice and the alternative of eliminating the requirement that it be found prior to imposition of dismissal).
67. *See DiPrete*, 710 A.2d at 1276. In so holding, the court effectively transplanted the circumstances in which the general supervisory powers of the court would permit for dismissal into the Rule 16 context. The court stated that "it appears in federal jurisprudence that the use of supervisory power would not permit a court in the federal system to create exclusionary rules not otherwise constitutionally authorized or to dismiss indictments in the absence of both outrageous conduct and demonstrable and otherwise incurable prejudice." *Id.* The significance of this, is that by limiting dismissal to the predicates of flagrant misconduct and substantial prejudice, the majority has essentially invented a set of factual requirements for *statutory* dismissal that is not found in the text, or case law surrounding Rule 16.
68. *See id.* at 1271-74.

as a matter of law that *Brady v. Maryland* does not create a pre-trial remedy and therefore, dismissal is not an available sanction to remedy a *Brady* violation.[69]

The court held that because neither *Brady* nor Rule 16 would permit pre-trial dismissal under these circumstances, the standard "abuse of discretion" analysis of a Rule 16(i) sanction was inapplicable.[70] In the absence of a requisite finding of flagrant misconduct and substantial prejudice, the court held that the trial judge's discretion was never called into question.[71] Rather, the court concluded that a trial judge has "no authority" to dismiss an indictment under circumstances such as were present in this case.[72] The court reinstated the charges against the DiPretes and remanded the case for trial on the merits.[73]

Justice Bourcier vigorously dissented. He emphasized the egregious nature of the prosecution's actions, the significant prejudice suffered by the defendants as a result of having to reveal their trial strategy (i.e. impeachment of the immunized witnesses) and the traditional standard for reviewing a trial judge's imposition of sanctions (i.e. for an abuse of discretion).[74] Justice Lederberg concurred and dissented. She agreed with the majority that this case should not have been dismissed, but also agreed with the dissent that such cases are always reviewed for an abuse of discretion.[75]

C. *Further Developments*

On remand to the superior court, Judge Dominic Cresto recused himself.[76] The trial was set for January 4, 1999, before Judge Francis J. Darigan of the Rhode Island Superior Court.[77] However, in a startling turn of events, the former governor agreed

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69. *See id.* at 1271.

70. *See id.* at 1274.

71. *See id.*; *supra* note 67.

72. *See DiPrete*, 710 A.2d. at 1274.

73. *See id.* at 1276-77.

74. *See id.* at 1279-96.

75. *See id.* at 1277-79.

76. *See* W. Zachary Malinowski et al., *Cresto Quits DiPrete Case: "My Motives Have Been Subtly Brought into Question by the Attorney General, Which I Perceive as an Unwarranted Impugning of my Integrity and Character in Order to Divert Attention from the Real Issues,"* Prov. J. Bull., Jan. 16, 1998, at A1, *available in* 1998 WL 6498628.

77. *See* Stanton, *supra* note 7, at A1.

to a plea bargain on December 11, 1998.[78] As part of the agreement, DiPrete pled guilty to the bribery, racketeering and extortion charges.[79] In exchange, the felony counts were dismissed against his son, Dennis.[80] Dennis received a $1,000 fine for a single misdemeanor charge and was not sentenced to any jail time.[81] Edward D. DiPrete, however, accepted a three year prison sentence, with one year to serve.[82] The following pages address the fact that the former governor and his son were never able to have Judge Cresto's dismissal of the charges reviewed under the correct legal standard. The proper review never occurred, despite the supreme court's recognition of the appropriate standard in a case[83] decided just three months after *State v. DiPrete.*[84]

II. Is Dismissal an Available Remedy Under *Brady v. Maryland*?

The majority of the Rhode Island Supreme Court relied on three arguments to support its conclusion that Judge Cresto lacked authority to dismiss the indictments against the DiPretes. First, the court argued that the principles of *Brady v. Maryland* create only a post-trial remedy, and thus have no relevance to the issue of

78. *See id.*
79. *See id.*
80. *See id.*
81. *See id.*
82. *See id.* He will serve his sentence at the Adult Correctional Institution (ACI) minimum security unit, where he was originally to have worked at his family insurance agency as a part of the Work Release Program. *See id.* Subsequently, however, the Department of Corrections, acting on the advice of the Attorney General, revoked DiPrete's ability to sell insurance. *See* Tom Mooney & Tracy Breton, *ACI Bars DiPrete's Work Release: The Former Governor's Felony Convictions Mean He Cannot Sell Insurance, State and Federal Prosecutors Say*, Prov. J. Bull., Feb. 9, 1999, at A1, *available in* 1999 WL 7327951. Thus, he also lost his ability to work at his family insurance agency. *See id.*

Even today, the headlines still contain developments in the DiPrete saga. *See* Tracy Breton, *Judge Won't Delay DiPrete Hearing: The Hearing on Whether to Suspend the Former Governor's Pension Will Proceed Next Wednesday as Scheduled*, Prov. J. Bull., Feb. 10, 1999, at A1, *available in* 1999 WL 7328119. The former governor is currently embroiled in a legal battle with the State Retirement Board and the Attorney General's office, both of which are seeking to have his pension revoked. *See id.* Additionally, DiPrete is said to be considering reopening his motion to regain 1.2 million dollars in legal fees which he claims he spent in ferreting out the prosecutorial misconduct discussed in this note. *See id.* He had waived this claim as part of the plea bargain. *See id.*

83. *See* State v. Musumeci, 717 A.2d 56 (R.I. 1998).
84. 710 A.2d 1266 (R.I. 1998).

pre-trial dismissal.[85] Second, it found that Rule 16(i) does not contemplate discretionary pre-trial dismissal of an indictment as a sanction for failure to comply with discovery.[86] Finally, the court held that the general supervisory powers of the court do not encompass the power to dismiss an indictment in the absence of flagrant prosecutorial misconduct *and* substantial prejudice to the defendants.[87] However, a discussion of whether the general supervisory powers of the court would justify dismissal in this case is beyond the scope of this Note. Accordingly, this Note now turns to a discussion of the first two of these arguments.

A. Brady *and Pre-Trial Dismissal*

1. "Brady *Principles*"

Judge Cresto appeared[88] to rely on the principles of *Brady v. Maryland* to create grounds for dismissal, independent of Rule 16.[89] The majority's rejection of this argument was correct and in accord with federal court treatment of this issue — *Brady* creates only a post-trial remedy.[90] However, it is important to examine Rhode Island's unique approach to *Brady*, because of its relevance to the supreme court's incorrect analysis of Rule 16.

In *Brady v. Maryland*, the United States Supreme Court held that it could be a violation of a defendant's due process right to a fair trial if the prosecution withholds exculpatory evidence that materially effects questions of either the defendant's guilt, or the punishment imposed.[91] In subsequent Supreme Court cases interpreting *Brady*, the Court refined the "materiality" standard. In *United States v. Bagley*,[92] the Court held that in order to be mate-

85. *See* State v. DiPrete, 710 A.2d 1266, 1270-71 (R.I. 1998).
86. *See id.* at 1271-74.
87. *See id.* at 1275-76.
88. I say "appeared" because Judge Cresto was rather ambiguous as to exactly what grounds he was using to justify dismissal. Although he stressed the Rule 16 issue, his holding appeared to assume that *Brady v. Maryland* also justified dismissal as a pre-trial remedy. Accordingly, I too will examine this issue. Judge Cresto stated that: "[s]ince the court has found that there has been a pattern of deliberate misconduct resulting in repeated violations of . . . *Brady* principles . . . all counts of the indictment . . . are dismissed." State v. DiPrete, Ind. P1 94-1000 A & B, 1997 WL 839899, at *21 (R.I. Super. Mar. 11, 1997).
89. *See supra* note 50 and accompanying text.
90. *See infra* Section II.A.2.
91. *See* Brady v. Maryland, 373 U.S. 83 (1963).
92. 473 U.S. 667 (1985).

rial, evidence must have "a reasonable probability that, had [it] been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome."[93]

In Rhode Island, however, the test has been different. In *State v. Wyche*,[94] the Rhode Island Supreme Court held that the defendant's due process rights were violated when the prosecution deliberately failed to turn over to the defense the results of the victim's blood tests.[95] Rather than adopt the United States Supreme Court's standard, the Rhode Island Supreme Court implemented "a variable standard of materiality based on the degree of prosecutorial culpability."[96] The court in *Wyche* stated that:

> [w]hen the failure to disclose is deliberate, this court will not concern itself with the degree of harm caused to the defendant by the prosecution's misconduct; *we shall simply grant the defendant a new trial.* The prosecution acts deliberately when it makes "a considered decision to suppress . . . for the purpose of obstructing" or where it fails "to disclose evidence whose high value to the defense could not have escaped . . . [its] attention."[97]

Thus, in Rhode Island, a deliberate violation of *Brady* results in a new trial, regardless of a finding of prejudice.

Note the inconsistency between the Rhode Island Supreme Court's and the United States Supreme Court's *Brady* tests. In Rhode Island, a finding of prejudice is unnecessary when the prosecution's misconduct is deliberate.[98] The United States Supreme Court, however, disregards the degree of prosecutorial misconduct in considering a *Brady* violation, and always requires a showing of prejudice.[99] In the federal courts, this accounts for the need to wait until after trial before remedying the *Brady* violation; only then can the court determine the impact of the State's nondisclosure on the defendant. It would seem, therefore, that a *Brady* rem-

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93. *Id.* at 682.

94. 518 A.2d 907 (R.I. 1986).

95. *See id.* at 910.

96. *Id.*; *see also* State v. Brisson, 619 A.2d 1099, 1102 (R.I. 1993) (adopting a standard of materiality based on the level of blameworthiness of the prosecution); *In re* Ouimette, 342 A.2d 250, 255 (R.I. 1975) (same).

97. *Wyche*, 518 A.2d at 910 (emphasis added) (citation omitted) (quoting United States v. Keogh, 391 F.2d 138, 146-47 (2d Cir. 1968)).

98. *See id.*

99. *See* United States v. Bagley, 473 U.S. 667, 682 (1985).

edy *could* be imposed before conviction in Rhode Island if the conduct of the State is deliberate, since prejudice need not be considered.

2. *Rhode Island's* Brady *Analysis Only Permits for a Post-Trial Remedy*

This inconsistency is more apparent than real, however, because the remedy for a *Brady* violation in Rhode Island is *still* a new trial, and a new trial would not be imposed unless the defendant had already been convicted. An acquittal would certainly not warrant a new trial, no matter how deliberate the misconduct was. Thus, *Brady* cannot constitute grounds for dismissal in Rhode Island.

The *DiPrete* majority correctly observed that the remedy for a *Brady* violation is determined post-conviction.[100] The notion of allowing *Brady* to create a pre-trial remedy would put trial judges in the difficult position of trying to predict the impact of a due process violation on the rights of a defendant at trial. Only in the event of a *conviction* is it possible to determine what impact the non-disclosure had on the defendant, and whether such evidence in the hands of "skilled counsel"[101] would have made a difference.

Until *DiPrete*, the propriety of using *Brady* as a means to impose a pre-trial remedy had not been explicitly discussed in Rhode Island's line of *Brady* cases. It is, therefore, appropriate to examine how the federal courts have treated the issue, since Rhode Island's *Brady* cases are ultimately derived from the United States

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100. State v. DiPrete, 710 A.2d 1266, 1271 (R.I. 1998). The court stated that:

> [u]nder *Brady*, the denial of due process is ripe for consideration only in the event that an accused has been convicted of an offense in circumstances in which the nondisclosure of exculpatory or impeaching evidence was deliberate or, when viewed in the context of the totality of the State's proof in the case, would have a material effect upon the outcome or would create a significant chance that such exculpatory or impeaching evidence in the hands of skilled counsel would have created a reasonable doubt in the minds of the jurors.

Id.; *see also* United States v. Bagley, 473 U.S. 667 (1985) (remanding for further proceedings to determine if new trial necessary); Brady v. Maryland, 373 U.S. 83 (1963) (granting a new trial); State v. Wyche, 518 A.2d 907, 910 (R.I. 1986) (stating that "[w]hen the failure to disclose is deliberate . . . *we shall simply grant the defendant a new trial*") (emphasis added); *In re* Ouimette, 342 A.2d 250 (R.I. 1975) (remanding to determine whether new trial was warranted).

101. *DiPrete*, 710 A.2d at 1271.

Supreme Court.[102] The Sixth Circuit is the only court of appeals that has addressed the issue, holding that *Brady* creates a post-trial, not a pre-trial, remedy.[103] In *United States v. Short*,[104] the court stated that:

> [A] *Brady* violation may . . . occur when the prosecution fails to disclose exculpatory material in response to a pretrial motion. The violation may take place at that time, but *Brady* may be invoked only when the trial has been completed. While the problem exists for a prosecutor before and during a trial, it becomes a concern of the Court *after* the trial has ended. As this Court has stated, "*Brady* was never intended to create pretrial remedies."[105]

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102. *See* State v. Brisson, 619 A.2d 1099, 1104 (R.I. 1993) (recognizing Rhode Island's departure from United States Supreme Court's "outcome-determinative" approach in defining "materiality" within the meaning of *Brady*); State v. Wyche, 518 A.2d 907, 908-11 (R.I. 1986) (holding that the prosecution's failure to disclose results of victim's blood-alcohol level violated the defendant's *Brady* rights); *In re* Ouimette, 342 A.2d 250, 254-55 (R.I. 1975) (adopting approach for determining whether nondisclosure is "material" within the meaning of *Brady v. Maryland* that depends on the degree of prosecutorial culpability).

103. *See* United States v. Presser, 844 F.2d 1275 (6th Cir. 1988); United States v. Short, 671 F.2d 178 (6th Cir. 1982). In *Presser*, the trial judge ordered pre-trial disclosure by the prosecution of all evidence tending to negate the guilt (including impeachment evidence) of the defendants in a criminal action in which the defendants were charged with, *inter alia*, violating the Racketeer Influenced and Corrupt Organizations Act (RICO). *See Presser*, 844 F.2d at 1277-78. The trial judge threatened the prosecution that if it failed to comply with the order, it would not be allowed to call certain witnesses as a sanction for failure to disclose the *Brady* materials. *See id.* at 1279. In vacating the trial court's discovery order as inconsistent with *Brady*, the Sixth Circuit addressed the appropriateness of a pre-trial *Brady* sanction:

> [t]he decisions which have construed the *Brady* doctrine make it absolutely clear that the remedy for a *Brady* violation is a new trial and that the remedy is available to a defendant *only after a first trial has ended in a conviction* and only after a defendant shows that there is a reasonable probability that had the *Brady* evidence been disclosed in time for use at trial, the first trial would not have resulted in a conviction. We find no support in any decision construing the *Brady* doctrine for the presumption that a trial judge can threaten to refuse to let a government witness testify in order to sanction noncompliance with the *Brady* doctrine which comes to light before or during trial.

Id. at 1286 (emphasis added). The *Presser* court's failure to permit the trial judge to sanction a *Brady* violation prior to the defendant's conviction demonstrates the Sixth Circuit's recognition of the need to have a conviction *before* a remedy can be given. Only then can one determine the impact of the nondisclosure on the outcome.

104. 671 F.2d 178 (6th Cir. 1982).

105. *Id.* at 187 (emphasis added).

Under the United States Supreme Court's interpretation of "materiality,"[106] therefore, it is impossible to tell whether or not the result would have been different until there first *is* a result, i.e. after trial.[107] Thus, under the Supreme Court's standard, *Brady* can only give rise to a post-trial remedy.

Although Rhode Island had not addressed the issue directly until *DiPrete*, its cases have held that the remedy for a *Brady* violation resulting from deliberate nondisclosure is to grant the defendant a new trial.[108] This is consistent with the Sixth Circuit's holding that *Brady* cannot be used to authorize a pre-trial remedy. Therefore, to the extent that Judge Cresto relied on *Brady* to justify dismissal, he was wrong.[109] The fact that the Rhode Island

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106. *See* United States v. Bagley, 473 U.S. 667, 678-83 (1985) (defining "materiality" in terms of a reasonable probability that had the evidence been disclosed, the result would have been different).

107. *See, e.g., In re* Ouimette, 342 A.2d 250, 253 (R.I. 1975).

> By its language, *Brady* mandates a new trial upon the showing of a suppression or nondisclosure of material evidence which is favorable to the accused. This has been seen by the commentators as requiring that the courts focus on the harm caused the defendant by his lack of evidence which was within the State's possession.

Id. (citing Comment, *The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant*, 74 Yale L.J. 136 (1964)).

108. *See, e.g.*, State v. Wyche, 518 A.2d 907, 910 (R.I. 1986).

109. In his dissent in *DiPrete*, Justice Bourcier apparently confused the nature of a *Brady* remedy, and the type of remedy Rule 16 envisions. He argued that permitting a trial judge to sanction *Brady* violations before trial would benefit judicial economy, as well as prevent further prejudice to the defendants. *See* State v. DiPrete, 710 A.2d 1266, 1284 (R.I. 1998) (Bourcier, J., dissenting). Bourcier wrote:

> I believe that the trial justice in this case properly referred to *Brady* in determining whether the prosecution's violation of its pretrial discovery obligations so prejudiced the defendants that any conviction following would be inherently infected by that prejudice and predestined for reversal. Any trial thereafter would be nothing but a costly, time-consuming judicial charade at the expense of the taxpayers and would serve only to heap additional prejudice upon the defendants.

Id. Bourcier's argument is that in some cases, it would be futile to continue a trial *after* the *Brady* violation, if it is clear that the violation has tainted the remainder of the trial. If it were to be clear that the remainder of the trial had become so tainted, the court could take some remedial action at that point, and thus avoid the expenditure of time and resources that would inevitably result from continuing the tainted trial through to a conclusion. What Bourcier fails to recognize, however, is that it will seldom, if ever, be *clear* that the violation has infected the remainder of the trial to the extent that a defendant has been deprived of due process as a result. *Brady* provides a remedy for constitutional due process violations; the impact of which, as discussed above, can only be determined in retrospect. The nature of *Brady* is not that of a prophylactic, allowing a trial judge unlimited discretion to

Supreme Court so heavily emphasizes deliberate misconduct in the *Brady* context, however, raises interesting questions about their *absolute* requirement of substantial prejudice prior to dismissal in the Rule 16 context.[110]

III. RULE 16(i) PERMITS PRE-TRIAL DISMISSAL AS A SANCTION FOR FAILURE TO COMPLY WITH DISCOVERY

Although a trial judge cannot use *Brady v. Maryland* to justify dismissal, Rule 16(i) of the Rhode Island Rules of Criminal Procedure allows the court to impose sanctions before trial for failure to comply with discovery. The *DiPrete* majority determined, however, that Rule 16(i) does not contemplate discretionary pre-trial dismissal as a sanction for failure to comply with discovery. The majority noted that the text of the criminal rule, unlike that of the civil rule,[111] does not explicitly permit pre-trial dismissal.[112] Also, the court found that the case law treatment of Rule 16(i) does not support discretionary pre-trial dismissal.[113] It therefore concluded that dismissal was not intended as a discretionary Rule 16(i) remedy in criminal trials.

The court attempted to distinguish two Rhode Island cases that uphold dismissal as a discretionary sanction.[114] It ultimately rested its conclusion, however, on the idea that the failure of Rule 16 to address criteria for dismissal is equivalent to a failure to *permit* dismissal.[115] Apparently, the court did not disagree with the trial court that the State's conduct was egregious.[116] However, the

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sanction the failure to produce evidence in the name of a due process violation. Rather, *Brady* permits an appellate court to determine *after* the fact whether or not the nondisclosed evidence would have had an effect on the outcome of the trial. *See* United States v. Presser, 844 F.2d 1275, 1286 (6th Cir. 1988); United States v. Short, 671 F.2d 178 (6th Cir. 1982). The impact of the nondisclosed information on the defendant's trial can only be determined after there first *is* a trial. Thus, the DiPrete's trial cannot be determined to have been a "judicial charade at the expense of the taxpayers" that *Brady* could have cured, until they are first convicted. *DiPrete*, 710 A.2d at 1284. Rule 16, on the other hand, does permit for pre-trial remedies; including, as discussed in the following pages, dismissal.

110. *See infra* note 262.

111. *See* R.I. Super. Ct. R. Civ. P. 37 (civil rule granting trial court authority to sanction a party for failing to comply with discovery).

112. *See DiPrete*, 710 A.2d at 1274-75 n.3 (R.I. 1998).

113. *See id.* at 1271-72.

114. *See id.* at 1273-74 & n.3; discussion *infra* Section III.B.1.

115. *See id.* at 1271-72.

116. *See, e.g., DiPrete*, 710 A.2d at 1276. The court stated that:

court held that in *DiPrete*, despite the trial court's specific findings, the prejudice to the defendants was not substantial;[117] thus, the court concluded as a matter of law that the trial justice had no authority to dismiss the indictments.[118] The court stated that:

> [i]t is the opinion of this Court that the trial justice did not have the authority to dismiss twenty-two counts of this indictment. We are not testing this order under an abuse-of-discretion standard. We hold to the contrary that there was an insufficient basis upon which the trial justice could enter an order of dismissal. Therefore, his discretion in this context was not called into action.[119]

Accordingly, this Note examines the majority's arguments with respect to the text of the Rhode Island rule and the case law interpretation thereof. An examination of the resulting prejudice to the defendants is postponed until later.[120]

A. *Sanctions for Failure to Comply with Discovery: Textual Considerations*

1. *Rule 16(i) Discovery and Inspection*

The majority correctly observed that Rule 16(i) does not explicitly authorize dismissal as a sanction for failure to comply with discovery. However, Rule 16(i) does provide a catchall phrase that does not explicitly *preclude* dismissal. The text of the Rhode Island rule provides:

> (i) *Failure to Comply*. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order is-

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> [d]uring the course of the trial justice's thirty-two day hearing and in his comprehensive and careful findings of fact set forth in his written decision, it is apparent that he was justifiably displeased at the State's conduct of its discovery obligations. Failure to communicate effectively among the members of the Attorney General's staff, reliance upon the assumption that prior members of the prosecutorial team had conducted exhaustive searches of documents, and failure to express with full candor the knowledge of criminal conduct on the part of significant witnesses brought forth appropriate critical comment from the trial justice.

Id.

117. *See supra* note 67 (discussing the engrafting of the test for dismissal under the general supervisory powers of the court into the Rule 16 context).

118. *DiPrete*, 710 A.2d at 1273-74.

119. *Id.* at 1274.

120. *See infra* Section IV.A.

> sued pursuant to this rule, it may order such party to provide the discovery or inspection, grant a continuance, or prohibit the party from introducing in evidence the material which or testimony of a witness whose identity or statement were not disclosed, *or it may enter such other order as it deems appropriate.*[121]

In crafting the current Rule 16 into the Rules of Criminal Procedure in 1974, Rhode Island adopted a version almost identical to the federal rule.[122] The rule is fairly explicit in the authority it gives to a trial judge. Specifically, he or she may order the production of the as-yet undisclosed discovery, grant a continuance, or prohibit the nondisclosing party from introducing the as-yet undisclosed information.[123] The last phrase of the rule is relevant to this inquiry. The rule states that the judge may enter "such other order as it deems appropriate."[124] Thus, the questions that are then presented are (1) whether "such other order" includes dismissal, (2) if so, what criteria should a judge consider prior to its imposition and (3) under what standard should a higher court review dismissal. Because the text of the rule itself does not fully answer these questions, this Note next considers the purposes of the rule in an attempt to ascertain the existence and/or limitations of a judge's discretion in this context.

2. *Purpose of the Rule*

The reporter's notes to the 1974 amendments to Rule 16 state that "[t]he purpose of the revision is to provide for the fullest, reciprocal discovery in criminal cases in the Superior Court that is practicable as well as consistent with the Constitutional rights of

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121. R.I. Super. Ct. R. Crim. P. 16(i) (emphasis added).

122. *See* Fed. R. Crim. P. 16(d)(2):

> *Failure to comply with a request.* If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, *or it may enter such other order as it deems just under the circumstances.* The court may specify the time, place and manner of making the discovery and inspection and may prescribe such terms and conditions as are just.

Id. (emphasis added); *see also* State v. Coelho, 454 A.2d 241, 244 (R.I. 1982) (discussing the Rhode Island rule, and stating that "[t]he rule is based largely upon its federal counterpart . . . .").

123. *See* R.I. Super Ct. R. Crim. P. 16(i).

124. *Id.*

defendants."[125] Rule 16 gives the trial judge authority to sanction a party for failing to comply with such broad discovery.[126] In *State v. McParlin*,[127] the Rhode Island Supreme Court noted that "in promulgating Rule 16 of the Rules of Criminal Procedure of the Superior Court, Rhode Island has adopted one of the most liberal discovery mechanisms in the United States."[128] Further, the court has stated that "Rule 16 is a 'criminal discovery mechanism, [that] attempts to ensure that both parties receive the fullest possible presentation of the facts prior to trial.'"[129] In addition, the court has determined that "[t]he purpose of Rule 16 is to eliminate surprise and procedural prejudice."[130] Thus, in seeking to ascertain the dynamics of a Rule 16(i) sanction, one must consider the functions of the rule, as interpreted by the supreme court: liberal construction[131] so as to provide for maximum disclosure (within the bounds of a defendant's constitutional rights)[132] to both sides in order to prevent surprise and *procedural* prejudice.[133] The language of the rule itself entrusts the trial judge with the authority

125. *Id.* reporter's notes.

126. *See* State v. Coelho, 454 A.2d 241, 244 (R.I. 1982).

127. 422 A.2d 742 (R.I. 1980).

128. *Id.* at 745.

129. State v. Ricci, 472 A.2d 291, 299 (R.I. 1984) (quoting State v. Concannon, 457 A.2d 1350, 1353 (R.I. 1983)).

130. State v. Boucher, 542 A.2d 236, 241 (R.I. 1988) (citing *Coelho*, 454 A.2d at 245).

131. *See McParlin*, 422 A.2d at 745.

132. *See* R.I. Super. Ct. R. Crim. P. 16 reporter's notes.

133. The significance of the fact that one of Rule 16's purposes is to prevent surprise and *procedural* prejudice can best be seen in the distinction between the nature of a *Brady* and a Rule 16 violation. *Brady* is concerned with the *substantive* harm, *see supra* Section II, accruing to a defendant as a result of the prosecution's noncompliance with discovery. As discussed above, the remedy is only imposed post-conviction, after the harm has materialized, and the determination of the impact of the nondisclosure on the defendant can be made. Under Rhode Island's "sliding scale" *Brady* analysis, the focus is on the conduct of the prosecution, and a determination of whether or not a new trial will ensue will also be made *after* conviction.

Alternatively, Rule 16 can act as a prophylactic, staving off *procedural*, as well as substantive harm to a defendant. There is no need for a trial judge to wait until after the defendant has been convicted to impose a Rule 16 remedy. Rather, he can take action at the moment the violation is brought to his attention. Thus, as the following pages explore, a finding of substantial prejudice should not be an absolute prerequisite in the Rule 16 context in order for the purpose of the rule to be served. *See Boucher*, 542 A.2d at 241.

to take certain measures to ensure the efficient functioning of these purposes.[134]

3. *Civil Rule Comparison*

The *DiPrete* majority argued that Rule 16(i)'s failure to specifically authorize dismissal denies a trial judge unfettered discretion to order such sanction in a criminal trial.[135] The majority buttressed this argument with the fact that Rule 37 of the Superior Court Rules of Civil Procedure,[136] Rule 16's corresponding civil dis-

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134. The text of Federal Rule of Criminal Procedure Rule 16(d)(2), *see supra* note 122, is much like the Rhode Island rule. According to the federal rule, the judge *"may enter such other order as it deems just under the circumstances."* Fed. R. Crim. P. 16(d)(2) (emphasis added). Thus, as in Rhode Island, we are left to the purposes of the rule in order to determine the limits of a judge's authority in regard to dismissal.

The theory behind Rule 16(d)(2) as enacted, was to expand the volume of discovery permissible in criminal trials. *See* Fed. R. Crim. P. 16(d)(2) advisory committee's notes on 1974 amendment. In the Advisory Committee notes to the 1974 amendments to the rule, it was written that:

> broad discovery contributes to the fair and efficient administration of criminal justice by providing the defendant with enough information to make an informed decision as to plea; by minimizing the undesirable effect of surprise at the trial; and by otherwise contributing to an accurate determination of the issue of guilt or innocence.

Id. It was also stated in *United States v. Maples*, 60 F.3d 244, 247 (6th Cir. 1995), that: "[t]he goal of discovery in criminal trials is to insure a fair and thorough determination of the defendant's guilt or innocence." Thus, like the Rhode Island rule's intentions to limit "surprise and procedural prejudice," the federal rule is also designed to allow for liberal disclosure in order to facilitate fairness in determining the guilt or innocence of a criminal defendant. *Boucher*, 542 A.2d at 241 (citing *Coelho*, 454 A.2d at 245). When the rule was originally passed in 1966, the advisory committee stated that:

> the . . . sentence gives wide discretion to the court in dealing with the failure of either party to comply with a discovery order. Such discretion will permit the Court to consider the reasons why disclosure was not made, the extent of the prejudice, if any, to the opposing party, the feasibility of rectifying that prejudice by a continuance, and any other relevant circumstances.

Fed. R. Crim. P. 16(d)(2) advisory committee's notes on 1966 amendments (discussing Rule 16(g) which was later renamed 16(d)(2) in 1975). Thus, the advisory committee intended that the trial judge be given wide latitude to fashion an appropriate remedy for a party's failure to comply with discovery. The purpose of the rule, as seen in the advisory committee's notes, gives some guidance, but offers little other than that a trial judge has *discretion* to fashion an appropriate sanction.

135. State v. DiPrete, 710 A.2d 1266, 1273-74 & n.2 (R.I. 1998).

136. R.I. Super. Ct. R. Civ. P. 37 provides: "(b) *Failure to Comply With Order.* (2) *Other Consequences.* If a party . . . refuses to obey an order to provide or permit

covery rule, *does* specifically authorize dismissal. This "implication-by-omission" type argument, however, directly contravenes the rules of statutory construction as laid down by the Rhode Island Supreme Court.[137] In Rhode Island, court rules are given the same force and effect as statutes.[138] Further, the court has specifically held that when engaging in statutory construction, it is inappropriate to consider what the legislature did *not* enact as indicative of what the legislature intended.[139]

The Rhode Island Supreme Court has specifically rejected the technique of reading a statute for what has been omitted from it.[140] In 1970, the plaintiffs in *Zexter v. Cerrone*[141] made such an argument, to which the court responded that "[t]his argument is unacceptable . . . . [O]ur primary concern . . . is not to inquire why the legislature elected *not* to use certain phraseology, but to ascertain what it meant when it *used* the language . . . ."[142] Thus, one cannot determine the legislative intent behind the use of specific language by considering language that does not in fact exist in the promulgated rule.

It has long been the rule in Rhode Island that, in the absence of clear evidence of a contrary legislative prerogative, the ordinary

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discovery, . . . the court may make such orders and enter such judgment in regard to the failure or refusal as are just, and among others the following: (C) [A] *final judgment dismissing the action . . . .*" *Id.* (emphasis added).

137. *See infra* notes 139-45 and accompanying text.

138. *See* R.I. Gen. Laws § 8-6-2 (1956) (1997 reenactment): *Rules of Practice and Procedure.* "(a) The . . . superior court, . . . 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." *Id.* "The rules of criminal procedure of the superior court and the district court, which are to go into effect on September 1, 1972, shall govern practice and procedure in criminal proceedings in those courts and before justices of the peace and bail commissioners and shall remain and continue in force and effect until revised, amended, repealed, or superseded by rules adopted in accordance with the authority granted to those courts." R.I. Gen. Laws § 8-6-4 (1956) (1997 reenactment); *see also* Letendre v. Rhode Island Hosp. Trust Co., 60 A.2d 471, 474 (R.I. 1948) (holding that "[a] rule of court, if promulgated under a proper exercise of judicial power to make rules for practice and procedure within that court, is given the same force and effect as a statute").

139. *See* Zexter v. Cerrone, 107 R.I. 92, 94-95 (1970).

140. *See id.*

141. 107 R.I. 92 (1970).

142. *Id.* (emphasis added).

words of a statute are given their ordinary meaning.[143] The court stated in *Blais v. Franklin*[144] that:

> It has been well said that the object of all construction and interpretation of statutes is to ascertain the meaning and intention of the legislature, to the end that the same may be enforced. This meaning and intention must be sought first of all in the language of the statute itself. For it must be presumed that the means employed by the legislature to express its will are adequate to the purpose and do express that will correctly.[145]

Dismissal is not among the sanctions specifically enumerated in Rule 16(i). However, a presumption that the specific inclusion of dismissal in the *civil* rules evidences a legislative intention to deny dismissal in the *criminal* rules, draws attention away from the ordinary meaning of the language actually enacted. Rule 16(i) allows a trial court to "*enter such other order as it deems appropriate.*"[146] Such broad, expansive language must be analyzed in light of the purposes of the rule and the relevant case law, not by reference to what the rule specifically does *not* say.

The court has determined that the language actually used by the legislature is presumptively sufficient to determine its meaning.[147] The plain meaning of the words found in Rule 16(i) leaves little doubt that the rule gives great power to the trial judge to fashion an appropriate remedy. In the absence of any textual ambiguity, therefore, it is unnecessary to travel outside of the rule itself, its history and its case law interpretation. Thus, the *DiPrete* court's comparison to the text of the civil rule is misplaced.

Additionally, any comparison between the language of the civil and criminal rules is inappropriate in light of their differing functions. Because a defendant's freedom is potentially at stake in a criminal trial, the discovery available to a criminal defendant must be examined by reference to the rules of criminal, not civil, procedure. In *United States v. Maples*,[148] the Sixth Circuit stated

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143. *See, e.g.*, Lynch v. King, 391 A.2d 117, 120 (R.I. 1978); Woods v. Safeway Sys., Inc., 232 A.2d 121, 123 (R.I. 1967); Kastal v. Hickory House, Inc., 187 A.2d 262, 264-65 (R.I. 1963); Blais v. Franklin, 31 R.I. 95, 106-09 (1910).

144. 31 R.I. 95 (1910).

145. *Id.* at 105.

146. R.I. Super. Ct. R. Crim. P. 16(i) (emphasis added).

147. *See Franklin*, 31 R.I. at 105-06.

148. 60 F.3d 244 (6th Cir. 1995).

that "[t]he goal of discovery in criminal trials is to insure a fair and thorough determination of [the] defendant's guilt or innocence."[149] Such a determination should not be made by reference to the civil rules, which were not drafted with the intention of a "fair and thorough determination of [the] defendant's guilt or innocence,"[150] nor with respect for the constitutional rights of criminal defendants.[151] Any interpretation of one by reference to the other, therefore, draws attention away from the plain meaning of the language of Rule 16(i).

Based on the foregoing analysis, the freedom to sanction the failure to comply with discovery is textually committed to the sound discretion of the trial judge. If restricted solely to considerations of the rule's text and purpose, Rule 16(i) would necessarily include dismissal simply based on the ordinary meaning of such expansive words. However, we have more than simply the text and purpose of the rule to examine in order to determine whether or not there are any bounds to a trial judge's discretion in this context.

B. *Rule 16(i): Is Dismissal an Available Sanction?: Case Law Considerations*

The *DiPrete* majority argued that under Rhode Island case law, dismissal is not one of the Rule 16(i) sanctions available to a trial judge, unless there exists flagrant misconduct and substantial prejudice.[152] The court stated that "[i]n all the Rhode Island cases cited by the State and by defendants save one that will be considered later, the issue presented to the Court was whether discovery violations would warrant the reversal of a conviction and the ordering of a new trial."[153] Essentially, the court argued that because the case law interpreting a trial judge's imposition of

149. *Id.* at 247.

150. *Id.*

151. *See, e.g.*, State v. Cianci, 496 A.2d 139, 146 (R.I. 1985) (holding that the media's attempt to set aside a court order sealing discovery in the assault prosecution of Providence Mayor Vincent A. Cianci, Jr. was improper, and that the media's appropriate remedy was a separate *civil* action. The court stated that "[a] defendant's constitutional right to a fair trial should not be interrupted or side-tracked while the collateral interests of third parties are adjudicated").

152. State v. DiPrete, 710 A.2d 1266, 1271-72 (R.I. 1998).

153. *Id.* at 1271 (referring to State v. Quintal, 479 A.2d 117 (R.I. 1984)); *see* discussion *infra* Section III.B.1.a.

sanctions does not address criteria for dismissal, it is therefore an unavailable remedy. Analyzing the majority's argument and the applicable case law, this section concludes that because the cases are consistent with the broad language of the rule itself, dismissal is indeed contemplated by the rule in certain circumstances. Further, like the sanctions explicitly provided for in Rule 16(i), dismissal is to be reviewed for an abuse of discretion.

1. State v. Quintal *and* State v. Rawlinson: *Addressing Dismissal*

The majority's "failure to address dismissal" rationale is significantly weakened by two cases: *State v. Quintal*[154] and *State v. Rawlinson*.[155] These cases both stand for the proposition that it is within a trial judge's statutory, Rule 16(i) authority to impose dismissal as a sanction for failure to comply with discovery.[156] The majority, however, attempted to distinguish these cases from *DiPrete*.[157] This section analyzes these two cases and concludes that the majority's attempt to distinguish them from *DiPrete* fails, when considered in light of the clear language of Rule 16(i).

a. *State v. Quintal*

In *State v. Quintal*, the Rhode Island Supreme Court held that it was not an abuse of discretion for a trial judge to dismiss an indictment because of a failure to comply with Rule 16.[158] On August 3, 1981, the defendant had been indicted for third degree sexual assault.[159] On November 9, 1981, the defendant moved for an order compelling more complete discovery, which the court granted.[160] The court issued another order to compel discovery on July 1, 1982, following the defendant's motion to dismiss for failure to comply with the above mentioned discovery order.[161] On November 23, when the State still had failed to satisfy its discovery obligations, the court entered a conditional sixty day order.[162] The

154. 479 A.2d 117 (R.I. 1984).
155. (R.I. Oct. 16, 1986) (No. 85-261-C.A.).
156. *See Quintal*, 479 A.2d at 119; *Rawlinson* (No. 85-261-C.A.).
157. *DiPrete*, 710 A.2d at 1271-74 & n.3.
158. *Quintal*, 479 A.2d at 119, 120.
159. *See id.* at 118.
160. *See id.*
161. *See id.*
162. *See id.*

order provided that if the State failed to comply with its discovery obligations by January 24, 1983, the case would automatically be dismissed with prejudice.[163] The State agreed to this court order.[164]

In discussing the issue of whether Rule 16(i) contemplates dismissal, the court stated:

> [a]lthough Rule 16(i) provides specifically for various sanctions for noncompliance, a trial judge is clearly free, within the bounds of sound discretion, to enter *any* order he or she deems most appropriate. We will not disturb a trial judge's action in this regard absent a clear showing that the trial justice abused his or her discretion.[165]

The court in *Quintal* stressed the fact that, because the State had persistently refused to comply with the court's order, and because, to date, the discovery had not yet been produced, none of the sanctions specifically authorized by Rule 16(i) would have been appropriate.[166] The court therefore concluded that it was proper for the trial judge to avail himself of the catchall language of Rule 16 ("such other order as it deems appropriate")[167] in dismissing the indictment.[168]

The circumstances that the Rhode Island Supreme Court found to counsel dismissal in *Quintal* are strikingly similar to those found by Judge Cresto in *DiPrete*. Like the trial justice in *Quintal*, Judge Cresto found that (1) the State did not comply with orders to compel discovery,[169] (2) it was likely that all of the evidence the court ordered disclosed had not yet been turned over[170]

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163. *See id.*

164. *See id.*

165. *Id.* at 119 (emphasis added) (citing State v. Coelho, 454 A.2d 241, 245 (R.I. 1982)).

166. *Id.*

167. R.I. Super. Ct. R. Crim. P. 16(i).

168. *See Quintal*, 479 A.2d at 119.

169. *Compare id.* ("None of the sanctions specifically provided for in Rule 16(i) could possibly have neutralized the prejudice suffered by defendant, especially in light of the state's persistent refusal to comply with the court-ordered discovery."), *with* State v. DiPrete, Ind. P1 94-1000 A & B, 1997 WL 839899, at *19 (R.I. Super. Mar. 11, 1997) ("The Court finds that the prosecutors in this case have engaged in a willful and deliberate course of misconduct . . . .").

170. *Compare Quintal*, 479 A.2d at 119 ("[S]ince the records requested by defense counsel were never produced, a continuance was certainly not the proper sanction for the State's noncompliance."), *with DiPrete*, 1997 WL 839899, at *20 ("Given the history of the prosecutors' actions in this case and the fact that addi-

and (3) the State's undisclosed material contained exculpatory evidence and, therefore, another sanction would not have been beneficial to the defense, or in the best interests of justice.[171] Above and beyond the similarities in *DiPrete* and *Quintal* regarding the prosecution's actions, Judge Cresto also found that "in *Quintal* the discovery consisted of specifically identifiable medical records and not the unidentifiable, amorphous mass of information present in this case."[172] Thus, for reasons extraordinarily similar to those presented in *DiPrete*, the Rhode Island Supreme Court has found on at least one occasion that Rule 16(i) contemplates a trial judge's imposition of dismissal.[173] Additionally, the court has held that, like all of the explicitly named sanctions in the rule, dismissal was to be reviewed for an abuse of discretion.[174]

The majority in *DiPrete* sought to distinguish *Quintal* on two grounds. First, *Quintal*, unlike *DiPrete*, involved a conditional order of dismissal.[175] Second, since the State agreed to the conditional order, "*State v. Quintal* cannot be extended beyond the particular facts upon which it was based."[176] These two facts are of questionable relevance to a judge's discretionary power. It nowhere appears in the rule, nor does *Quintal* stand for the proposition, that dismissal is only permitted if conditioned on the occurrence of some event. The court in *Quintal* clearly asserted

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tional discovery material was found and forwarded to defendants . . . long after the hearings were concluded, the court cannot rely on the State's representation that the defendants are now in receipt of all exculpatory material . . . .").

171. *See DiPrete*, 1997 WL 839899, at *19 ("[W]arranting a remedy beyond a mere continuance . . . ."); *Quintal*, 479 A.2d at 119 ("[T]he records sought by defense counsel may well have contained exculpatory evidence, and thus the interests of justice, and the interests of defendant in particular, did not call for exclusion of any nondisclosed records."). Exclusion of the non-disclosed evidence would merely have increased the level of prejudice to the DiPretes in that the evidence was of an exculpatory nature. In addition, a continuance would likely have been ineffectual since Judge Cresto was so clearly convinced that all of the evidence to which the defense was entitled had still not been turned over. Simply continuing the matter would likely not have secured compliance, nor would it have impressed on the prosecution the seriousness of their actions.

172. *DiPrete*, 1997 WL 839899, at *20. This made it that much more difficult for the defendants to know exactly what was being withheld.

173. *See Quintal*, 479 A.2d at 119.

174. *See id.*

175. When discussing a conditional, or self-executing order of dismissal, I mean that automatic dismissal was conditioned on the happening of some event, namely, failure to comply with the discovery order within a prescribed period of time.

176. State v. DiPrete, 710 A.2d 1266, 1273 (R.I. 1998).

that a trial judge has the power to dismiss a case under Rule 16(i).[177] Even if it were obvious (and it by no means is) that dismissal were only appropriate if entered as the result of a conditional, self-executing order, the *DiPrete* majority's statement that the trial judge "did not have the authority to dismiss twenty-two counts of this indictment"[178] is still overbroad.[179]

Additionally, a rule that permitted dismissal only if it were in the form of a conditional order would result in the prosecution's having acted with impunity in *this* case, because Judge Cresto did not so condition his order. Although Judge Cresto found that the prosecution continually flouted the court's orders, the majority would see such conduct go unpunished because the dismissal was not in the form of a conditional order. In *DiPrete*, the State should not have gone completely unsanctioned because the trial judge was unaware of a requirement that he first had to warn of forthcoming dismissal.

Quintal itself does not mandate that a judge issue any such warning. Thus, the distinction the court draws between a self-executing order of dismissal and the type of dismissal in *DiPrete* is a distinction without a difference. As clearly stated in *Quintal*: "[a]lthough Rule 16(i) provides specifically for various sanctions for noncompliance, a trial judge is clearly free, within the bounds of sound discretion, to enter *any* order he or she deems most appropriate."[180] The only result obtained by requiring such a self-executing order of dismissal is to permit the prosecution in *DiPrete* to go unpunished and to constrain the hands of judges in the future.

Equally inapposite is the court's reliance on the fact that, in *Quintal*, the State agreed to the conditional order.[181] The validity of a court order should not depend on whether or not the parties

177. *Quintal*, 479 A.2d at 119.

178. *DiPrete*, 710 A.2d at 1274.

179. Even if a trial court were required to enter a conditional order before dismissing a case, it would be inaccurate to say that the trial court has "no authority" to dismiss. If the supreme court is suggesting that it might have upheld Judge Cresto's order if it had been entered as the result of a conditional order, then obviously he would have had more than the "no authority" the supreme court stated. This is a minor point, but it is important to show the inconsistency between the majority's "no authority" standard, and the few limited circumstances when the majority would permit dismissal.

180. *Quintal*, 479 A.2d at 119 (emphasis added).

181. *See DiPrete*, 710 A.2d at 1273.

agreed to it in advance.[182] The specter of a system in which a trial judge could only impose a sanction after he had first received the parties' approval would remove too much power from the judge's hands. Such agreement might *support* a given judge's ability to dismiss a case, but at best it is merely one factor.

State v. Quintal weakens the *DiPrete* majority's "failure to address" argument by specifically holding that Rule 16(i) does in fact contemplate dismissal and that such dismissal is to be reviewed for an abuse of discretion. Additionally, the majority's attempts to draw factual distinctions between *DiPrete* and *Quintal* are tenuous at best. However, even assuming that the court is correct in its attempt to distinguish *Quintal* on its facts, the majority is still faced with *State v. Rawlinson*, decided two years later, in which the court upheld dismissal in the absence of a conditional, self-executing order and/or agreement by the parties.

b. *State v. Rawlinson*

In *State v. Rawlinson*, the trial judge[183] dismissed a criminal information[184] against the defendant as a Rule 16(i) sanction for the State's failure to comply with discovery.[185] The trial judge did not specify, however, whether or not the dismissal was with prejudice.[186] The State immediately filed a new information, on the

182. *See id.* at 1294 (Bourcier, J., dissenting). "A court order, even when prepared by the parties, once entered by the court, becomes the order of the court, not of the parties, and must be complied with and respected. 'A court order, once issued, must be obeyed, or our system of justice evolves into a system of injustice.'" *Id.* (quoting State v. Brisson, 619 A.2d 1099, 1103 (R.I. 1993)).

183. Ironically, Judge Cresto was also the trial judge in *Rawlinson*.

184. *See* Black's Law Dictionary 779 (6th ed. 1990). An information is:

> [a]n accusation exhibited against a person for some criminal offense, without an indictment. An accusation in the nature of an indictment, from which it differs only in being presented by a competent public officer on his oath of office, instead of a grand jury on their oath. A written accusation made by a public prosecutor, without the intervention of a grand jury. Function of an "information" is to inform defendant of the nature of the charge made against him and the act constituting such charge so that he can prepare for trial and to prevent him from being tried again for the same offense.

Id. (citations omitted).

185. State v. Rawlinson, (R.I. Super. Ct. June 15, 1983) (No. P2/83-0816) (Cresto, J.) (stating: "[i]t seems to the Court that the bedrock upon which [the] . . . search for the truth is founded are the discovery rules promulgated by the Court and the power to enforce adherence to them even to the extent of dismissal.").

186. *See* State v. Rawlinson, (R.I. Oct. 16, 1986) (No. 85-261-C.A.).

same charges, and then proceeded to appeal the dismissal of the first information.[187] The defendant moved for dismissal of the second information, a motion that was subsequently denied.[188] Upon denial of the defendant's motion to dismiss the second information, the State withdrew its appeal of the dismissal of the first information.[189] The defendant was thereafter convicted on the basis of the second information.[190]

On appeal to the Rhode Island Supreme Court, the defendant argued that the trial judge's dismissal of the first information precluded the state from going forward with the second information on the same materials.[191] In an unpublished, per curiam opinion, the court stated that "[it] is of the opinion that the trial justice had ample authority to dismiss the original information with prejudice in light of the persistent failure of the prosecution to make discovery."[192] The court then remanded the issue to the trial court to determine whether or not the dismissal of the first information was with prejudice.[193] The trial court concluded that the dismissal was indeed with prejudice;[194] accordingly, the court vacated the defendant's conviction on the second information.[195]

The *DiPrete* majority attempted to disregard the authority of *Rawlinson*. It argued that *Rawlinson* should not be expanded

> beyond the narrow issue it presented. The sole question before us at that time was whether the initial information had been dismissed with prejudice . . . In any event, the appropriateness of the dismissal of the first information was never presented to us in an adversary context. Consequently this case is a weak reed upon which to base a sweeping statement that this Court has long recognized the discretionary authority of a trial justice to dismiss . . . .[196]

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187. *See Rawlinson* (No. P2/83-0816).

188. *See id.*

189. *See Rawlinson* (No. 85-261-C.A.), *cited in* State v. DiPrete, 710 A.2d 1266, 1292 (R.I. 1998) (Bourcier, J., dissenting).

190. *See id.*

191. *See* Supplemental Pre-Briefing Statement of the Defendant-Appellant, *Rawlinson* (No. 85-261-C.A.).

192. *Rawlinson* (No. 85-261-C.A.).

193. *See id.*

194. *See* State v. Rawlinson, (R.I. Super Ct. Oct. 30, 1986) (No. P2/82-1628).

195. *See Rawlinson* (No. 85-261-C.A.), *cited in* State v. DiPrete, 710 A.2d 1266, 1292 (R.I. 1998) (Bourcier, J., dissenting).

196. *DiPrete*, 710 A.2d at 1275 n.3.

Thus, the majority's disregard of *Rawlinson* seems to lie in the fact that the issue was presented, and the comments of the court made, in a non-adversarial context.[197]

The *DiPrete* majority, however, fails to explain exactly (1) what difference it makes that *Rawlinson* was an unpublished order, or (2) the significance that the issue of authority to dismiss was collateral to the issue of whether or not the information was dismissed with prejudice.[198] The majority's attempt to discredit the authority of *Rawlinson* is especially hollow because *Rawlinson* so clearly speaks to the issue. The majority is forced into the position of declaring *Rawlinson* a "weak reed"[199] because it would otherwise destroy the argument that failure to address dismissal is therefore a failure to permit dismissal.

The majority's argument that the case law interpreting Rule 16(i) does not address dismissal ignores the validity of *Quintal* and *Rawlinson*. What the majority fails to recognize is that *Quintal* and *Rawlinson* are merely logical extensions of the language of Rule 16 and the cases interpreting it. As discussed above, the rule's plain language permits a trial judge to fashion an appropriate remedy for failure to comply with discovery.[200] If the court determines, as Judge Cresto found in *DiPrete*, that dismissal is the appropriate remedy, then that finding is entitled to deference under the abuse of discretion standard of review.

2. *The* Coelho *Test*

The majority argued that the applicable case law does not address *criteria* for dismissal and then proceeded to impose the requirement that a trial judge must find flagrant misconduct and substantial prejudice as the applicable criteria. In so doing, the majority failed to give content to an already existing test for the

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197. *See id.*

198. *Id.* at 1294 & n.20 (Bourcier, J., dissenting).

> I firmly believe that the earlier pronouncement by this Court in that case, which was said to represent the opinion of the members of this Court on a question concerning the legal interpretation of one of the more important rules of Superior court procedure, should not be lightly cast aside and referred to as a "weak reed" simply because it was pronounced in an unpublished order.

Id. at 1294 n.20.

199. *Id.* at 1275 n.3.

200. *See supra* Section III.A.

imposition of sanctions that better corresponds to the text and purpose of the rule. *State v. Coelho*[201] is the leading Rhode Island case discussing the criteria a trial judge is to consider in determining what sanction(s) to apply for a party's failure to comply with discovery.[202] In *Coelho*, the supreme court determined that it was an abuse of the trial judge's discretion to deny a motion for a continuance when the State failed to provide certain discovery materials to the defense until just prior to trial.[203] The court stated that "[w]ithout question, the trial justice is in the best position to determine whether any harm has resulted from noncompliance with discovery motions and whether the harm can be mitigated; therefore, his ruling should not be overturned absent a clear abuse of discretion."[204] The *Coelho* court devised a four part test for a trial judge to use in determining the appropriate sanction for a party's failure to comply with discovery.[205] The court stated that "we believe that in considering a request for a continuance based upon the failure of a party to make a timely disclosure, . . . the trial justice should take into account: (1) the reason for nondisclosure, (2) the extent of prejudice to the opposing party, (3) the feasibility of rectifying that prejudice by a continuance, and (4) any other relevant factors."[206] These factors also apply to sanctions other than a continuance.[207]

Additionally, the Rhode Island Supreme Court has enunciated several other principles that apply to a trial judge's choice of sanc-

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201. 454 A.2d 241 (R.I. 1982).

202. *See infra* note 207 (for cases that cite to *Coelho*).

203. *Coelho*, 454 A.2d at 246.

204. *Id.* at 244-45.

205. *Id.* at 245.

206. *Id.* The Federal Courts have endorsed a similar test. In *United States v. Maples*, 60 F.3d 244, 247 (6th Cir. 1995), the court stated that:

> Appellate decisions in this and other circuits have identified several factors which should be considered in deciding whether suppression of evidence is an appropriate remedy to be imposed for a discovery violation. These include: (1) the reasons for the government's delay in producing the materials, including whether it acted intentionally or in bad faith; (2) the degree of prejudice, if any, to the defendant; and (3) whether the prejudice to the defendant can be cured with a less severe course of action, such as granting a continuance or a recess.

Id.

207. *See, e.g.*, State v. Gomes, 690 A.2d 310, 319 (R.I. 1997); State v. Evans, 668 A.2d 1256, 1259-60 (R.I. 1996); State v. Squillante, 622 A.2d 474, 478 (R.I. 1993); State v. Brisson, 619 A.2d 1099, 1102 (R.I. 1993); State v. Ramos, 553 A.2d 1059, 1067 (R.I. 1989); State v. Payano, 528 A.2d 721, 729 (R.I. 1987).

tions. In *State v. Wyche,*[208] the court determined that the sliding-scale *Brady* analysis was applicable in the Rule 16 context as well,[209] thereby permitting a trial judge to consider the blameworthiness of the prosecution in fashioning a pre-trial remedy.[210] Further, in *State v. Allan,*[211] the court held that in determining the appropriate sanction to impose, a trial judge is to consider what is "right and equitable under all of the circumstances and the law."[212] Thus, principles in addition to those that make up the *Coelho* "test" are relevant to a trial judge's choice of sanctions.

In addition to following a balancing test similar to that espoused in *Coelho*, federal courts have established other additional factors that serve to elucidate even further the considerations a trial court should give the matter. These principles are generally, if not explicitly, adhered to in Rhode Island as well.[213] In *United States v. Euceda-Hernandez,*[214] the Eleventh Circuit determined that, in choosing the appropriate sanction for failure to comply with discovery, the court must use "the least severe sanction that will accomplish the desired result . . . ."[215] Additionally, the Tenth Circuit stated in *United States v. Wicker*[216] that "[w]e note that these . . . factors should merely guide the district court in its consideration of sanctions; they are not intended to dictate the bounds of the court's discretion."[217] Thus, a trial court is not necessarily limited to the *Coelho* factors, but must impose the least severe sanction necessary in order to accomplish its goal, whether that be deterrence of future misconduct or punishment of an errant prose-

208. 518 A.2d 907 (R.I. 1986).

209. *Id.* at 911; discussion *infra* Section II.

210. *See Wyche*, 518 A.2d at 911.

211. 433 A.2d 222 (R.I. 1981).

212. *Id.* at 225.

213. *See, e.g.*, State v. DiPrete, 710 A.2d 1266 n.2 (R.I. 1998) (invoking federal court principles to support the propositions that the least severe sanction necessary should be utilized, and that the chosen sanction must be proportional to the misconduct); State v. Sciarra, 448 A.2d 1215, 1218-19 (R.I. 1982) (holding that "severe" sanction of exclusion not suited to State's discovery violation); State v. Silva, 374 A.2d 106, 109 (R.I. 1977) (holding it was an abuse of discretion to impose "drastic" sanction of witness preclusion when defendant's disclosure was "at least in substantial compliance with the letter and spirit of Rule 16").

214. 768 F.2d 1307 (11th Cir. 1985).

215. *Id.* at 1312 (quoting United States v. Sarcinelli, 667 F.2d 5, 7 (5th Cir. 1982)).

216. 848 F.2d 1059 (10th Cir. 1988).

217. *Id.* at 1061.

cutor for deliberately failing to disclose information.[218] These considerations serve to provide guidance to what is otherwise committed to the sound discretion of the court, allowing an appellate court to review a trial court's exercise of its discretion by examining the underlying reasoning process.

Thus, the "no authority" standard enunciated in *DiPrete* is difficult to support, in light of the primary sources of authority in this area: (1) the text of the rule itself, (2) the purposes of the rule, (3) *Coelho* and (4) the additional limiting factors discussed above, which provide guidance to a trial court in the exercise of its discretion. These factors limit neither the availability nor the circumstances in which dismissal is appropriate. Nor do these factors *define* the circumstances in which dismissal is appropriate. Rather, they serve to guide a trial judge in the exercise of his or her discretion.

As Justice Bourcier noted in his dissent, the case law is almost universally in support of the proposition that a trial judge's choice of sanctions under Rule 16(i) is to be reviewed for an abuse of discretion.[219] It was the *DiPrete* majority's argument, however, that

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218. It is pertinent at this point to reiterate that there is an additional policy that favors adjudication of criminal matters on their merits, suggesting that dismissal should be reserved for cases that truly warrant such a harsh sanction. *See supra* note 2. Recall, however, that in light of Rule 16's purpose to prevent procedural surprise and prejudice, *see supra* note 133, Rule 16 sanctions (including dismissal) can serve to ensure the *procedural* integrity of a criminal trial, which may, in a given case, outweigh the limiting principles discussed above.

219. *See* State v. DiPrete, 710 A.2d 1266, 1290 (R.I. 1998) (Bourcier, J., dissenting) (citing State v. Gomes, 690 A.2d 310, 319 (R.I. 1997); State v. Garcia, 643 A.2d 180, 186 (R.I. 1994); State v. LaChapelle, 638 A.2d 525, 530 (R.I. 1994); State v. Squillante, 622 A.2d 474, 478 (R.I. 1993); State v. Brisson, 619 A.2d 1099, 1102 (R.I. 1993); State v. Amaral, 611 A.2d 380, 383 (R.I. 1992); State v. Sanders, 609 A.2d 963, 965 (R.I. 1992); State v. Morejon, 603 A.2d 730, 735 (R.I. 1992); State v. O'Dell, 576 A.2d 425, 430 (R.I. 1990); State v. Parker, 566 A.2d 1294, 1297 (R.I. 1989); State v. Bibee, 559 A.2d 618, 621 (R.I. 1989); State v. St. Jean, 554 A.2d 206, 210 (R.I. 1989); State v. Ramos, 553 A.2d 1059, 1068 (R.I. 1989); State v. Padula, 551 A.2d 687, 690 (R.I. 1988); State v. Boucher, 542 A.2d 236, 241 (R.I. 1988); State v. Dufault, 540 A.2d 355, 358 (R.I. 1988); State v. Brown, 528 A.2d 1098, 1102 (R.I. 1987); State v. Payano, 528 A.2d 721, 728 (R.I. 1987); State v. Robbio, 526 A.2d 509, 512 (R.I. 1987); State v. Lawrence, 492 A.2d 147, 149 (R.I. 1985); State v. Engram, 479 A.2d 716, 718-19 (R.I. 1984); State v. Quintal, 479 A.2d 117, 119 (R.I. 1984); State v. Verlaque, 465 A.2d 207, 213 (R.I. 1983); State v. Tillinghast, 465 A.2d 191, 197 (R.I. 1983); State v. Concannon, 457 A.2d 1350, 1353 (R.I. 1983); State v. Coelho, 454 A.2d 241, 245 (R.I. 1982); State v. Sciarra, 448 A.2d 1215, 1218 (R.I. 1982); State v. Darcy, 442 A.2d 900, 902 (R.I. 1982); State v. Silva, 374 A.2d 106, 108 (R.I. 1977)).

since the choice of sanctions does not include dismissal in the absence of a given factual predicate, i.e. flagrant misconduct and substantial prejudice, then barring a finding of those predicates, dismissal cannot be reviewed for an abuse of discretion.[220]

Ultimately, the majority's argument is that because "*Coelho* and the cases in interpretation thereof . . . do not address the criteria for dismissal of an indictment,"[221] that sanction is not within the trial judge's arsenal of discretionary sanctions under Rule 16(i).[222] The majority, however, failed to recognize that *Coelho* is an extension of the expansive language of Rule 16(i), permitting the court to "enter such other order as it deems appropriate."[223] A clear picture of how the *Coelho* factors operate can be seen in Judge Cresto's opinion dismissing the charges against the DiPretes.[224]

3. *The State Fails All Four Prongs of the* Coelho *Test*

Before dismissing the charges against the DiPretes, Judge Cresto carefully considered all of the *Coelho* criteria. He examined: 1) the reason for nondisclosure, 2) the extent of prejudice to the defendants, 3) the feasibility of rectifying that prejudice with a continuance and 4) other relevant factors.[225] He specifically found that the prosecution's conduct was deliberate.[226] He concluded that there was substantive prejudice to the defendants[227] that warranted "a remedy beyond a mere continuance,"[228] since they were required to divulge their trial strategy at the thirty-two day hearing.[229] He also found that the prejudice could not be

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220. *DiPrete*, 710 A.2d at 1274.

221. *Id.* at 1273.

222. *See id.*

223. R.I. Super. Ct. R. Crim. P. 16(i).

224. *See* State v. DiPrete, Ind. P1 94-1000 A & B, 1997 WL 839899, at *7, 19-20 (R.I. Super. Mar. 11, 1997).

225. *Compare* State v. Coelho, 454 A.2d 241, 244-45 (R.I. 1998) (establishing criteria to be considered prior to imposition of sanctions), *with DiPrete*, 1997 WL 839899, at *19, 20 (applying the *Coelho* criteria).

226. *See DiPrete*, 1997 WL 839899, at *19 ("The Court finds that the prosecutors in this case have engaged in a willful and deliberate course of misconduct . . . .").

227. *See id.* ("The court also finds the pattern of misconduct to be so pervasive that the defendants have suffered substantive prejudice . . . .").

228. *Id.*

229. *See supra* notes 47-49 and accompanying text.

cured with any lesser sanction than dismissal.[230] In addition to considering the first three prongs of the *Coelho* test, Judge Cresto also found that because the State acted so egregiously in this case, dismissal was required in order to preserve confidence in the judicial system.[231]

An examination of the *Coelho* criteria reveals that a broad range of sanctions are available. Implicit in the third prong of the *Coelho* test — whether or not a continuance is appropriate[232] — is that, if it is not, some sanction *beyond* a continuance must be at least *available* in a given case. If a trial judge were to determine that, given a set of facts, a continuance was insufficient to rectify the situation, he must be free to impose some remedy *other* than a continuance. The availability of some sanction beyond a continuance supports the proposition that *Coelho* does not foreclose a trial judge's authority, but rather provides him with guideposts designed to aid in exercising his discretion.

The majority's sole argument with respect to the *Coelho* line of cases, however, is that, because they do not specifically address dismissal, such sanction is only available in cases involving flagrant prosecutorial misconduct and substantial prejudice.[233] The majority fails to recognize that the *Coelho* test leaves the trial judge free to determine the appropriate Rule 16(i) sanction to impose in any given case.[234] Once a judge has determined that a continuance will not effectively respond to the facts, the judge is to consider "any other relevant factors."[235] Where, as here, the judge determines that other relevant factors exist, the language of Rule 16(i) itself[236] permits the judge to fashion a remedy that responds to the circumstances.

After a trial judge has considered these factors, he is free to exercise his judgment in sanctioning the misconduct. His actions

230. *See DiPrete*, 1997 WL 839899, at *19.

231. *See id.* at *20.

232. *Coelho*, 454 A.2d at 245. The third prong of the *Coelho* "test" requires consideration of "(3) the feasibility of rectifying that prejudice by a continuance." *Id.*

233. *See* State v. DiPrete, 710 A.2d 1266, 1273, 1276 (R.I. 1998); *see also supra* note 67 (discussing the engrafting of the conditions for dismissal under the general supervisory powers of the court into the statutory, Rule 16 context).

234. *Coelho*, 454 A.2d at 244-45.

235. *Id.* at 245.

236. *See* R.I. Super. Ct. R. Crim. P. 16(i) (*"such other order as it deems appropriate"*) (emphasis added).

can then be reviewed for an abuse of discretion. It defies the expansive language of Rule 16 and the discretion *Coelho* provides to virtually eliminate one of a trial judge's most powerful resources. The *DiPrete* majority erroneously read *Coelho* for the proposition that since it does not address criteria for dismissal, that sanction is therefore unavailable. In doing so, they diminish the significance of the text of the rule and supreme court precedent that in fact *upholds* dismissal as a discretionary remedy.

The Rhode Island Supreme Court has recognized the validity of dismissal as a statutory, discretionary sanction for failure to comply with discovery.[237] It has also, in two cases, found that such an order is *not* an abuse of the trial judge's discretion.[238] For Judge Cresto, discretionary authority meant the sanction of dismissal. *Quintal*, *Rawlinson* and the text of Rule 16 indicate that such action was well within his power.

Thus, despite the court's holding in *DiPrete*, this Note concludes that prosecutorial fault and resultant prejudice are merely *factors*; the absence of one and the presence of others, might still allow for dismissal in a given case. In an apparent attempt to avoid reviewing Judge Cresto's factual findings under the appropriate and deferential abuse of discretion standard, the supreme court sidestepped the question with the "no authority" standard enunciated in *DiPrete*.

Perhaps Justice Bourcier's dissenting opinion, in light of the local significance of this case, hits a little too close to home for the *DiPrete* majority. Bourcier writes:

> [u]nfortunately my colleagues in the majority have abandoned . . . precedent, and in so doing, one is left to surmise that perhaps adherence to precedent would not have permitted the desired end in this case, and, therefore, precedent was sacrificed on the alter of expediency . . . . The "Great Case" now before this Court should not have persuaded the majority to abandon our well-established standard of review upon which trial justices and litigants alike have come to rely and depend. Rather, we should all stand firm and apply the law evenhandedly regardless of who stands at the bar of justice before us and of the vagaries of public sentiment.[239]

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237. *See* State v. Rawlinson, (R.I. Oct. 16, 1986) (No. 85-261-C.A.); State v. Quintal, 479 A.2d 117, 119-20 (R.I. 1984).

238. *See id.*

239. State v. DiPrete, 710 A.2d 1266, 1296 (R.I. 1998) (Bourcier, J., dissenting).

Whatever the motivating factors behind the court's new rule as announced in *DiPrete*, the decision represented a sharp break from precedent. However, the court would soon reexamine the issue of Rule 16(i) dismissal and this time it would reach a different conclusion.

IV. AN "ABUSE OF DISCRETION":[240] *STATE V. MUSUMECI*

The *DiPrete* decision cast the previously settled state of the law in Rhode Island into doubt. Three months after the *DiPrete* decision, however, the Rhode Island Supreme Court again reviewed a trial judge's dismissal of an indictment for prosecutorial misconduct. In *State v. Musumeci*, the supreme court, this time sitting in full and without retired justices Shea and Murray, overturned *DiPrete* to the extent that a trial judge has no discretionary authority to dismiss an indictment as a remedial sanction under Rule 16(i).[241] The court in *Musumeci* agreed with the court in *DiPrete,* however, that a judge commits reversible error if he dismisses a case in the absence of flagrant prosecutorial misconduct and substantial prejudice.[242]

In *Musumeci*, the defendant was charged with one count of unlawful delivery of marijuana[243] after he procured it for an under cover police officer.[244] At trial, the defendant sought to assert the defense of entrapment, contending that this was his first experience with drug offenses.[245] The State responded by introducing evidence from the arresting officer's log.[246] The log tended to show that the defendant had previously engaged in drug related activities.[247] However, the defense had been unaware of the log, because it was not made available to them until they cross examined the officer.[248]

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240. This is a three word summary of the court's "new" standard of review, as explained in *State v. Musumeci*, 717 A.2d 56 (R.I. 1998).

241. *Musumeci*, 717 A.2d at 66.

242. *Id.* at 65.

243. The defendant was in violation of Section 21-28-4.01(A)(2)(a) of the Rhode Island General Laws. *See id.* at 59.

244. *Id.* at 58-59.

245. *See id.*

246. *See id.*

247. *See id.*

248. *See id.*

Upon the defendant's motion to dismiss, the trial judge ordered a mistrial, concluding that dismissal was an inappropriate remedy under the circumstances.[249] Ten months later, at his new trial, the defendant again moved for dismissal, contending that the State's failure to produce the log in a timely fashion prevented him from interviewing witnesses "while the events were still fresh in their minds."[250] Although she found that the State's nondisclosure was unintentional, the second trial judge dismissed the action as a sanction for the State's negligent failure to affect discovery.[251] The trial court's finding that the State's nondisclosure was merely negligent, contrasts with Judge Cresto's finding in *DiPrete* that the State's conduct was deliberate.

The supreme court reversed, holding that the second trial judge abused her discretion in dismissing the indictment. After the first trial judge had determined that a mistrial was sufficient to cure the prejudice to the defendant and because there was no additional prejudice accruing to the defendant in the ten months between trials,[252] dismissal was inappropriate. The court concluded, however, that Rule 16(i) does permit pre-trial dismissal as a sanction in certain circumstances.[253] The court "conclude[d] that dismissal is an appropriate sanction only as a last resort and only when less drastic sanctions would be unlikely or ill suited to achieve compliance, to deter future violations of this kind, and to

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249. *See id.* The trial judge stated "I think it's too severe a sanction to dismiss it [the information]." *Id.* Thus, the trial judge concluded that the appropriate sanction to rectify any prejudice to the defendant, was a mistrial. *See id.*

250. *Id.* at 60.

251. *See id.* The supreme court commented on the second trial judge's rationale:

> she granted Musumeci's renewed motion to dismiss the charges on the grounds that the State's grossly negligent nondisclosure of the log had prevented defense counsel from interviewing potential witnesses while events were still fresh in their minds and that the dismissal sanction would serve as a deterrent to any future such instances of negligent nondisclosure of discoverable evidence by the prosecution.

Id. Implicit in the second trial judge's findings, was a consideration of the *Coelho* factors. She found (1) negligent nondisclosure, (2) prejudice, and (4) other relevant factors (deterrence). The problem faced on appeal, however, was that the first trial judge had already determined that a mistrial was sufficient to cure whatever prejudice existed (prong (3) of the *Coelho* test). Additionally, note that the merely *negligent* nondisclosure of the State was inconsistent with *DiPrete's* requirement that the State's misconduct be *flagrant*.

252. *See id.* at 64.

253. *See id.* at 66.

remedy any material prejudice to [the] defendant."[254] The court made clear, however, that despite the "no authority" language of *DiPrete*, when the prosecution repeatedly fails to comply with court ordered discovery, dismissal can be an appropriate Rule 16 sanction.[255] The court additionally held that, when a trial judge imposes dismissal, it will review such action for an abuse of discretion.[256]

A. *A Question of Prejudice*

Musumeci and *DiPrete* raise one issue in particular, which could have tremendous significance in clarifying the state of the law in Rhode Island. The majority in *Musumeci,* agreeing with the majority in *DiPrete*, held that dismissal should not be entered in the absence of a showing of substantial prejudice.[257] The issue then becomes, whether it would better serve our system of justice if a judge had the power to enter dismissal regardless of the degree of prejudice. It is important to note that in *Musumeci*, the court found that the prosecution's conduct was merely negligent.[258] The supreme court also found the degree of prejudice insufficient to warrant dismissal because the evidence was eventually disclosed.

The *Musumeci* court found that, unlike in *Quintal*, the failure to comply involved unintentional nondisclosure.[259] Thus, the first *DiPrete* prerequisite for dismissal — flagrant misconduct — was lacking. The court further indicated that the situation was similar to that of *DiPrete* in that the discovery was eventually turned over, thus minimizing the prejudice to the defendants.[260] Thus, the second *DiPrete* prerequisite for dismissal — substantial prejudice — was also lacking. The conclusion of both the *DiPrete* and *Musumeci* courts was that dismissal is only appropriate when the failure to disclose is flagrant and the resulting prejudice cannot be remedied any other way.[261]

A determination that a trial judge is not required to find substantial prejudice, however, could have important significance for

254. *Id.* at 63.
255. *See id.* at 60, 61, 66.
256. *See id.*
257. *Id.* at 65.
258. *Id.* at 63-64.
259. *Id.*
260. *See id.* at 61.
261. *Id.* at 74 (Goldberg, J., dissenting).

defendants who find themselves in positions similar to the DiPretes. The supreme court failed to consider the benefits, though, of eliminating the need to find substantial prejudice in the dismissal context, if the conduct of the State is deliberate. Such a judicial determination is only a short step away and is consistent with the current state of Rule 16, *Brady* and the *Coelho* factors discussed above.[262] Additionally, the systemic benefits that would result from such a broad grant of judicial discretion suggest that the supreme court ought to consider this issue. The following section argues from a public-policy standpoint that such a rule would greatly benefit our system of justice.

1. *A Policy Based Argument Against Requiring a Finding of Prejudice*

As discussed earlier, and as affirmed in *Musumeci*, Rule 16 does provide discretionary authority for dismissal in certain circumstances.[263] The text of the rule and the *Coelho* factors permit

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262. Recall that in the *Brady* context, the Rhode Island Supreme Court disregards the degree of prejudice to a defendant if the conduct of the State is deliberate. *See* State v. Wyche, 518 A.2d 907, 910 (R.I. 1986) (holding that under *Brady*, deliberate nondisclosure results in a new trial without regard to the degree of prejudice). This is inconsistent with *DiPrete* and *Musumeci*, which mandate a finding of prejudice in the Rule 16 context before *dismissal* can be imposed. *See* State v. DiPrete, 710 A.2d 1266, 1276 (R.I. 1998); *Musumeci*, 717 A.2d at 65. In fact, it makes even greater sense to emphasize punishment of deliberate prosecutorial misconduct in the Rule 16 context, than it does in the *Brady* context. As opposed to the general thrust of *Brady*, which is to wait until after conviction before imposing a remedy (new trial), Rule 16 permits for *pre-trial* remedies, and is concerned with preventing *procedural* prejudice. Thus, the courts should have greater freedom to punish the prosecution for deliberate misconduct by eliminating the necessity of finding prejudice in the Rule 16 context. At the very least, this would allow for some internal consistency in the Rhode Island Supreme Court's approach to deliberate prosecutorial misconduct.

Moreover, the court itself has recognized the applicability of the "sliding-scale" *Brady* analysis to the Rule 16 context. In *Wyche*, the court stated that "[t]he Court's decision today makes clear that questions involving deliberate discovery violations under either *Ouimette* [sliding-scale due process analysis] or Rule 16 shall be governed by the same standards." 518 A.2d at 911. Although the supreme court has never interpreted this language to eliminate the need for prejudice in the Rule 16 context, it does seem to suggest that the court should tip the scales against deliberate misconduct in a manner consistent with *Brady*. As this Note argues, an elimination of the need to find substantial prejudice best serves the interests of justice in a case like *DiPrete*, and in light of the heavy-handed approach the court has taken in the *Brady* context, such a rule is only a short distance away. *See infra* Section IV.A.1.

263. *See supra* Section III.

a trial judge to make a considered decision based on the facts of a given case.[264] However, requiring the judge to find substantial prejudice unnecessarily limits a judge's freedom to consider other factors that might weigh heavily in favor of dismissal. This is the scenario that presented itself in *DiPrete*.

In *DiPrete*, the interest in punishing errant prosecutors on such egregious facts might warrant dismissal despite the fact that the supreme court was not impressed by the level of resulting prejudice to the defendants. Judge Cresto determined that nothing short of dismissal would impress upon the State the seriousness of its misconduct.[265] Since the rule textually permits the trial judge to fashion an appropriate remedy and the case law establishes that the judge's choice of sanctions is discretionary, the judge should be permitted to enter dismissal even in the absence of a finding of prejudice. If the interest in preserving the integrity of the judicial system in a particular case is sufficiently great, the trial judge should have the freedom to "enter such other order as it deems appropriate."[266]

In keeping with *Musumeci*, such a decision can still be reviewed for an abuse of discretion. However, limiting the freedom of a judge by requiring a finding of prejudice is dangerous, as evidenced by *DiPrete*. In *DiPrete*, the trial judge's dismissal of the charges was never reviewed under the appropriate and deferential "abuse of discretion" standard, simply because the supreme court *changed* the standard of review. The patent unfairness is the possibility that the former governor might have obtained a different result if the decision had been reviewed under the appropriate standard. The interests of justice might still have required dismissal if Judge Cresto had not been constrained to find substantial prejudice. Under *Musumeci* and *DiPrete*, however, a trial judge is not free to make such a determination. In effect, the court has overruled the *discretionary* nature of the *Coelho* factors and, in their place, *required* a finding of flagrant misconduct and substantial prejudice.

Coelho itself seems to raise the assumption that other factors may counsel dismissal, in the absence of a finding of prejudice. The fourth prong of the *Coelho* test permits consideration of

264. *See id.*
265. *See supra* notes 50-52 and accompanying text.
266. R.I. Super. Ct. R. Crim. P. 16(i).

whether or not there are any other relevant factors in *addition* to the extent of the prejudice.[267] Since, under *Musumeci*, dismissal is to be reviewed for an abuse of discretion, perhaps one ought to have confidence in the discretion of the trial judge that he would not dismiss a case in the absence of prejudice unless there were other extenuating factors. Eliminating the need to find prejudice in the dismissal context would simply free the judge to consider (1) protection of the integrity of the judiciary, (2) the interest in punishing errant prosecutors and (3) the systemic interest in preventing prosecutorial misconduct. Additionally, eliminating the need to find substantial prejudice would protect the interests of justice in a case like *DiPrete*.

Judge Cresto unquestionably found such other factors (diminished confidence in the legal system, deterrence, etc.).[268] Since he found that no other remedy would alleviate the situation,[269] he may nonetheless have been justified in entering dismissal if not for the substantial prejudice requirement. The likelihood of judicial error in this regard would be minimized in light of the appropriate abuse of discretion standard reestablished in *Musumeci*.

2. *Would* DiPrete *Have Been Decided Differently in Light of* Musumeci?

The majority in *Musumeci* indicated that perhaps *DiPrete* would not have been decided differently anyway.[270] The court suggested that the "no authority" standard articulated in *DiPrete* was mere dictum; it was therefore not essential to the court's determination that Judge Cresto should not have dismissed the case in the absence of substantial prejudice.[271] The court stated that:

> [n]otwithstanding our disagreement with the 'no authority' test used in *DiPrete* to evaluate the motion justice's dismissal sanction in that case, we do no violence to the doctrine of *stare decisis* here because our holding in this case reversing the indictment's dismissal is consistent with the same result reached by the Court in *DiPrete*.[272]

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267. State v. Coelho, 454 A.2d 241, 245 (R.I. 1982).
268. *See* State v. DiPrete, Ind. P1 94-1000 A & B, 1997 WL 839899, at *20-21 (R.I. Super. Mar. 11, 1997).
269. *See id.* at *19.
270. *Musumeci*, 717 A.2d at 64.
271. *See id.* at 65.
272. *Id.* at 64.

The court concluded "that the second trial justice in this case, like the motion justice in *DiPrete*, committed reversible error when she dismissed the indictment in the absence of the requisite showing of substantial prejudice to the defendant . . . ."[273] Thus, it appears that, according to the *Musumeci* majority, even if *DiPrete* was decided under an abuse of discretion standard, it would still have come out the same way. One wonders if that is necessarily accurate, however, when, considering the particularly egregious facts of *DiPrete* and the specific findings of the trial judge, the defendants were deprived of having Judge Cresto's order reviewed with some degree of deference.

In *Musumeci*, the court determined that even though the second trial justice appropriately took into account the deterrent effect of dismissal, it was an abuse of discretion to dismiss the case when the prosecutorial misconduct was merely negligent. The first justice had already determined that a mistrial was a sufficient remedy and no additional prejudice had befallen the defendant between the mistrial and the start of the second trial.[274] Conversely, the facts in *DiPrete* counseling dismissal were much stronger. In *DiPrete*, the trial judge determined (1) that the prosecution's conduct was deliberate,[275] (2) that substantial prejudice resulted to the defendants,[276] (3) that the prejudice could not have been cured by "a mere continuance"[277] and (4) that dismissal would also serve an important function in the administration of justice.[278]

In *DiPrete*, there was an extraordinary thirty-two day evidentiary hearing.[279] Afterwards, the trial judge was reasonably confident that all of the evidence still had not been disclosed.[280] Thus, *DiPrete* was a much better candidate for dismissal than *Musumeci*, even with the substantial prejudice requirement. However, if the court adopted the rule that prejudice need not be found if the State's conduct is deliberate, then the DiPretes, and others simi-

273. *Id.* at 65.

274. *See id.* at 64.

275. State v. DiPrete, Ind. P1 94-1000 A & B, 1997 WL 839899, at *19 (R.I. Super. Mar. 11, 1997).

276. *Id.*

277. *Id.*

278. *Id.* at *20.

279. State v. DiPrete, 710 A.2d 1266, 1269 (R.I. 1998).

280. *DiPrete*, 1997 WL 839899, at *20.

larly situated, would stand a much stronger chance of having dismissal upheld.

CONCLUSION

Both *DiPrete* and *Musumeci* demonstrated that dismissal is inappropriate in the absence of flagrant prosecutorial misconduct and substantial prejudice. *Musumeci* established that the imposition of dismissal is a viable Rule 16(i) sanction, and that it is to be reviewed for an abuse of discretion. However, *Musumeci* and *DiPrete* constrain a trial judge's ability to impose dismissal so severely, that it will be a rare case indeed when such action is upheld. As Judge Cresto so aptly put it, "[a]n integral and indispensable part of the criminal justice system is an effective pretrial procedure."[281] As *DiPrete* and *Musumeci* made clear, the effectiveness of that procedure has been hotly disputed. It is the final conclusion of this Note, however, that providing the trial judge with broad discretion in this area, to see that the interests of justice are served, is the best safeguard of all our rights.

Although *Musumeci* and *DiPrete* stated otherwise, *DiPrete* might have been decided differently if Judge Cresto had been permitted to determine that factors other than prejudice counseled dismissal. In the future, a judge might decide that the conduct of the State was so egregious, and the systemic interest in preserving the integrity of the judicial system so weighty, that the interests of justice require dismissal even in the absence of a finding of substantial prejudice. A trial judge ought to be free to make such a determination. The saga that has been *State v. DiPrete* has resolved some questions and raised new ones; but as for the DiPretes themselves, the law has been clarified for the rest of us at their expense.

Michael P. Robinson

281. *Id.* at *5.