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1998 Survey of Rhode Island Law: Cases: Criminal Procedure

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Criminal Procedure. *State v. DeMagistris*, 714 A.2d 567 (R.I. 1998). A trial justice's disbelief of a defendant's testimony as to profit motive under the statute proscribing prostitution is insufficient to sustain a conviction where there exists no other evidence of guilt. Statute proscribing loitering for indecent purposes is intended to apply to the public solicitation of prostitution. A defendant, on a request for a *Franks* hearing resulting from an omission in the warrant application, must first show that the omission was made knowingly or recklessly, and second, that the omission was material.

In *State v. DeMagistris*,[1] the Rhode Island Supreme Court examined the application of Rhode Island General Laws sections 11-34-5 and 11-34-8 to the defendant's attempt to beguile prospective models to pose nude and perform sexual acts on him, while filming the scene in a seemingly professional style, and to his statement that he was a professional photographer who intended to market the photographs abroad.[2] Reversing the conviction for harboring prostitution under section 11-34-5, the court held that the evidence was insufficient to establish beyond a reasonable doubt the requisite profit motive to convict defendant of securing an indecent act for pecuniary gain.[3] In construing Rhode Island General Laws section 11-34-8, the Rhode Island Supreme Court held that the prohibition of loitering for indecent purposes is aimed at public solicitation of prostitution, and does not extend to the telephone solicitation of potential actors for pornographic movies.[4]

Rhode Island has recognized that the *Franks* doctrine may extend to material omissions in addition to affirmative falsehood.[5] However, the court in *DeMagistris*, held that the police affiant's failure to mention the defendant's statement that he had no drugs, while presumably reckless, was not material, and therefore, the warrant to search his apartment was supported by probable cause.[6]

1. 714 A.2d 567 (R.I. 1998).
2. *Id.* at 568-70.
3. *See id.* at 572.
4. *See id.* at 574.
5. *See id.* at 575 (citing State v. Wilshire, 509 A.2d 444 (R.I. 1998)).
6. *See id.* at 576.

FACTS AND TRAVEL

Between the summer of 1992 and June of 1993, the defendant, moonlighting as "Josh," solicited prospective nude models over the telephone.[7] His phone calls began gingerly; he merely inquired whether the phone recipient was interested in earning some extra money for "modeling."[8] Once Josh successfully peaked the woman's interest, he became more lascivious, and eventually revealed that she would be expected to pose nude, assume erotic positions, and perform various sexual acts, including fellatio and intercourse with the photo/videographer.[9] Josh assured his prospective models that any photographs or films that he took would be distributed outside of New England.[10]

The defendant located his targets by searching confidential school records while in his professional capacity as director of special education at the Pawtucket School Department.[11] He was especially fond of single mothers or younger female students because of what he perceived to be their restrained financial situation, making them potentially receptive candidates.[12]

After several failed attempts, Josh's luck turned the other way; he located an ambitious actress—a working prostitute—who willingly performed fellatio upon him while he filmed the event, all for the bargain price of forty dollars for each "love" scene.[13] Sadly enough for Josh, his exploits ended with his phone call to Susan Gity (Gity), a thirty-two-year-old mother of two boys in the Pawtucket special education program, who accepted Josh's invitation to model bathing suits or lingerie.[14] Once at Gity's house, Josh explained that the modeling would require nude poses, and performing various sex acts on film.[15] Josh offered Gity and her female friend some marijuana to help them relax.[16]

Once enlightened about the parameters of the modeling job, Gity and her friend feigned interest, but stated they "wanted to

7. *See id.* at 569.
8. *See id.*
9. *See id.*
10. *See id.*
11. *See id.*
12. *See id.*
13. *See id.*
14. *See id.*
15. *See id.*
16. *See id.*

think it over."[17] Once the defendant left Gity's house, she phoned the Pawtucket police, and together they set up a sting operation.[18] When defendant arrived at Gity's request the next day, she asked Josh if he had any drugs, to which he replied, "he did not."[19] After asking Gity to undress, he went to his car to retrieve his camera bag, and upon returning, the police arrested him.[20]

The police applied for a warrant to search the defendant's home, car, camera case and office at the Pawtucket school department for evidence of his business venture and also for any drugs.[21] The warrant affidavit only described Gity's recount of Josh's pitch where he offered to supply Gity and her friend with some marijuana to help them relax; however, the affiant did not inform the magistrate of Josh's negative response to Gity's request for some drugs during their second encounter.[22] The warrant was issued, and upon searching defendant's residence, the police found a small quantity of marijuana in a closed jewelry box, along with several video tapes including the one with the fellatio incident.[23] Documents with phone numbers of various women were also found.[24]

The defendant was charged by information with forty-one criminal counts.[25] Following a trial without a jury, the defendant was found guilty on all counts pertaining to the securing of an indecent act for pecuniary gain, enticement of prostitution or other indecent act, and obscene or harassing telephone calls in violation of Rhode Island General Laws sections 11-34-5, 11-34-8 and 11-35-

17. *Id.*

18. *See id.*

19. *Id.* at 570.

20. *See id.*

21. *See id.*

22. *See id.* This omission formed the basis of the defendant's appeal on the alleged *Franks* violation issue. The defendant disputes that probable cause existed for the magistrate to authorize the seizure of "[a] *certain quantity of controlled or illegal substances.*" *Id.*

23. *See id.*

24. *See id.*

25. *See id.* Included in this myriad of charges were several counts of solicitation of the crime against nature in violation section 11-1-9 of the Rhode Island General Laws, and one count of a completed infraction of the crime against nature proscribed in section 11-10-1 of the Rhode Island General Laws; however the Rhode Island Superior Court dismissed these counts on equal protection grounds. *See id.*

17 respectively.[26] The defendant was also charged with one count of possession of a controlled substance in violation of Rhode Island General Laws section 21-28-4.01(C)(1)(b); he was convicted on this count, and appealed based upon the lack of probable cause to issue the warrant, which led to the seizure of marijuana from his residence.[27]

BACKGROUND

The Rhode Island Supreme Court has been "especially loathe to question the [trial] justice's evaluation of the evidence, especially on a critical issue of mental intent."[28] A criminal conviction, requiring proof beyond a reasonable doubt, will be set aside only where the judgment is "clearly erroneous."[29] According to the court, a "finding of fact is 'clearly erroneous' when the totality of the evidence leaves the reviewing court with 'a definite and firm conviction that a mistake has occurred.'"[30] Additionally, it is not the task of the reviewing court to weigh testimony or to assess the credibility of witnesses; that determination is reserved for the trial court.[31]

With respect to the statutory construction of section 11-34-8, pertaining to loitering for indecent purposes, the intent of the statute is to prohibit prostitutes from "hawking their wares in public—whether this is done by strutting up and down a public street or by calling out to passersby . . . ."[32] This section was carved out of the former version of 11-34-5 in response to a rash of streetwalking in the West End of Providence.[33] In the *COYOTE* case, the court addressed the prostitution problem in Providence, specifically the problem of male customers, or "johns," harassing people on the

26. *See id.* The defendant conceded on appeal his conviction under section 11-35-17 of the Rhode Island General Laws; accordingly the court affirmed the conviction. The convictions under the other two statutes remained the subject of the appeal. *See id.*

27. *See id.*

28. *Id.* at 571 (citing *In re* Derek, 448 A.2d 765, 767 (R.I. 1982); State v. Chatell, 401 A.2d 436, 437-38 (R.I. 1979)).

29. *Id.* (citing *In re Derek*, 448 A.2d at 767).

30. *In re Derek*, 448 A.2d at 767 (citing State v. Riendeau, 448 A.2d 735, 737 (R.I. 1982)).

31. *See Chatell*, 401 A.2d at 437.

32. *DeMagistris*, 714 A.2d at 573.

33. *See id.* (citing COYOTE v. Roberts, 523 F. Supp. 352, 354-55 (D.R.I. 1981)).

street while trying to pick up girls.[34] The situation in the West End neighborhood sparked the amendment of section 11-34-5 to include the phrase "for pecuniary gain."[35]

With respect to the *Franks* violation, the United States Supreme Court held in *Franks v. Delaware*[36] that a police officer's intentional or reckless inclusion of false material facts in a warrant application, would render any evidence seized pursuant to this warrant suppressed.[37] The federal *Franks* doctrine mandates a two-part test: first, the defendant must show that the affiant intended to deceive the magistrate issuing the warrant, and second, the defendant must show a material falsehood, in that probable cause to issue the warrant would not have existed if the affiant had properly informed the magistrate.[38] While Rhode Island has impliedly recognized that the *Franks* doctrine may extend to material omissions, the Rhode Island Supreme Court has yet to address the implications of the doctrine in depth, or define the outer contours of constitutional protections surrounding the warrant clauses of either the Federal or Rhode Island constitutions.[39] In *State v. Wilshire*,[40] the Rhode Island Supreme Court held that the affiant's omission of a witness' tentative statement as to the whereabouts of a defendant, which could potentially negate his/her guilt, did not automatically trigger a *Franks* violation.[41] In support of its holding, the court reasoned that it is not the police officer's function in preparing an affidavit for a search warrant to assume the role of a defense attorney or to include facts that might diminish the establishment of probable cause.[42]

34. *See COYOTE*, 523 F. Supp at 354.

35. *Id.* at 355 (quoting the testimony of Richard Kelaghan, legal counsel to the House Judiciary Committee). The *COYOTE* court suggested that the amendment was in part prompted by the decision to treat "johns" as prostitutes, and charged with a petty misdemeanor, rather than "pimps," and charged with a felony. Hence the new version of section 11-34-5 was directed towards "pimps" and not "johns." *See id.*

36. 438 U.S. 154 (1978).

37. *See DeMagistris*, 714 A.2d at 574 (citing *Franks*, 438 U.S. at 155-56).

38. *See id.* at 575.

39. *See id.* at 575 n.3 (citing State v. Wilshire, 509 A.2d 444, 450-51 (R.I. 1986)).

40. 509 A.2d 444 (R.I. 1986).

41. *Id.* at 450-51.

42. *See id.* at 451.

ANALYSIS AND HOLDING

Section 11-34-5

Justice Flanders, in writing the opinion for the court, first stated that the primary objective of the clause in section 11-34-5, pertaining to the securing of an indecent act for pecuniary gain, is to prohibit "pandering."[43] Read in conjunction with section 11-34-1, which prohibits recruiting prostitutes, section 11-34-5 seems to target the pimp who secures the "john" for the prostitute and profits from a share of the john's fee.[44] Justice Flanders rejected the state's contention that the statute should extend to persons, such as the defendant, who secured actors for blue movies, and intended to profit by subsequently selling the films or photographs of the indecent acts, because there was insufficient evidence to prove beyond a reasonable doubt that the defendant intended to profit from the sale of the tapes or photographs from the modeling shoot.[45]

The court reasoned that after an exhaustive search, the only evidence of a profit motive that the police were able to come up with was flimsy at best.[46] All they had was Josh's statement that he was a professional photographer; that Josh used his marketing pitch on the prostitute who performed fellatio on him; that Josh filmed the fellatio scene in a seemingly professional style;[47] that the nude photographs of other women could not be found; and that

43. *DeMagistris*, 714 A.2d at 571. The court defines "pandering" as "'[o]ne who caters to the lust of others; a male bawd, a pimp, or procurer.'" *Id.* at n.1 (quoting Black's Law Dictionary 1110 (6th ed. 1990)).

44. *See id.* at 571. Section 11-34-1 provides: "It shall be unlawful for any person to secure a person for a house of ill fame, or to procure for a person a place as inmate of a house of ill fame . . . or come into this state or leave this state for the purpose of prostitution. It shall be unlawful for any person by any means to keep, hold, or detain . . . any person in any place for the purpose of prostitution . . . ." R.I. Gen. Laws § 11-34-1 (1956) (1994 Reenactment), *quoted in DeMagistris*, 714 A.2d at 571 n.2. Likewise, section 11-34-5 provides: "It shall be unlawful for any person, *for pecuniary gain*, to secure, direct, or transport another for the purpose of prostitution . . . ." R.I. Gen. Laws. § 11-34-5 (1956) (1994 Reenactment), *quoted in DeMagistris*, 714 A.2d at 571 (emphasis added).

45. *See id.* at 571. By reversing the conviction on sufficiency grounds, the court did not elaborate on whether the element of "pecuniary gain" may still be satisfied where a defendant—who initially pays for the indecent act—profits from the subsequent sale of the tapes, films or photographs.

46. *See id.* at 572.

47. As Justice Flanders noted, this essence of professionalism was limited to the defendant's ability to "hold the camera steady during his multiple sexual climaxes." *Id.*

the defendant's testimony that he did not intend to profit from any resale of the tapes or photos lacked credibility.[48] The totality of the evidence failed to connect the defendant to any commercial venture, and lacked any suggestion of real marketing activity.[49] Rather, the evidence was more indicative of a "flimsy ruse that [the defendant] used to justify his telephonic solicitations for sex."[50] The mere evidence that the defendant had preserved the videotape of the prostitute performing fellatio proved to the court little more than the defendant's desire to use the film for his own later viewing pleasure since there were no evidence of any copies, editing or prints.[51] Likewise, the court found inconclusive evidence of Josh's steady camera hand since this, too, could have enhanced his personal viewing pleasure.[52]

With respect to the credibility of the defendant's testimony, the court noted that in *State v. Mattatall*[53] the Rhode Island Supreme Court recognized that a defendant, who elects to testify, risks being disbelieved, and a trier of fact may conclude that the opposite of the defendant's testimony is true.[54] Disbelief of testimony is sufficient to sustain a finding of guilt where there is other evidence of the defendant's guilt.[55]

The court distinguished *Mattatall* on the basis that there existed no other competent evidence of the defendant's profit motive; rather, the evidence suggested that he was acting out a misguided fantasy.

Section 11-34-8

The Rhode Island Supreme Court held that the defendant's telephone solicitations were not the kind of passersby solicitation for prostitution or other indecent acts that the statute was intended to prohibit, but rather, such acts were prohibited by the statute dealing with obscene or harassing telephone calls.[56] The court rejected the state's technical reading of the language con-

48. *See id.*
49. *See id.*
50. *Id.*
51. *See id.*
52. *See id.*
53. 603 A.2d 1098 (R.I. 1992).
54. *See DeMagistris*, 714 A.2d at 572.
55. *See id.* (citing *Mattatall*, 603 A.2d at 1109).
56. *See id.* at 573. Section 11-34-8 provides:

tained in the last portion of the statute to criminalize any "patronage, inducement, or securing of indecent acts" regardless of where those acts occur.[57] The court further rejected the state's contention that "any such act" refers to not only loitering, but also the act of prostitution or any indecent act.[58]

The court reasoned that this interpretation would take the latter portion of the statute out of context from the rest of the preceding statutory language.[59] In support of this reasoning the court observed one of the fundamental canons of statutory construction; that is, no construction should be adopted that would "demote any significant phrase or clause to mere surplusage."[60] Hence, the court applied the statutory-construction principle of "*noscitur a sociis*," whereby one phrase in the statute draws its scope from its association with the other portions of the statute.[61]

Franks *Violation*

The court applied the First Circuit's analysis in *United States v. Rumney*[62] to determine that the trial court did not abuse its discretion when it denied the defendant a *Franks* hearing.[63] In *Rumney*, the First Circuit applied the federal *Franks* test to a situ-

> It shall be unlawful for any person to stand or wander in or near any public highway or street, or any public or private place, and attempt to engage passersby in conversation, . . . for the purpose of prostitution or other indecent act, or to patronize or induce or otherwise secure a person to commit any such act.

R.I. Gen. Laws § 11-34-8 (1956) (1994 Reenactment).

57. *Id.*

58. *See id.*

59. *See id.*

60. *Id.* (citing State v. Ricci, 533 A.2d 844, 848 (R.I. 1987); State v. Caprio, 477 A.2d 67, 70 (R.I. 1984)).

61. *Id.* Here, the court noted that the phrase, "to patronize or induce or otherwise secure a person to commit any such act," Section 11-34-8 of the Rhode Island General Laws draws its scope from the preceding language referring to prostitution as well as its title, "Loitering for indecent purposes." R.I. Gen. Laws § 11-34-8 (1956) (1994 Reenactment).

62. 867 F.2d 714 (1st Cir. 1989), *cert. denied*, 491 U.S. 908 (1989). The court did not engage in an independent assessment of whether the federal *Franks* doctrine was applicable to omissions of critical facts from a warrant application, as distinguished from mistruths, or whether the Warrant Clause in Article 1, section 6 of the Rhode Island Constitution would offer greater protections. *See DeMagistris*, 714 A.2d at 575 n.4. Rather, the court evaluated the First Circuit approach to *Franks* violations under the federal standard to determine whether a *Franks* hearing should have been granted in the case at hand. *See id.* at 575-76.

63. *See id.* at 575-76.

ation involving a police officer's omission from a warrant application of a witness' denial of any connection with the defendant, but who offered another version of events following his arrest as an accomplice.[64] While presumably reckless, the omission was immaterial because the inclusion of the witness' denials prior to his arrest would not have undercut his credibility so as to dispel any basis for probable cause.[65]

Based on the *Rumney* analysis, the Rhode Island Supreme Court held that the police affiant's failure to include the no-drug exchange between Gity and Josh during the sting operation, while presumably reckless, was not material, and therefore the trial court did not abuse its discretion by refusing a *Franks* hearing.[66] The court reasoned that Josh's admissions as to his association with drugs represented conflicting statements to Gity at different times, and that it was not the role of a magistrate, assessing a warrant application, to resolve credibility questions or to make any firm conclusions beyond the threshold determination that there exists a "'fair probability that contraband or evidence of a crime will be found in a particular place.'"[67] Even if the omitted statement had been included in the warrant application, probable cause still would have existed .[68]

CONCLUSION

The Rhode Island Supreme Court's analysis in *DeMagistris* provides helpful guidance as to the scope and application of two prostitution statutes. However, the court did not reach the issue of whether section 11-34-5, dealing with the harboring of prostitution, may apply to someone other than a panderer or "pimp," but who subsequently profits from his indecent acts. The court's decision does make clear that in order to sustain a conviction under this statute, the totality of the evidence must link the defendant to

64. *See id.* at 575 (citing *Rumney*, 867 F.2d at 714).

65. *See id.*

66. *See id.* at 576.

67. *Id.* (quoting State v. King, 693 A.2d 658, 661 (R.I. 1997) (quoting Illinois v. Gates, 462 U.S. 213, 238 (1983))).

68. *See id.* The defendant, posing as Josh, told Gity and her friend that he could "provide marijuana for them to relax if they wanted to 'get high.'" *Id.* at 569. The court also noted that one possible interpretation of Josh's later statement, "'I don't have any [stuff]'" could have meant that he didn't have any drugs available at that particular time. *Id.* at 576 n.4.

some real commercial activity. Likewise, the court's narrow interpretation of section 11-34-8 limits the types of acts that may be proscribed under the statute. In the area of search and seizure, the Rhode Island Supreme Court affirmatively made clear that the *Franks* doctrine does extend to material omissions; however, the court stopped short of any in depth analysis of its application to omissions of critical facts from a warrant application, or of defining the outer contours of the constitutional protections surrounding the warrant clauses of the Federal and the Rhode Island constitutions.

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Criminal Procedure. *State v. DiPrete,* 710 A.2d 1266 (R.I. 1998). The dismissal of an indictment, due to the state's failure to comply with discovery orders, is not warranted by prejudice to defendants that resulted from defense attorneys allegedly being forced to disclose their trial strategy. A state court's supervisory power does not grant the authority to dismiss a grand jury indictment unless both "outrageous conduct and demonstrable and otherwise incurable prejudice" are found.

In *State v. DiPrete,*[1] the Rhode Island Supreme Court limited the scope of courts' inherent supervisory powers and articulated a conservative application of Rule 16 of the Superior Court Rules of Criminal Procedure. The court acknowledged that case law generally allows the vacating of a conviction and the ordering of a new trial as possible sanctions for violations of discovery orders.[2] However, the court found that Rule 16 did not authorize a dismissal of the indictment in *DiPrete* because the violation was not a denial of discovery; a mere delay of discovery was not sufficiently prejudicial for the trial judge to impose the harsh sanction of dismissal.[3] Although the superior court is vested with the inherent power to impose sanctions pursuant to its judicial authority, the Rhode Island Supreme Court noted that such authority is not without limitation.[4] Thus, it is inappropriate for a court to punish prosecutorial misconduct by creating an unauthorized exclusionary measure, particularly in the absence of extreme transgression which causes severe prejudice.[5]

Facts and Travel

Former Rhode Island Governor Edward D. DiPrete, and his son, Dennis L. DiPrete, were indicted by a grand jury which charged them with twenty-two counts relating to acts of bribery and extortion.[6] The state was sanctioned after the superior court determined that it had attempted to subvert the discovery process

1. 710 A.2d 1266 (R.I. 1998).
2. *See id.* at 1271-73.
3. *Id.* at 1272.
4. *See id.* at 1276.
5. *See id.*
6. *See* State v. DiPrete, Ind. P1 94-1000 A&B, 1997 WL 839899 (R.I. Super. March 11, 1997).

with undue delay.[7] After a lengthy hearing, the trial justice found that state's counsel had not cooperated with discovery orders, violating Rule 16 of the Superior Court Rules of Criminal Procedure, the *Brady* doctrine, and provisions of a stipulation between the state and defendants.[8] Accordingly, all counts of the indictment were dismissed.[9]

On appeal, the state contended that the doctrine articulated in *Brady v. Maryland*[10] did not provide precedent for such a severe sanction, and therefore was erroneously applied by the trial court judge.[11] The state also proposed that Rule 16 did not warrant a dismissal under the circumstances of the case, and that case law supported a limited application of the rule.[12] Furthermore, the state argued that the superior court could not invoke its general supervisory power to dismiss an indictment returned by a grand jury for the purpose of sanctioning the prosecution.[13]

Analysis and Holding

On appeal, the state presented three issues for consideration. First, the state argued that the *Brady* principles were insufficient to uphold the dismissal of the entire indictment.[14] Second, the state contended that Rule 16 did not support the judgment.[15] Third, it was argued that the superior court, in the exercise of its supervisory power, overreached in the application of its authority.[16]

Brady Principles

Prior to *Brady*, the United States Supreme Court found that false testimony against an accused was a violation of due process,

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7. *See id.* at *19.
8. *See id.*
9. *See id.* at *20. Counts 23 and 24 were severed counts and were not dismissed at this time. The counts were perjury charges not at issue in this appeal, and were also eventually dismissed.
10. 373 U.S. 83 (1963) (holding that due process is violated when evidence against the accused is withheld, notwithstanding the good faith or bad faith of the prosecution).
11. *See* State v. DiPrete, 710 A.2d 1266, 1270 (R.I. 1998).
12. *See id.*
13. *See id.*
14. *See id.*
15. *See id.*
16. *See id.*

and that the ordering of a new trial was an appropriate remedy in such instances.[17] In 1963, *Brady* extended the principle to include the withholding of evidence that could result in the defendant's acquittal.[18] If such testimony could create any "reasonable likelihood that the judgment of the jury could be affected," then due process was violated and a new trial must be ordered.[19]

The *Brady* principles were not adopted by Rhode Island courts until the case of *In re Ouimette*.[20] There, the Rhode Island Supreme Court adopted a test in which the defendant "must show there is a significant chance that the use and development of the withheld evidence by skilled counsel at trial would have produced a reasonable doubt in the minds of enough jurors to avoid a conviction.[21] This principle was furthered in *State v. Wyche*,[22] where the court held a defendant was entitled to a new trial without establishing prejudice in cases where the prosecution intentionally withheld evidence.

As applied to the case at bar, the Rhode Island Supreme Court found that the *Brady* principles were irrelevant.[23] *Brady* is only applicable in the event that an accused has been convicted after exculpatory evidence was deliberately withheld and that evidence could have created a reasonable doubt in the minds of the jurors.[24] Thus the doctrine is necessarily a post-trial remedy, and inapplicable to the pretrial issues raised by the state on appeal.

Rule 16 - Discovery

In determining whether a Rule 16 violation would warrant a reversal of a conviction and the granting of a new trial, the Rhode Island Supreme Court turned to the existing state case law. A host of cases were presented in which a new trial was granted due to prosecutorial misconduct.[25] The cases indicated that the vacating

17. *See Giles v. Maryland*, 386 U.S. 66 (1967); *Napue v. Illinois*, 360 U.S. 264 (1959).

18. *See DiPrete*, 710 A.2d at 1270.

19. *Id.*

20. *In re* Ouimette, 342 A.2d 250 (R.I. 1975).

21. *Id.* at 254-55. This test was originally articulated in *United States v. Kahn*, 472 F.2d 272, 287 (2d Cir. 1973).

22. 518 A.2d 907 (R.I. 1986).

23. *See DiPrete*, 710 A.2d at 1271.

24. *See id.*

25. *See* State v. Evans, 668 A.2d 1256, 1260 (R.I. 1996) (new trial ordered for unintentional nondisclosure); State v. Wyche, 518 A.2d 907, at 910-11 (R.I. 1986)

of a conviction and the ordering of a new trial were appropriate remedies for violations of discovery orders, regardless of whether the violation was intentional.[26] The court paused to distinguish the case at bar from the above cases in noting that the defendants were not denied discovery but that discovery was merely delayed.[27] In the cited cases, all defendants had gone through the entire trial process and were convicted before a new trial was ordered due to discovery violations. Defendants here had not yet gone to trial, but the court allowed the granting of a new trial.[28]

The court next discussed *State v. Quintal,*[29] where an indictment was dismissed for failure to follow a superior court order.[30] The trial justice place heavy reliance on *Quintal* in justifying his dismissal, but the supreme court could not agree with his interpretation because it felt the ruling in that case was limited to its particular facts.[31] *Quintal* was unique because the state had signed an agreement which compelled it to produce certain materials or be subject to the condition of dismissal. The state was unable to meet the condition, and accordingly the court implemented the final judgment as stipulated to in the agreement.[32]

The trial justice applied the four-part test enunciated in *State v. Coelho* to determine sanctions.[33] He found that sufficient prejudice existed in that the defense counsel was forced to disclose its strategy in moving for dismissal. The Rhode Island Supreme Court, however, found this prejudice to be minimal and was insuf-

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(new trial ordered for deliberate nondisclosure by prosecution); State v. Verlaque, 465 A.2d 207, 212-14 (R.I. 1983) (new trial ordered because of nondisclosure); State v. Coelho, 454 A.2d 241 (R.I. 1982) (new trial ordered because of trial justice's refusal to grant a continuance in light of failure of state to complete furnishing of discovery material until eleventh hour); State v. Darcy, 442 A.2d 900, 903 (R.I. 1982) (new trial was ordered for failure to disclose an incriminating statement made by the accused).

26. *See DiPrete*, 710 A.2d at 1272.

27. *See id.*

28. *See id.*

29. 479 A.2d 117 (R.I. 1984).

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

31. *See id.*

32. *See id.*

33. 454 A.2d 241 (R.I. 1982). The factors in *State v. Coelho* provide that "[a] trial justice should consider '(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.'" *DiPrete*, 710 A.2d at 1273 (quoting *Coelho*, 454 A.2d at 245).

ficient to warrant a dismissal.[34] Rule 16(i) contains a "catchall" provision which does not specifically include or exclude the power of dismissal as a sanction, and defendants' counsel argued that dismissal is an appropriate remedy.[35] Such a strong sanction, reasoned the court, is not warranted when less extreme measures could be taken to ensure adherence to discovery order.[36]

Furthermore, the defense voluntarily chose to seek sanctions against the prosecution. It was in pursuance of that end that its defense strategy was revealed, rather than a delay in discovery because of prosecutorial misconduct.[37] Finally, the court found that the disclosure of the strategy was of very little consequence because liberal discovery rules make each side's strategies equally accessible, and "trial by ambush" is no longer available as a technique to be used by either side.[38]

The court concluded that the trial justice exceeded his authority under Rule 16 by dismissing the entire indictment against the defendants.[39] It was careful to note, however, that the trial justice did not abuse his discretion; rather, he merely had an insufficient basis upon which to enter a dismissal order.[40] Thus, his discretion was never brought into action. For a trial justice to have the authority to enter such a sanction, very rare circumstances such as those present in *State v. Quintal* would have to exist.[41] The case at bar was not considered to be one of those instances.

Supervisory Power

The court acknowledged that the superior court is vested with an inherent supervisory power to govern proceedings before them. This power, although not codified by statute or enumerated by constitution, allows the court to impose appropriate sanctions against any party before it if necessary to carry out the court's orders.[42]

The supervisory power of the court is not to be exercised without limitations. The United States Supreme Court recognizes the

34. *See DiPrete*, 710 A.2d at 1273.
35. *See id.*
36. *See id.* at 1273 n.2.
37. *See id.* at 1274.
38. *See id.*
39. *See id.*
40. *See id.*
41. *See id.*
42. *See id.* at 1275.

existence of the inherent authority, but has cautioned lower courts as to improper exercise of that power. For example, the Supreme Court has warned that harsh sanctions, such as reversal of convictions,[43] or excluding the use of evidence,[44] to "punish" prosecutorial misconduct are appropriate only in the more extreme cases of misconduct.

The Rhode Island Supreme Court's opinion in *State v. Jackson*[45] is consistent with the federal ruling that a court's use of supervisory power must be narrow; it does not allow for the creation of rules not explicitly authorized, nor the dismissal of indictments in the absence of outrageous conduct and prejudice to the defendant.[46] Because such sanctions are indeed harsh, they must derive from an explicit source of law rather than the inherent supervisory power.

Conclusion

Only under the most extreme circumstances may a court dismiss the charges of an indictment. Once a grand jury returns an indictment, it is the court's duty to evaluate the merits of the issues. Dismissing the charges to vindicate prosecutorial misconduct is an act of overreaching and is far too excessive to reasonably correlate to the wrongdoing.

Christopher H. Lordan

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43. *See* United States v. Hasting, 461 U.S. 499, 505-07 (1983).
44. *See* Unites States v. Payner, 447 U.S. 727, 730-31 (1980).
45. 570 A.2d 1115 (R.I. 1990).
46. *See DiPrete*, 710 A.2d at 1276.

Criminal Procedure. *State v. Francis*, 719 A.2d 858 (R.I. 1998). The Rhode Island Supreme Court determined that the *Maloney* rule applies in all district court proceedings. Under the *Maloney* rule, the exclusion of evidence alleged to have been obtained illegally must be sought procedurally by a motion prior to the trial. Otherwise, postponement of the suppression hearing, until during the trial, would forfeit the State's right to seek judicial review of the trial justice's finding since jeopardy would have attached at that point.

FACTS AND TRAVEL

State v. Francis[1] involved a trial that was scheduled to be conducted at the district court level.[2] Defendant had made a motion to suppress evidence which the state intended to use at trial.[3] Prior to trial, the state made an oral request that defendant's motion be heard and decided by the court before the commencement of the trial.[4] This request was made before the swearing in of any witnesses.[5]

The district court justice denied the state's request for a pretrial hearing on defendant's motion to suppress after arguments by both sides.[6] The trial justice did, however, grant the state's motion to stay the trial in order to allow the state to petition the Rhode Island Supreme Court for a writ of certiorari.[7] The supreme court granted the state's petition.[8]

ANALYSIS AND HOLDING

The Rhode Island Supreme Court determined that the central issue concerning this case was jeopardy.[9] The court noted that jeopardy attaches in district court proceedings in a similar manner in which it attaches in superior court proceedings.[10] Jeopardy can

1. 719 A.2d 858 (R.I. 1998).
2. *Id.* at 859.
3. *See id.*
4. *See id.*
5. *See id.*
6. *See id.*
7. *See id.*
8. *See id.*
9. *See id.*
10. *See id.*

attach in two different ways, depending on whether or not the case is before a jury.[11] If the case is to be heard before a jury, "jeopardy attaches when the jury is empanelled and sworn."[12] However, in a non-jury case, "jeopardy attaches when the first witness is sworn."[13]

The Rhode Island Supreme Court tackled a similar issue in *State v. Maloney*.[14] In *Maloney*, the court held that "in all criminal trials conducted subsequent to the filing of this opinion, efforts to suppress evidence must be, by motions, made and heard prior to trial."[15] Unlike *Francis*, where the trial was to be conducted at the district court level, *Maloney* involved a trial conducted at the superior court.[16] The supreme court, however, decided that the same reasoning which applied in *Maloney* should apply equally in *Francis*.[17]

The court found that the extension of the *Maloney* rule to district courts was necessary to preserve the state's right to appeal a suppression.[18] According to the court, a postponement of the suppression hearing would "subvert the state's right to appeal," because, once the first witness is sworn, jeopardy attaches.[19] Therefore, if the defendant prevails in a suppression hearing held concurrent with the trial, the state's appeal of the trial justice's decision to suppress is irrelevant, because, even if successful upon appeal, the defendant cannot be re-tried due to the double jeopardy clause.

Thus, in all criminal cases held in the district court, to effectuate the state's opportunity to challenge the exclusion of essential evidence, any suppression hearings should be held prior to the commencement of the trial.[20] Thereupon, if the defendant's motion to suppress is granted, the state shall be afforded the opportunity

11. *See id.*
12. *Id.* (citing Crist v. Bretz, 437 U.S. 28, 37 (1978)).
13. *Id.*
14. 300 A.2d 259, 265 (R.I. 1973).
15. *Francis*, 719 A.2d at 859 (quoting State v. Maloney, 300 A.2d 259, 265 (R.I. 1973)).
16. *See id.*
17. *See id.*
18. *See id.*
19. *Id.*
20. *See id.*

to file a petition for certiorari with the Rhode Island Supreme Court, for review of the trial justice's decision.[21]

Conclusion

Under the Rhode Island Supreme Court's decision in *State v. Francis*, the common district court practice of holding suppression hearings and trials simultaneously has been determined to violate the state's right to appeal the suppression of essential evidence. In *Francis*, the court extends it's prior holding in *State v. Maloney*, which addressed superior court pre-trial criminal procedure, to the state's district courts. As a result, in all criminal proceedings, any suppression hearing must be heard and decided prior to the commencement of the trial.

Christopher E. Friel

21. *See id.* at 859-60.

Criminal Procedure. *State v. Musumeci*, 717 A.2d 56 (R.I. 1998). When a trial justice declares a mistrial based on the prosecution's negligent and unintentional failure to disclose inculpatory evidence, and ten months later a second trial justice dismisses the charge based on the same prosecutorial misconduct, the second trial justice commits reversible error when no additional prejudice accrued to the defendant in the ten months between trials that could not have been cured with some lesser sanction than dismissal.

In *State v. Musumeci*,[1] the Rhode Island Supreme Court revisited the issue presented in *State v. DiPrete*:[2] the propriety of pretrial dismissal as a sanction for prosecutorial misconduct under Rule 16(i) of the Superior Court Rules of Criminal Procedure.[3] In *Musumeci*, the court overruled the holding in *DiPrete* which held that a trial justice has "no authority" to dismiss a case as a sanction for prosecutorial misconduct.[4] Rather, the *Musumeci* court held that, like all of the other sanctions specifically provided for in Rule 16(i), imposition of dismissal is to be reviewed for an abuse of discretion, but that it is not an appropriate remedy in the absence of flagrant misconduct and substantial prejudice.[5]

FACTS AND TRAVEL

In 1993, the defendant, Robert Musumeci (Musumeci), was charged with one count of unlawful delivery of marijuana in violation of section 21-28-4.01(A)(2)(a) of the Rhode Island General Laws, after an undercover police officer had made repeated attempts to purchase drugs from him at his place of work, the North

1. 717 A.2d 56 (R.I. 1998).
2. 710 A.2d 1266 (R.I. 1998).
3. Rule 16(i) provides:

> 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 issued 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.

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

4. *DiPrete*, 710 A.2d at 1274.
5. *Musumeci*, 717 A.2d at 63-66.

Providence public works department (DPW).[6] After several months, the defendant allegedly sold the officer one quarter ounce of marijuana for $50.00.[7] At trial, the defendant sought to assert the defense of entrapment, and his attorney claimed in his opening statement that Musumeci "had never used and had never been involved with illegal drugs."[8]

During cross examination of the police officer, it was revealed for the first time that the officer had kept a log documenting the operation, and that the log revealed both Musumeci's familiarity, and prior experiences with drugs.[9] Musumeci moved for a dismissal of the charges, arguing that the prosecution's failure to make the log available during pretrial discovery had materially prejudiced his ability to obtain a fair trial.[10] The trial justice ruled that the conduct of the state was nondeliberate, but nonetheless found that it was a violation of Rule 16 of the Rhode Island Rules of Criminal Procedure.[11] The trial justice determined that dismissal was too severe a sanction under these circumstances, but found that a mistrial would be sufficient to remedy the situation.[12]

Ten months later, at his second trial, the defendant sought to have the charges dismissed based on double jeopardy grounds.[13] The second trial justice proceeded to dismiss the case on the grounds that Musumeci was prevented from interviewing witnesses while events were still fresh in their minds.[14] The second trial justice noted the nondeliberate nature of the prosecution's actions, but nonetheless determined that dismissal of the charges was appropriate based on the deterrent function such a sanction would serve, as well as on a finding that the defendant was deprived of timely interviews of witnesses.[15] The state appealed the second trial justice's dismissal of the charges.

6. *See id.* at 59.
7. *See id.*
8. *Id.*
9. *See id.*
10. *See id.*
11. *See id.*
12. *See id.*
13. *See id.*
14. *See id.* at 60.
15. *See id.*

BACKGROUND

Three months prior to *Musumeci*, the Rhode Island Supreme Court had decided *State v. DiPrete*, in which it was held that a trial justice has no authority, under Rule 16 of the Superior Court Rules of Criminal Procedure, to dismiss a case pretrial for violations of discovery by the state, in the absence of flagrant misconduct and substantial prejudice.[16] In *DiPrete*, the court found that the conduct of the state involved only delayed discovery, and thus found that the prejudice accruing to the defendants (defendants forced to reveal trial strategy in their pursuit of the imposition of sanctions), was not sufficient to justify dismissal.[17] In *DiPrete*, two justices of the Rhode Island Supreme Court recused themselves,[18] and two retired justices were brought back to decide the case.[19] In *Musumeci*, the entire sitting supreme court, without the retired justices, heard the appeal.[20]

ANALYSIS AND HOLDING

The *Musumeci* court first addressed the propriety of dismissal as a discovery-violation sanction.[21] The court held that because the state's conduct was merely negligent, and because the log was eventually turned over, dismissal of the case by the second trial justice was an abuse of discretion.[22] The court found that Musumeci had not presented evidence of his inability to locate or effectively interview witnesses, or that he had in fact tried to contact such witnesses at all.[23] Thus, the court held that, in the absence of a showing of some additional prejudice accruing to the defendant after the conclusion of the first trial, the second trial justice was not at liberty to dismiss the charges.[24] Especially when

16. *See* State v. DiPrete, 710 A.2d 1266, 1274 (R.I. 1998).
17. *See id.* at 1273.
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, *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. *See Musumeci*, 717 A.2d at 66.
20. *Id.* at 65-66.
21. *Id.* at 60.
22. *See id.* at 64.
23. *See id.* at 62.
24. *See id.* at 64.

the first trial justice had specifically found that declaring a mistrial was sufficient to rectify the prejudice.[25]

Although this part of the holding was consistent with *DiPrete*, (i.e. that dismissal is inappropriate in the absence of flagrant misconduct and substantial prejudice, and that merely delayed discovery is insufficient prejudice to justify dismissal), the court overruled *DiPrete* to the extent that *DiPrete* held that a trial justice has "no authority" to dismiss a case under Rule 16 for discovery violations of the prosecutor.[26] Rather, the court found that, like all of the other sanctions specifically provided for in Rule 16, dismissal is to be reviewed for an abuse of discretion.[27] The court found itself less reluctant to overrule such a recently decided case than it would be otherwise, in light of the fact that it was decided in part by two retired justices.[28] Accordingly, the court found the "no authority" standard enunciated in *DiPrete* to be so far inferior to the widely accepted abuse of discretion standard, that the former "is so unique that it is without precedent and is likely to be without progeny,"[29] such that it would be appropriate to overrule it.[30] The court additionally found that double-jeopardy was not a bar to the second prosecution, because the state had not goaded the defendant into seeking a mistrial and, citing *Oregon v. Kennedy*,[31] found that when a defendant requests a mistrial, it is not a bar to a subsequent prosecution.[32]

Chief Justice Weisberger, author of the majority opinion in *DiPrete*, issued a concurring opinion, in which he agreed that the second trial justice's dismissal of the charges should be vacated, but chastised the majority for overturning the "no authority" test articulated in *DiPrete*.[33] He reiterated his holding in *DiPrete* reasoning: that dismissal is to be reserved for only the most extreme cases, and only when the twin predicates of flagrant prosecutorial misconduct and substantial prejudice are found.[34] Chief Justice

25. *See id.*
26. *See id.* at 66.
27. *See id.*
28. *See id.* at 65-66.
29. *Id.* at 65 n.9 (quoting Western Pacific R.R. Corp. v. Western Pacific R.R. Co., 345 U.S. 247, 275 (1953)).
30. *See id.* at 64-66.
31. 456 U.S. 667 (1982).
32. *See Musumeci*, 717 A.2d at 66-67.
33. *See id.* at 67.
34. *See id.* at 70.

Weisberger would have found that in the absence of these prerequisites, dismissal was wrong as a matter of law, and not merely an abuse of discretion.[35] Rather, he believed the second trial justice had no discretion in this context which she was at liberty to exercise.[36]

Justice Goldberg concurred in the holding of the court that pretrial dismissal under Rule 16 should be reviewed for an abuse of discretion, but dissented from the majority's holding that dismissal was an abuse of discretion in this case.[37] Justice Goldberg found that, at the very least, the case should have been remanded for an evidentiary hearing on the question of the degree of prejudice accruing to Musumeci,[38] and also stated that "I am of the opinion that Rule 16 should be used not only to remedy the prejudice resulting from a party's nondisclosure but also as a prophylactic measure to deter future misconduct."[39] Justice Goldberg would have held that the interest in preserving the integrity of the judicial system, (i.e. deterrence of future misconduct), would counsel dismissal in this case.[40]

CONCLUSION

Despite the fact that *Musumeci* was decided only three months after *DiPrete*, it has helped to clarify the state of the law regarding pretrial dismissal. In the wake of *Musumeci*, it is now clear that in order for a trial judge to be justified in entering dismissal, the conduct of the state must be flagrant, and the prejudice resulting to the defendant must be so substantial that no lesser remedy will be suited to rectify it.[41] It is also clear that merely delayed discovery will not normally rise to the level of prejudice required to justify dismissal if there is no additional prejudice,[42] and that merely negligent misconduct on the part of the state is equally insufficient to support dismissal.[43] Additionally, despite the court's "guidelines" as to the factual predicates that must exist prior to an entry of

35. *See id.* at 71.
36. *See id.*
37. *See id.*
38. *See id.* at 74 n.16.
39. *Id.* at 76.
40. *See id.*
41. *Id.* at 63-64.
42. *See id.* at 62.
43. *See id.* at 64.

dismissal, the judge's actions in this regard will not be disturbed unless they amount to an abuse of discretion.[44] Thus, although the abuse of discretion standard returned to in *Musumeci* is a significant departure from the "no authority" test enunciated for the first time in *DiPrete*, the factual circumstances that would serve to uphold dismissal seem to be consistent in both cases.

Michael P. Robinson

44. *See id.* at 66.

Criminal Procedure. *State v. Pineda*, 712 A.2d 858 (R.I. 1998). When an appellant files a petition for writ of certiorari to the supreme court, but fails to order a transcript of the lower court proceedings, the supreme court will dismiss the petition pursuant to Supreme Court Rules of Appellate Procedure, Article I, Rule 10(b)(1).

In *State v. Pineda*,[1] since the record on appeal lacked the requisite findings and evidentiary rulings from both the district court and Administrative Adjudication Court (AAC) judges, the Rhode Island Supreme Court could not conduct a meaningful review of the issues Pineda raised.[2] Additionally, for collateral estoppel purposes, the district court decision, taking the form of findings of fact made during the district court's hearing on motion for judgment of acquittal in a nonjury trial, can neither serve as a final judgment nor have any legal effect.[3]

FACTS AND TRAVEL

On September 27, 1996, a Pawtucket police officer stopped an automobile, driven by Luis Pineda (Pineda), which was operating on a blown tire.[4] Waiting for Pineda to produce his license and registration, the officer detected the scent of alcohol; additionally, the officer noticed Pineda's bloodshot eyes.[5] The officer asked Pineda to step out of the vehicle.[6] Upon doing so, Pineda stumbled; and he ultimately failed the officer's field sobriety tests.[7] The officer, upon advising Pineda of his rights, took him into custody.[8] En route to the police station, Pineda fell asleep.[9] Upon his arrival at the station, Pineda had difficulty remaining awake.[10] The officer read the "Rights for Use at the Station" form to Pineda, but Pineda was either unwilling or unable to sign it.[11] Pineda then agreed to submit to a chemical breath test. However, he did not

1. 712 A.2d 858 (R.I. 1998).
2. *Id.*
3. *See id.* at 862.
4. *See id.* at 859.
5. *See id.*
6. *See id.*
7. *See id.*
8. *See id.*
9. *See id.*
10. *See id.*
11. *See id.*

complete the test successfully.[12] Thus, the officer charged Pineda with refusal to submit to a chemical test in violation of section 31-27-2.1[13] of the Rhode Island General Laws and driving under the influence of liquor in violation of section 31-27-2.[14]

The Sixth Division District Court entered a judgment of acquittal on the driving-under-the-influence charge, because the prosecution failed to establish that it complied with section 31-27-3.[15] This section affords a person arrested and charged with operating a motor vehicle while under the influence of intoxicating liquor with the opportunity to be examined by a physician of his or her own choosing, at his or her own expense.[16] Additionally, the arresting officer must immediately inform the person of this right and afford reasonable opportunity to exercise it.[17] Thus, at trial, the prosecution must prove that the officer so informed the accused and afforded him or her reasonable time to exercise the right.[18]

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12. *See id.*
13. Section 31-27-2.1 states in pertinent part:

> (b) . . . the administrative adjudication court shall immediately notify the person involved in writing, and upon his or her request, within fifteen (15) days shall afford the person an opportunity for a hearing as early as practical upon receipt of a request in writing. . . . If the administrative judge finds after the hearing that the law enforcement officer making the sworn report had reasonable grounds to believe that the arrested person had been driving a motor vehicle within this state while under the influence of intoxicating liquor . . . and that the person while under arrest refused to submit to the tests upon the request of a law enforcement officer, that the person had been informed of his or her rights in accordance with § 31-27-3, and that the person had been informed of the penalties incurred as a result of noncompliance with this section, the administrative judge shall sustain the violation.

R.I. Gen. Laws § 31-27-2.1 (1956) (1994 Reenactment).

14. *See Pineda*, 712 A.2d at 859.
15. *See id.* Section 31-27-3 states that:

> A person arrested and charged with operating a motor vehicle while under the influence of narcotic drugs or intoxicating liquor, whatever its alcoholic content, shall have the right to be examined at his or her own expense immediately after the person's arrest, by a physician selected by the person, and the officer so arresting or so charging the person shall immediately inform the person of this right and afford the person a reasonable opportunity to exercise the same, and at the trial of the person the prosecution must prove that he or she was so informed and was afforded that opportunity.

R.I. Gen. Laws § 31-27-3 (1956) (1994 Reenactment).

16. *See Pineda*, 712 A.2d at 859.
17. *See id.*
18. *See id.*

The only evidence of such a finding by the district court consists of an undated order entitled "Findings of Fact," which Pineda filed with the supreme court.[19] The AAC held a hearing on January 13, 1997 on the charge that Pineda refused to submit to a chemical test.[20] The prosecution again had the burden of proving that it complied with section 31-27-3 to sustain a finding under section 31-27-2.1.[21] Thus, Pineda motioned the court for a pretrial ruling that would collaterally estop the prosecution from relitigating the issue of compliance with section 31-27-3 because of the district court's aforementioned "Findings of Fact."[22] The administrative judge denied the motion, began a hearing on the merits and eventually sustained the refusal charge.[23] Pineda appealed the prehearing ruling regarding the estoppel issue as well as the decision on the merits to an AAC appeals panel; the panel affirmed the administrative judge's ruling and decision.[24]

Analysis and Holding

Pineda produced majority, concurring and dissenting opinions. Justice Goldberg, joined by Justice Bourcier, wrote the majority opinion. Justices Flanders and Lederberg wrote the concurrence, while Chief Justice Weisberger dissented.

The Majority Opinion

In *State v. Pineda*, the Rhode Island Supreme Court dismissed Pineda's petition for writ of certiorari. Pineda raised three issues in his petition:

> that the evidence produced at the hearing demonstrates that Pineda did submit to the breathalyzer tests because the breathalyzer printouts, which read "deficient sample," are in and of themselves insufficient to prove that Pineda did not

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19. The "Findings of Fact" order stated that:

> After a full trial on the merits in this case, the Court finds that the state failed to establish its compliance with section 31-27-3 of the Rhode Island General Laws *for the purposes of this trial*. For that reason the court granted [sic] the Defendant's motion for a judgment of acquittal [sic].

Id. at 859 (emphasis added).

20. *See id.*
21. *See id.*
22. *See id.* at 860.
23. *See id.*
24. *See id.*

submit to the test, (2) that Pineda was not fully informed of his rights because he was asleep at the time the rights were administered to him, and (3) that the state was collaterally estopped from relitigating its compliance with § 31-27-3 because the issue had previously been decided in the Sixth Division District Court.[25]

Although the supreme court recognized that these issues were "matters of great import that have yet to be addressed by [the] court," it declined to reach the questions because "the record on appeal is devoid of the requisite findings and the evidentiary rulings of both the AAC judge and the District Court judge . . . ."[26] Thus, the court refused to rely on "inference and supposition" to decide the questions Pineda raised.[27]

Rule 10(b)(1) of the Supreme Court Rules of Appellate Procedure requires that the appellant, within ten days after filing his or her notice of appeal, "shall order from the reporter a transcript of such parts of the proceedings not already on file as the appellant deems necessary for inclusion in the record."[28] In *In re Kimberly and James*[29] and *State v. Jennings*[30] the court held that if an appellant fails to comply with Rule 10(b)(1), then the court may dismiss the appeal.[31] Pineda's "record" consisted of a transcript, which Pineda prepared, of the AAC hearing.[32] Additionally, the district court proceedings were not preserved via a stenographic record.[33] As such, the supreme court determined that the "Findings of Fact" statement, which Pineda prepared and the district court judge signed, was inadequate for the purposes of the supreme court's judicial review.[34] Thus, the court lacked a transcript of the pretrial hearing before the AAC judge regarding Pineda's motion to estop the state from relitigating whether it had in fact complied with section 31-27-3.[35] Due to the "glaring de-

25. *Id.* at 860.
26. *Id.*
27. *Id.*
28. R.I. Sup. Ct. R. App. P. Rule 10(b)(1).
29. 583 A.2d 877 (R.I. 1990).
30. 366 A.2d 543 (R.I. 1976).
31. *See Pineda*, 712 A.2d at 861 (citing *In re Kimberly*, 583 A.2d at 879; *Jennings*, 366 A.2d at 545).
32. *See id.*
33. *See id.*
34. *See id.*
35. *See id.*

fects" in the record, impeding its ability to review the hearing judge's decision regarding the issue, the majority had no alternative but to dismiss the petition and affirm the appeals panel's decision.[36]

Additionally, the court would not review Pineda's estoppel issue. Pineda supported his argument with the "Findings of Fact" made during the hearing on his motion for judgment of acquittal in a nonjury trial; such findings are in fact a "legal nullity."[37] In *State v. McKone*,[38] the court stated that "in jury-waived trials in this state, the appropriate motion by which a defendant may challenge the legal sufficiency of the state's trial evidence at the close of the state's case is by motion to dismiss."[39] In fact, the court went on to conclude that, in criminal trials, the trial justice's obligations regarding motions to dismiss in nonjury trials versus motions for judgment of acquittal in jury trials are wholly different in form and effect: "[h]enceforth, motions for judgment of acquittal in jury-waived criminal trials will be considered legal nullities and be subject to summary dismissal by the trial justice."[40] Thus, for collateral estoppel purposes, since Pineda failed to bring the appropriate motion, the district court's decision neither represented a final judgment nor had legal effect.

The Concurrence

In their concurrence, Justices Flanders and Lederberg disagreed with the majority regarding the collateral estoppel issue. They agreed with Chief Justice Weisberger's dissent on that point, except for one crucial determination: the prosecution's burden of proving that it in fact complied with section 31-27-3. Justices Flanders and Lederberg concluded that the General Assembly intended for the prosecution to prove compliance with the statute as an element of its case.[41] Thus, the prosecution must prove such compliance beyond a reasonable doubt.[42] Since the district court determined that the state had not proved compliance with section

36. *See id.*
37. *See id.*
38. 673 A.2d 1068 (R.I. 1996).
39. *Pineda*, 712 A.2d at 861 (quoting State v. McKone, 672 A.2d 1068, 1072 (R.I. 1996)).
40. *Id.* at 862 (quoting *McKone*, 672 A.2d at 1073).
41. *See id.* at 863 (Flanders & Lederberg, JJ., concurring).
42. *See id.*

31-27-3, the district court was in fact applying a higher standard of proof (beyond a reasonable doubt) than the civil standard (clear and convincing evidence) used in administrative violation hearings like breathalyzer-refusal cases.[43] Therefore, since criminal prosecutions for driving-under-the-influence charges utilize a higher standard of proof, the district court's finding cannot bar the state from attempting a future proceeding against the same defendant before the AAC.[44] For, in this situation, the party has a much heavier burden of persuasion in the initial action than he would need to meet in the subsequent action.[45]

The Dissent

Chief Justice Weisberger dissented from the majority regarding the applicability of collateral estoppel. Although the proceedings in the AAC were civil rather than criminal, collateral estoppel would prevent the rehearing of the same factual issue in a subsequent proceeding as long as the burden of proof was the same.[46] Chief Justice Weisberger drew an analogy between determining the compliance with section 31-27-3 and determining the voluntariness of a confession before introducing it into evidence.[47] The latter requires the state to determine voluntariness by clear and convincing evidence.[48] Thus, Chief Justice Weisberger stated that the burden of proof in district court proceedings for determining compliance with section 31-27-3 is also by clear and convincing evidence.[49] This is the same burden of proof for all breathalyzer-refusal issues in civil proceedings at the AAC.[50]

Although Chief Justice Weisberger agreed with the majority's holding that *McKone* bars trial judges from hearing motions for judgment of acquittal in jury-waived cases, he nevertheless emphasized that "the acquittal of a defendant by a court of competent jurisdiction, even if the procedure were erroneous, is still binding

43. *See id.* (citing R.I. Gen. Laws § 31-43-3 (1956) (1994 Reenactment) ("[n]o charge may be established except by clear and convincing evidence.")).

44. *See id.*

45. *See id.* (quoting Restatement (Second) of Judgments § 28(4), at 273 (1982)).

46. *See id.* at 864 (Weisberger, C.J., dissenting).

47. *See id.*

48. *See id.*

49. *See id.*

50. *See id.*

for double-jeopardy and collateral estoppel purposes."[51] Therefore, since the district court had subject-matter jurisdiction over the driving-under-the-influence charge, and, in such cases, compliance with section 31-27-3 is a condition precedent to introducing substantive evidence of intoxication, the District Court's finding is not "vitiated or invalidated" merely because the court lacks a transcript of the trial proceedings.[52] Significantly, Chief Justice Weisberger emphasized the trial judge's specific, written finding acquitting Pineda due to a section 31-27-3 violation: "This finding clearly sets forth the judge's factual determination even though he reached it by a route other than that approved in *McKone* . . . ."[53] Thus, collateral estoppel barred the AAC from redetermining that same factual issue.

Conclusion

State v. Pineda, stymied by procedural flaws, left unresolved several important issues of first impression. This case is itself a labyrinth in which the Rhode Island Supreme Court justices cannot come to terms with issues of burden of proof, whether an issue is, in fact, a genuine issue of material fact and the proper function of collateral estoppel. Hopefully soon, a case involving section 31-27-3 will arise where the justices can resolve these important issues. Until then, *State v. Pineda* stands for the proposition that proper procedure is still a definitive benchmark in Rhode Island's system of justice.

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51. *Id.* at 865 (citing Sanabria v. United States, 437 U.S. 54, 69 (1978)).
52. *Id.* Of interest is Chief Justice Weisberger's statement that "[i]n the ordinary course stenographers are not utilized in the District Court, and therefore, such a record will seldom be available." *Id.*
53. *Id.*

Criminal Procedure. *State v. Saluter*, 715 A.2d 1250 (R.I. 1998). An indictment or information is not fatally duplicitous where it describes the period of the alleged acts in terms of "day and dates," but becomes fatally duplicitous when the bill of particulars does not adequately clear the ambiguity of the counts.

In *State v. Saluter*,[1] the Rhode Island Supreme Court addressed the problem concerning duplicitous indictments and informations. In *Saluter*, the court determined that even if an indictment or information is duplicitous, it is not fatal unless the state's bill of particulars does not clear the ambiguity.[2] Additionally, the court rejected the state's contention that the crime of sexual assault consists of a continuous course of conduct, thus making it impossible for the information or indictment to include specific dates.[3]

FACTS AND TRAVEL

On March 8, 1994, Glenn A. Saluter (Saluter) was charged by indictment with two counts of first-degree sexual assault, four counts of first-degree child molestation, and three counts of second degree child molestation.[4] These offenses allegedly occurred between April 1, 1984 and April 30, 1987, while defendant was living with the complaining witness' mother.[5] The complaining witness, Amy, was under the age of thirteen during the period of the alleged incidents.[6]

Saluter moved, pursuant to Rule 7(f) of the Superior Court Rules of Criminal Procedure, for a bill of particulars.[7] The bill of particulars provided by the state alleged that Saluter committed the acts charged in seven of the nine counts on multiple occasions.[8] Only in Counts Five and Eight did the state allege a single incident of conduct charged in that count.[9]

1. 715 A.2d 1250 (R.I. 1998).
2. *Id.* at 1256.
3. *See id.* at 1255.
4. *See id.* at 1251.
5. *See id.*
6. *See id.*
7. *See id.*
8. *See id.*
9. *See id.*

Thereafter, the defendant filed a motion to dismiss, asserting that the bill of particulars was inadequate and the charges duplicitous, violating Rule 8(a) of the Superior Court Rules of Criminal Procedure.[10] Saluter also argued that the manner of the charges, as they stand, deprived him of the minimum notice requirement under both the Federal Constitution and Rhode Island law.[11] The motion to dismiss was denied by the trial justice, who concluded that the indictment charged "nine specific acts" and afforded Saluter sufficient notice.[12]

After trial, a jury convicted Saluter on all nine counts.[13] Defendant filed a timely appeal to the supreme court, raising two issues.[14] First, whether the nature of the bill of particulars, together with the evidence presented at trial and the justices failure to adequately instruct the jury, resulted in uncertainty over whether the jury's decision was based upon the same conduct for which the indictment had been returned.[15] Second, whether the trial justice committed reversible error in his instructions to the jury.[16]

ANALYSIS AND HOLDING

The gravamen of defendant's argument rests upon the issue of duplicity. According to the court, "'duplicity' refers to the joining of two or more offenses, however numerous, in a single count of an indictment."[17] The problem with duplicity stems from a defendant's fundamental right to due process.[18] At a minimum, due process requires that "a defendant be afforded 'adequate notice of the offense with which he is charged.'"[19]

All nine counts of the indictment used the same "formulaic language" when describing the charges. In each of the counts the defendant was charged as acting "on a day and dates" when referring to the period of his conduct.[20] The court found that it was not

10. *See id.*
11. *See id.*
12. *Id.* at 1252.
13. *See id.*
14. *See id.*
15. *See id.*
16. *See id.*
17. *Id.* at 1253.
18. *See id.*
19. *Id.* at 1252 (quoting State v. Hendershot, 415 A.2d 1047, 1048 (R.I. 1980)).
20. *See id.* at 1253.

clear whether the defendant was charged with a single act or multiple acts in each of the nine counts.[21] However, the court decided, this language alone "did not render the indictment defective *per se*."[22]

Such language is not per se duplicitous because a general charge such as this can be reduced to specific facts in a bill of particulars.[23] A bill of particulars "provide[s] the defendant with the factual detail omitted from an indictment or information. Its primary purpose is to supply the defendant with such particulars as are necessary in order that judicial surprise is avoided at trial."[24] Here, however, it was the Attorney General's failure to clarify the ambiguity in the bill of particulars, that led the court to conclude that the indictment was fatally duplicitous.[25]

To exemplify the problem with duplicity in the present case, the court discussed one count brought against the defendant in detail. In response to Count Two of the indictment, the bill of particulars read as follows:

> Count 2. The State's answer with respect to dates, times, and places is the same as Count 1. The allegations are that defendant inserted his finger or fingers into the vagina of the complainant more than once, and with a frequency of "quite a few times per week" during the period alleged in the indictment.[26]

At trial, Amy had testified regarding numerous incidents where the defendant digitally penetrated her vagina.[27] Two such incidents were recounted in detail: once when she was wearing a striped nightgown, and another time where she endured the same abuse "in exchange for being excused from having to eat her vegetables at dinner."[28] Both incidents took place within the time frame charged in Count Two, and both incidents were offered at trial as evidence of the charged crime.[29]

21. *See id.*
22. *Id.*
23. *See id.*
24. *Id.* (citing State v. Rios, 702 A.2d 889, 890 (R.I. 1997)).
25. *See id.* at 1256.
26. *Id.* at 1254.
27. *See id.*
28. *Id.*
29. *See id.*

The problem was further amplified because the "trial justice appeared to suggest [to the jury] that the dinner incident was the act charged by Count Two, whereas the state contended in its closing argument that the nightgown incident satisfied its burden of proof for that count."[30] According to the court, the jury could have convicted the defendant under Count Two based upon either of the two incidents.[31] The court theorized that,

> If some members of the jury were convinced beyond a reasonable doubt that the nightgown incident did take place while the remaining members were not adequately convinced of that allegation but instead were convinced beyond a reasonable doubt that the dinner quid pro quo had occurred, the jury could have returned a verdict on count 2 without the actual jury unanimity required for conviction under our laws.[32]

The state claimed that the crime of sexual assault, as opposed to other crimes, constitutes a continuing course of conduct, thus eliminating the duplicity problem when charging these offenses.[33] The court, while recognizing that some other states permit charging sex crimes as continuing offenses, refused to step into what it perceives to be "the domain of the Legislature," by judicially creating a crime of continuing sexual assault.[34]

The court differentiated this case from two earlier cases in which the duplicitous issue was raised: *State v. LaPlante*[35] and *State v. Roberts*.[36] In both *LaPlante* and *Roberts*, the defendants waived their objections to the complaints by failing to comply with the rules of criminal procedure.[37] The court noted that the proper method by which to attack a duplicitous complaint, indictment, or information, is by filing a timely motion to dismiss pursuant to Superior Court Rules of Criminal Procedure 12(b)(2) and (3).[38] In the case at bar, Saluter preserved that claim by raising the issue in a timely manner.

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30. *Id.* at 1254-55.
31. *See id.* at 1255.
32. *Id.*
33. *See id.* at 1255.
34. *Id.*
35. 409 A.2d 130 (R.I. 1979).
36. 420 A.2d 837 (R.I. 1980).
37. *See Saluter*, 715 A.2d at 1254.
38. *See id.* at 1254 (citing State v. Roberts, 420 A.2d 837, 840 (R.I. 1980)).

CONCLUSION

In *State v. Saluter*, the Rhode Island Supreme Court addressed the problem of duplicitous charging in criminal complaints, indictments and informations. The court held the use of the phrase "on a day or dates" when charging various sexual assault crimes was not per se duplicitous. However, the failure to clarify such, through a bill of particulars, so that the defendant is charged with one offense in each count, warrants a vacation of the convictions of those counts. Additionally, the court noted that the issue of duplicity is properly raised through a pretrial motion to dismiss pursuant to Rhode Island Superior Court Rule of Criminal Procedure 12(b)(2) and (3).

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