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Criminal Law. *Guido v. State*, 746 A.2d 697 (R.I. 2000). The Rhode Island Supreme Court determined that their holding in *Doe*[1] did not apply retroactively to the defendant in this case, but simply put a halt to the unauthorized practice of police officers, acting as agents for the grand jury, being used as investigatory tools for police departments or the Office of the Attorney General.[2]

FACTS AND TRAVEL

Defendant Salvatore Guido (Guido) was convicted of driving under the influence with serious bodily injury resulting following a near-fatal, head-on motor vehicle collision.[3] Guido had been returning home from a bachelor party where he had been seen drinking, and rescue workers found an open, partially filled bottle of beer on the front floor of Guido's car.[4] Guido was taken by medical helicopter to Rhode Island Hospital where blood samples were drawn from him and tested for alcohol.[5] Three days later, a police officer, who was investigating the accident, appeared before a grand jury and requested a subpoena to obtain hospital medical records relating to Guido's blood-alcohol level.[6] He also asked to be made an agent of the grand jury for return of service of the subpoena.[7] After receiving the documents, he turned them over to the Office of the Attorney General, which used them to determine that probable cause existed to charge Guido pursuant to criminal information.[8] Ultimately, Guido was convicted.[9]

Guido appealed his conviction and the Rhode Island Supreme Court dismissed the appeal.[10] In that action, defendant had applied for post-conviction relief, which was denied.[11] He again appealed.

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1. *In re* Doe, 717 A.2d 1129 (R.I. 1998).
2. *See* Guido v. State, 746 A.2d 697, 700 (R.I. 2000).
3. *See id.* at 698.
4. *See* State v. Guido, 698 A.2d 729, 732 (R.I. 1997).
5. *See id.*
6. *See Guido*, 746 A.2d at 698.
7. *See id.*
8. *See id.*
9. *See id.*
10. *See id.*
11. *See id.* at 698.

ANALYSIS AND HOLDING

Guido filed his application for post-conviction relief in light of a recent ruling in *Doe*.[12] In *Doe*, the Rhode Island Supreme Court took the opportunity to address the use of police officers as agents of the grand jury.[13] The court was concerned that police officers receiving possibly privileged information could use this information to prosecute misdemeanor crimes, or worse, that prosecutors could use the grand jury to issue subpoenas to obtain evidence concerning matters not before the grand jury.[14] The court held that the subpoena power of the grand jury is for the grand jury's own use, not to further independent investigations of the prosecutor or police.[15]

Guido argued that *Doe* announced a new rule of law that altered the fundamental way the grand jury had been operating.[16] However, the court maintained that there had never been authority for the practice of using grand juries as investigatory tools for police departments or prosecutors.[17] The court held that even if *Doe* had announced a new rule of law, once a defendant's appeal has been decided and a subsequent new rule announced, the defendant is not entitled to retroactive application of the new rule except where the new rule enhanced accuracy and ensured fundamental fairness.[18] The court held that this exception did not apply here.[19]

Since the court had already considered Guido's appeal once before, and *Doe* was distinguished from Guido's latest appeal, his appeal was denied and the denial of his application for post-conviction relief was affirmed.[20]

CONCLUSION

In *Guido v. State*, the Rhode Island Supreme Court held that the rule of *Doe*, that the use of police officers as agents of a grand jury was illegal, was not a new rule of law. Even if it were, it would

12. *See id.* at 699.
13. *See id.* (citing *Doe*, 717 A.2d at 1136).
14. *See id.* (citing *Doe*, 717 A.2d at 1138).
15. *See id.* (citing *Doe*, 717 A.2d at 1138-39).
16. *See id.* at 699-700.
17. *See id.* (citing *Doe*, 717 A.2d at 1137).
18. *See id.* at 700.
19. *See id.* (citing Pailin v. Vose, 603 A.2d 738, 742 (R.I. 1992)).
20. *See id.*

not apply to the defendant. If a defendant's appeal has already been decided when a new rule is announced, then the defendant is not entitled to retroactive application of the new rule except in certain narrow circumstances not present in the defendant's case. Therefore, the defendant was not entitled to post-conviction relief challenging the use at trial of medical records obtained by a police officer unlawfully acting as an agent of the grand jury.

Joseph Proietta

Criminal Law. *Seddon v. Bonner*, 755 A.2d 823 (R.I. 2000). The Victims Rights Statute[1] (statute), which requires the court to enter a civil judgment against the defendant after conviction of a felony, does not provide the exclusive remedy for the crime victim.[2]

In *Seddon v. Bonner*,[3] the court stated that the civil judgment rendered against the defendant conclusively established the defendant's liability to the victim, but damages must be determined in a separate judicial proceeding.[4] The court also rejected the defendant's argument that the statute violated his federal constitutional rights to due process under the Fifth and Fourteenth Amendments of the United States Constitution.[5]

FACTS AND TRAVEL

In March 1998, a jury found the defendant guilty of second-degree child-molestation sexual assault.[6] In May 1998, the plaintiffs commenced a civil suit and moved for an automatic civil judgment against the defendant pursuant to the statute.[7] The defendant objected to the motion and argued that the statute violated his right to due process and against self-incrimination.[8] The plaintiffs then moved to withdraw their motion for civil judgment because the statute did not cover punitive damages.[9] The plaintiffs also motioned for partial summary judgment stating that the defendant was collaterally estopped from arguing the issue of liability.[10] The defendant then objected to the motion for partial summary judgment arguing that until the statute is deemed unconstitutional, the statute offers the victims their exclusive remedy.[11]

The Attorney General moved to have the questions regarding the statute certified by the supreme court.[12] The motion was

1. R.I. Gen. Laws § 12-28-5 (1956) (2000 Reenactment).
2. 755 A.2d 823 (R.I. 2000).
3. *See id.*
4. *See id.*
5. *See id.* at 824.
6. *See id.* at 825.
7. *See id.*
8. *See id.*
9. *See id.*
10. *See id.*
11. *See id.*
12. *See id.* at 824.

granted and four questions were submitted to the supreme court for certification.[13]

ANALYSIS AND HOLDING

The first question the court entertained was whether the statute precluded a plaintiff from pursuing other remedies.[14] The court stated: "when the language of a legislative enactment is clear and unambiguous, this [c]ourt will interpret the statute literally and accord the words of the statute their plain and ordinary meanings."[15] In the present case, the court determined that the statute merely addresses the issue of liability of a convicted defendant to an injured victim, and does not by its terms declare that it is the sole remedy for the victim.[16] The court found the statute to be a mere "procedural shortcut" that established the liability of the defendant but still required damages to be proven.[17] This "procedural shortcut" does not preclude the victim from seeking alternate means of relief from the defendant.[18] Thus, the court answered the question in the negative; that is, the statute does not preclude a victim from pursuing other relief.[19] The second question that the court was to certify only needed to be answered if the first question was answered in the affirmative; thus the court moved on to the third question.[20]

The third question was whether the statute *required* the superior court to enter a civil judgment against the convicted defendant.[21] The court relied on the unambiguous terms of the statute, "a civil judgment shall automatically be entered by the trial court

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13. *See id.* at 825.
14. *See id.*
15. *Id.* at 826 (citing Accent Store Design, Inc. v. Marathon House, Inc., 674 A.2d 1223, 1226 (R.I. 1996)). The statute reads, in part:

> upon his or her final conviction of a felony after a trial by jury, a civil judgment shall automatically be entered by the trial court against the defendant conclusively establishing his or her liability to the victim for such personal injury and/or loss of property as was sustained by the victim as a direct and proximate cause of the felonious conduct of which the defendant has been convicted.

Id.
16. *See id.*
17. *See id.*
18. *See id.*
19. *See id.*
20. *See id.* at 827.
21. *See id.*

against the defendant," to determine that the superior court is required to enter a civil judgment.[22] Thus, the court answered the third question in the affirmative.[23]

The fourth question was whether the statute "on its face *or* as applied to a Defendant who elects not to take the stand in his own defense at the criminal trial violate that Defendant's constitutional rights under either the 5th or 14th Amendments . . . ."[24] The court stated that due process requires a full and fair hearing, which includes the opportunity by both parties to be heard, to present evidence and to call witnesses.[25] Here, although the defendant elected not to testify at trial, he had the opportunity to do so.[26] Also, although the defendant did not testify at the criminal trial, the statute requires the victim to prove damages at a subsequent hearing, where the defendant will again have the opportunity to testify.[27]

The court also disagreed with the defendant's argument that automatic estoppel is prejudicial and violates due process.[28] The defendant had already been found guilty under a "beyond a reasonable doubt" standard. The court found no reason why the defendant should be allowed an opportunity to relitigate the liability issue under a lesser standard.[29] Thus, the court answered the fourth question in the negative; that is, the statute does not violate the defendant's constitutional rights to due process.[30]

CONCLUSION

In *Seddon v. Bonner*, the court stated that the civil judgment rendered against the defendant conclusively established the defendant's liability to the victim, but damages must be determined in a separate judicial proceeding. The court also rejected the defendant's argument that the statute violated his federal constitutional rights to due process under the Fifth and Fourteenth Amendments of the United States Constitution. Therefore, the Victims Rights

22. *Id.*
23. *See id.*
24. *Id.*
25. *See id.* at 828.
26. *See id.*
27. *See id.*
28. *See id.*
29. *See id.*
30. *See id.*

Statute, which requires the court to enter a civil judgment against the defendant after conviction of a felony, does not provide the exclusive remedy for the crime victim.

Stan Pupecki

Criminal Law. *State v. Acciardo*, 748 A.2d 811 (R.I. 2000). In order to prove the crime of harboring, the state must prove that the defendant knew that his or her client had committed a crime and was subject to arrest either by warrant or based upon probable cause.

In *State v. Acciardo*,[1] the state failed to establish the essential element of scienter.[2] The state police's decision to deliberately misrepresent facts to the defendant caused him to believe that there existed neither outstanding warrants for his clients nor probable cause for their arrest.[3] Thus, the defendant did not knowingly shield his clients from arrest.[4]

Also, in regard to the crime of harboring, a criminal defense attorney had no duty to advise his clients to surrender to the police or to inform the police of their location himself, unless he was aware that there existed a sound legal basis for the arrest of his clients for a particular offense.[5]

FACTS AND TRAVEL

On March 1, 1996, defendant, Gregory Acciardo (Acciardo), a criminal defense attorney, was visited at his home by two of his clients, Michael Rossi (Rossi) and Louis Marchetti (Marchetti).[6] Rossi and Marchetti informed Acciardo that one of their former criminal partners, Richard Hartley (Hartley), was taken from the Adult Corrections Institution to Rhode Island State Police headquarters.[7] Rossi and Marchetti professed to Acciardo their belief that Hartley would implicate them in a string of criminal offenses.[8] Rossi and Marchetti sought Acciardo's advice on this matter.[9]

Acciardo commenced an investigation of the situation and contacted the state police.[10] Acciardo spoke with Detective Steven O'Donnell and asked him if there were any outstanding warrants

1. 748 A.2d 811 (R.I. 2000).
2. *See id.* at 814.
3. *See id.*
4. *See id.*
5. *See id.*
6. *See id.* at 812.
7. *See id.*
8. *See id.*
9. *See id.*
10. *See id.*

for Rossi and Marchetti.[11] O'Donnell deliberately and falsely stated that there were no outstanding felony warrants.[12] It was undisputed at trial that the state police consciously withheld the information concerning the existence of the felony warrants from Acciardo.[13] It was also undisputed at trial that O'Donnell did not disclose to Acciardo that the state police had probable cause to arrest either Rossi or Marchetti.[14]

Acting on the erroneous information provided to him by the state police, Acciardo transported Rossi and Marchetti to the unoccupied apartment of his mother-in-law.[15] Apparently, Acciardo had his clients transported to the apartment in his automobile, provided them with food, drink, his wife's cellular phone and even provided for Rossi's girlfriend to visit.[16]

On Sunday, March 3rd, Acciardo learned that the police were looking for Rossi at his house.[17] Acciardo counseled both Rossi and Marchetti to surrender themselves to the police.[18] Rossi turned himself in on March 3rd and Marchetti surrendered on March 4th.[19] Rossi also made statements to the state police connecting Acciardo to the commission of past crimes.[20]

Acciardo was indicted for several criminal offenses for which he was acquitted and the offense of harboring for which he was convicted.[21] Acciardo appealed and the Rhode Island Supreme Court reversed the conviction.[22]

ANALYSIS AND HOLDING

The Rhode Island General Laws define the crime as "knowingly harboring or relieving the offender, with intent that he or she shall escape or avoid detection, arrest, trial, or punishment."[23] In

11. *See id.*
12. *See id.*
13. *See id.*
14. *See id.*
15. *See id.*
16. *See id.*
17. *See id.* at 813.
18. *See id.*
19. *See id.*
20. *See id.*
21. *See id.*
22. *See id.* at 814.
23. R.I. Gen. Laws § 11-1-4 (1956) (1997 Reenactment).

State v. Davis,[24] the court held that the term "knowingly" implies that the harborer is aware of the specific offense for which the offender is charged.[25] Also, the court held that the harborer must have intended to shield the offender from the law.[26]

In the present case, the Rhode Island Supreme Court held that in order to be found guilty of harboring, the state had the burden of proving that Acciardo was aware that Rossi and Marchetti had in fact perpetrated a specific crime for which they were subject to arrest by a warrant or based on probable cause.[27] Here, the deliberate misrepresentation by the state police to Acciardo concerning the existence of the felony warrants rules out, as a matter of law, Acciardo's knowledge of the existence of the warrants or probable cause.[28]

Furthermore, information Acciardo received from his clients was privileged.[29] Acciardo had no duty to divulge the location of his clients or advise them to surrender to authorities unless he was aware of a sound legal basis for their arrest for a particular crime. The court stated that the police do not possess "a roving commission to apprehend individuals without either a warrant or probable cause."[30] Here, the state police's misrepresentations to Acciardo ruled out his knowledge of warrants or probable cause, thus, Acciardo was not aware of any sound legal basis for the arrest of his clients for a particular crime.[31]

CONCLUSION

In *State v. Acciardo*, the Rhode Island Supreme Court held that the deliberate misrepresentations made to Acciardo "negated as a matter of law" his knowingly harboring his clients, and thus the state failed to establish an essential element of the crime.

Stan Pupecki

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24. 14 R.I. 281 (1883).
25. *See Acciardo*, 748 A.2d at 813 (citing *Davis*, 14 R.I. at 284).
26. *See id.* (citing *Davis*, 14 R.I. at 284).
27. *See id.*
28. *See id.* at 814.
29. *See id.* (citing Mallory v. United States, 354 U.S. 449, 456 (1957)).
30. *Id.*
31. *See id.*

Criminal Law. *State v. Brown*, 744 A.2d 831 (R.I. 2000). Admitting a missing witness's prior testimony under a hearsay exception, after making a good faith attempt to locate the witness, did not violate the Confrontation Clause of the Sixth Amendment to the United States Constitution. Also, instruction on a lesser offense is not required when it is wholly unsupported by the evidence.

FACTS AND TRAVEL

In *State v. Brown*,[1] defendant Brown appealed from a judgment of conviction of first degree murder.[2] Brown, along with his co-defendant, was convicted of murder and conspiracy to murder Sherry Roy.[3] Bell, a state witness, failed to appear and testify at trial.[4] Bell did, however, testify previously at the defendant's bail hearing.[5] The trial judge, after declaring Bell unavailable, admitted Bell's previous testimony into evidence pursuant to Rule 804(b)(1) of the Rhode Island Rules of Evidence.[6] The defendant contends that this was reversible error.[7]

ANALYSIS AND HOLDING

Brown argued that the admission of Bell's testimony violated his right to confront and cross-examine the witness.[8] The supreme court disagreed.[9] The Confrontation Clause of the Sixth Amendment to the United States Constitution provides that 'the accused shall enjoy the right . . . to be confronted with witnesses against him."[10] This right includes the ability to cross-examine witnesses.[11] However, Rule 804 of the Federal Rules of Evidence allows for the introduction of hearsay statements when the declarant is unavailable to testify at trial.[12] The test for determining

1. 744 A.2d 831 (R.I. 2000).
2. *See id.* at 833.
3. *See id.*
4. *See id.* at 834.
5. *See id.*
6. *See id.*
7. *See id.*
8. *See id.*
9. *See id.*
10. *See id.* at 835 (quoting Pointer v. Texas, 380 U.S. 400, 400-01 (1965)).
11. *See id.* (citing *Pointer,* 380 U.S. at 400-01).
12. *See id.*

whether a witness's unavailability at trial violates the right of confrontation is whether the state has made a "good faith" effort to secure the witness's presence.[13] "Whether the state has exercised reasonable diligence in securing the presence of a witness is assessed on a case-by-case basis."[14] Here, the state made repeated attempts to find the witness.[15] These attempts included a search of local hospitals and the training school.[16] The Rhode Island Supreme Court found that the state made a reasonable and good faith effort to secure Bell's presence at trial.[17]

Brown next contended that the trial justice improperly refused to instruct the jury on the lesser-included offense of second-degree murder.[18] A defendant is entitled to an instruction on a lesser-included offense when the evidence supports a possible verdict on that offense.[19] The injuries of the victim suggest that she was murdered "in a manner that demonstrated more than momentary resolve."[20] The supreme court properly held that there was no evidence to support an instruction on second-degree murder.[21]

CONCLUSION

In *State v. Brown*, the Rhode Island Supreme Court held that admitting a missing witness's prior testimony as a hearsay exception, after making a good faith attempt to locate the witness, did not violate the Confrontation Clause. Also, an instruction on a lesser offense is not required when wholly unsupported by the evidence.

Sheila M. Lombardi

13. *See id.* (citing Ohio v. Roberts, 448 U.S. 56, 74 (1980) (quoting Barber v. Page, 390 U.S. 719, 724-25 (1968))).
14. *Id.* (citing State v. Prout, 347 A.2d 404, 406 (1975)).
15. *See id.* at 836-37.
16. *See id.* at 836.
17. *See id.*
18. *See id.* at 837.
19. *Id.* at 838 (quoting State v. Messa, 594 A.2d 882, 884 (R.I. 1991)).
20. *Id.* at 839.
21. *See id.*

Criminal Law. *State v. Chiellini*, 762 A.2d 450 (R.I. 2000). A trial justice must make an initial inquiry as to the fitness of a potential prejudiced juror before he may grant a mistrial. Upon finding a criminal to be a habitual offender pursuant to section 12-19-21 of the Rhode Island General Laws, a trial justice must impose an additional period of incarceration upon the criminal defendant.

FACTS AND TRAVEL

On October 28, 1995, Nicole Benvie (Benvie) was stabbed in her back and rushed to the hospital.[1] Benvie was pronounced dead on October 29, 1995, and Robert M. Chiellini (Chiellini) was charged with her murder.[2] During the jury deliberations of Chiellini's trial, Juror #237 (Juror) called attorney Richard Gonnella (Gonnella) and told him that she was confused about the difference between first-degree and second-degree murder.[3] Gonnella told the Juror that he was unable to talk to her and that calling him was very serious.[4] The following day Gonnella phoned the trial judge and informed him that the Juror had called him during the night. Gonnella explained his version of the conversation with the Juror and told the judge that he did not tell her any information.[5]

After speaking with Gonnella on the telephone, the trial justice called the Juror into his chambers and in the presence of the defense counsel and the prosecution he questioned her on the record about her conversation with Gonnella.[6] Following his conversation with the Juror, the trial judge asked the defense counsel what he would like to do.[7] The defense counsel was confident that the juror was not tainted and agreed to allow her to remain on the jury.[8] Both the defense counsel and the prosecution agreed that they did not want to try the case again and wished to proceed with the case and the present jury.[9]

After determining that both parties were satisfied with the inquiry of the Juror and after agreeing that both parties wished to

1. *See* State v. Chiellini, 762 A.2d 450, 452 (R.I. 2000).
2. *See id.*
3. *See id.*
4. *See id.*
5. *See id.*
6. *See id.*
7. *See id.* at 453.
8. *See id.*
9. *See id.*

proceed, the attorneys returned to open court without the presence of the jury.[10] At this time Chiellini made a pro se motion for a mistrial.[11] Chiellini asked the trial judge for a new trial because the jury was confused and because the trial judge had instructed the jury not to talk to anyone and someone had.[12] The trial justice informed Chiellini that if the Juror had actually spoken to the attorney, then he might lean towards passing the case, however, since the trial justice was satisfied that the Juror did not speak to the attorney about any legal issues he denied the motion.[13]

Chiellini was found guilty of first-degree murder.[14] At Chiellini's sentencing hearing, the trial justice declined to impose a requisite additional sentence upon finding Chiellini to be a habitual criminal pursuant to section 12-19-21 of the Rhode Island General Laws.[15] Both parties appealed to the Rhode Island Supreme Court.

ANALYSIS AND HOLDING

Denial of Mistrial Based on Juror Misconduct

On appeal, Chiellini argued that the trial justice erred in denying his motion for a new trial because he failed to make an adequate inquiry of the Juror in order to determine if she was prejudiced in some way by her conversation with Gonnella.[16] However, "a decision to pass a case and declare a mistrial are matters left to the sound discretion of the trial justice."[17] Furthermore, the supreme court has no authority to reverse a trial justice's decision to pass a case unless it is clearly wrong.[18]

The Rhode Island Supreme Court stated that if a trial justice is concerned about the fitness of a juror, it is his or her responsibility to "conduct sufficient inquiry to make a reasoned determination whether the juror should be discharged or may continue to serve."[19] The supreme court also held that a "trial justice has an affirmative duty to conduct an initial inquiry to determine whether

10. *See id.*
11. *See id.*
12. *See id.*
13. *See id.*
14. *See id.*
15. *See id.*
16. *See id.*
17. *Id.* (quoting State v. DaSilva, 742 A.2d 721 (R.I. 1999)).
18. *See id.* (citing *DaSilva*, 742 A.2d at 725).
19. *Id.* (quoting *DaSilva*, 742 A.2d at 725).

the juror has been prejudiced by the encounter so as to render the juror unfit to continue to serve."[20] Following this initial inquiry, the trial justice must also determine if further inquiry is needed to determine if the juror or jury has been prejudiced.[21] The supreme court also noted that any failure on the part of the trial justice to make such an inquiry may result in a violation of the defendant's Sixth Amendment rights, which "requires 'diligent scrutiny' to protect the defendant's right to a trial by a fair and impartial jury."[22]

In the case at bar, the supreme court found that the trial justice conducted a sufficient inquiry of the Juror, made a reasoned determination that she should remain as a juror and exercised appropriate discretion in declining to pass the case.[23] The supreme court based its decision on the fact that the trial justice questioned the Juror on the record in front of both the defense counsel and the prosecution.[24] During such inquiry, neither party had any objection to the trial justice's line of questioning and neither offered any other questions or suggestions to the court as to how to proceed.[25] Also, when asked by the trial justice if they wished to proceed, both sides agreed that they were satisfied with the Juror and jury and wished to proceed.[26]

Sentencing of Habitual Offender

On appeal, the state argued that the sentencing judge committed reversible error when it failed to impose an additional sentence upon Chiellini after the court found him to be habitual criminal pursuant to section 12-19-21 of the Rhode Island General Laws.[27] Section 12-19-21 states that "upon conviction, the person deemed a habitual criminal shall be punished by imprisonment in the adult correctional institution for a term not exceeding twenty-five years, in addition to any sentence imposed for the offense of which he or she was last convicted."[28]

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20. *Id.*
21. *See id.*
22. *Id.* at 454. (quoting *DaSilva*, 742 A.2d at 725).
23. *See id.*
24. *See id.* at 455.
25. *See id.*
26. *See id.*
27. *See id.*
28. R.I. Gen. Laws § 12-19-21 (1956) (1994 Reenactment).

The supreme court held that the statute "required the trial justice to impose an additional period of incarceration upon a criminal defendant if he or she is found to be a habitual criminal."[29] The supreme court noted that the statute has no provision that would allow any trial justice to exercise his or her discretion in imposing an additional period of incarceration upon finding a defendant to be a habitual criminal.[30]

CONCLUSION

In *State v. Chiellini*, the Rhode Island Supreme Court addressed the steps that a trial justice must take in order to determine the fitness of a potential prejudiced or wayward juror. The supreme court found that the trial justice made a sufficient inquiry to make a reasoned determination as to whether a juror had been prejudiced by a conversation she had with an outside attorney during jury deliberations. Therefore, the trial justice did not err in not declaring a mistrial.

The Rhode Island Supreme Court also held that upon finding a criminal defendant to be a habitual offender pursuant to section 12-19-21 of the Rhode Island General Laws, a trial justice has no discretion in deciding whether to impose an additional period of incarceration upon the criminal defendant and must do so.

Heather M. Spellman

29. *Chiellini*, 762 A.2d at 456.
30. *See id.*

Criminal Law. *State v. Dumas*, 750 A.2d 420 (R.I. 2000). Under certain circumstances, the question "Can I get a lawyer?" can objectively be construed as an unequivocal request for counsel.

FACTS AND TRAVEL

On November 9, 1990, the body of Diane Goulet (Goulet) was found behind Shaw's Meat Market in Woonsocket, Rhode Island.[1] A clothesline had been tied around her neck.[2] The cause of death was determined to be ligature strangulation.[3] On October 16, 1995, Marc Dumas (Dumas), the defendant, entered the Woonsocket police station claiming to have information concerning Goulet's murder.[4] Over the next twelve hours, Dumas gave police a detailed account of the facts surrounding the crime.[5] Dumas's account implicated Mike Jellison as the one who had committed the murder.[6]

Portions of Dumas's statement were videotaped.[7] While the video camera was turned off, police showed Dumas photos of Goulet's corpse in an attempt to trigger his memory as to details he could not recall.[8] After looking at the photos, Dumas told police that he was the one who had tied the rope around Goulet's neck.[9] Police immediately stopped questioning Dumas, advised him of his constitutional rights and had him sign a rights form.[10]

Ten minutes later, the police resumed their videotaped questioning of Dumas.[11] Dumas's constitutional rights were again explained, this time on videotape.[12] At some point thereafter, Dumas used the word "lawyer."[13] The poor quality of the tape, even after the state had it digitally enhanced, made it extremely difficult to determine exactly what Dumas said.[14] Not surpris-

1. *See* State v. Dumas, 750 A.2d 420, 422 (R.I. 2000).
2. *See id.*
3. *See id.*
4. *See id.*
5. *See id.*
6. *See id.*
7. *See id.*
8. *See id.*
9. *See id.*
10. *See id.*
11. *See id.*
12. *See id.*
13. *See id.*
14. *See id.* at 422-23 & n.2.

ingly, the prosecution and defense did not agree as to the interpretation of the tape. The prosecution contended that the defendant asked, "Do I need a lawyer?"[15] The defense maintained that Dumas asked, "Can I get a lawyer?"[16] Although the trial justice could not tell exactly what was said, she denied the defense counsel's request that a neutral expert be appointed to determine exactly what was said.[17] The trial justice based her denial on her conclusion that neither interpretation of the tape constituted an unequivocal request for counsel, and therefore the police did not violate Dumas's constitutional rights by continuing to question him after the statement was made.[18] Accordingly, she denied Dumas's motion to suppress his statements made after his "lawyer" reference.[19]

Dumas was found guilty of second-degree murder after his January 1997 trial.[20] Dumas appealed to the supreme court alleging that the trial justice erred by not granting his motion for a continuance so that a neutral expert could determine exactly what he said in his reference to a "lawyer."[21] Dumas further claimed that even if his reference to a lawyer was an equivocal request for counsel, the Rhode Island Constitution required police to ask follow up questions to determine if he was in fact making a request for counsel.[22] Finally, Dumas claimed that the trial justice erred by not instructing the jury on mistake of fact because if the jury accepted his claim that he believed Goulet was dead before he tied the rope around her neck, that would serve as a defense to the murder charge.[23]

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15. *Id.* at 423.

16. *Id.*

17. *See id.*

18. *See id.*

19. Dumas's post-"lawyer" statement was an admission in which he claimed that he acquiesced to Jellison's demands that he tie the rope around Goulet's neck and engage in sexual contact with the corpse. Dumas claimed that he believed that Goulet was already dead. According to the defendant, Jellison forced him to perform these acts so that he would be implicated in the crime and refrain from telling anyone what had happened. *See id.* at 422-23.

20. *See id.* at 423.

21. *See id.*

22. *See id.*

23. *See id.*

ANALYSIS AND HOLDING

On appeal, the Rhode Island Supreme Court only addressed Dumas's first claim of error, which was the trial justice's refusal to appoint an expert to determine exactly what Dumas said when he mentioned the word "lawyer." Although the trial justice stated that she heard, "Do I need a lawyer?," she specifically stated that it was not necessary to make a finding on the issue because "[e]ither interpretation of [the] sentence is not an unequivocal invocation of the right to counsel."[24]

When invoking his right to counsel, "'a suspect need not speak with the discrimination of an Oxford don' . . . ."[25] Rather, a suspect need only make a statement that would communicate to a reasonable officer in like circumstances that he is requesting an attorney.[26] The supreme court held that the statement, "Can I get a lawyer?" can be an unequivocal request for counsel in some circumstances.[27] Accordingly, the trial justice was in error by not making a specific finding as to exactly what Dumas said during the questioning.[28]

The Rhode Island Supreme Court remanded the case, stating that the trial justice must make a finding of fact as to what Dumas said and whether the statement was an unequivocal request for counsel.[29] In making that finding, the trial justice should rely on a court-appointed neutral expert who is qualified to obtain the best videotape enhancement available.[30] The expert should also gather testimony of the police officers present during the questioning concerning their recollections of the statement.[31]

If, after the further examination of the statement and surrounding circumstances, the trial justice finds that the statement amounts to an unequivocal request for counsel, a new trial should be granted.[32] If, however, the trial judge finds the statement to be an equivocal request for counsel, the case should be returned to the

24. *Id.* at 424.
25. *Id.* at 425 (quoting Davis v. United States, 512 U.S. 452, 458-59 (1994)).
26. *See id.*
27. *Id.* at 425.
28. *See id.*
29. *See id.*
30. *See id.*
31. *See id.*
32. *See id.*

supreme court to review that finding as well as Dumas's two remaining claims of error.[33]

CONCLUSION

The determination of whether a request for counsel is unequivocal depends on the exact language used by the suspect and the surrounding circumstances. In this case, the Supreme Court of Rhode Island held that, in certain situations, the statement, "Can I get a lawyer?," can amount to an unequivocal request for counsel.

Michael J. Daly

33. *See id.* at 426.

Criminal Law. *State v. Garcia*, 743 A.2d 1038 (R.I. 2000). The Rhode Island Supreme Court held that the statements and testimony of two witnesses were not coerced, that the prior testimony of an unavailable witness was properly admitted at trial, that the same witness's purported recantation of this testimony was properly excluded and that the defendant's statement regarding uncharged prior bad acts was properly admitted under the exceptions to Rhode Island Rule of Evidence 404(b) to show motive, settled purpose and malicious intent of the accused. While a limiting instruction following the introduction of such evidence is advisable, the trial justice's failure to repeat this instruction a second time when the defense objection was renewed during the prosecution's closing did not constitute reversible error.

FACTS AND TRAVEL

At midnight on February 26, 1993, a house located at 54 Haywood Street in Providence, Rhode Island, burned as a result of arson, killing four children and their parents as they slept in their third floor apartment.[1] This tragedy had its beginnings earlier that same day, when two cars met each other while traveling from opposite directions on Haywood Street.[2] The drivers of the two respective vehicles, Jose Tapia (Tapia) and William Cifredo (Cifredo) were cousins, and stopped their cars in the street to have a conversation.[3] Jose Garcia (Garcia), the defendant, was a passenger in the car driven by Tapia.[4] While the two vehicles were stopped on the street another car suddenly backed out of a driveway located at 54 Haywood Street and collided with Tapia's automobile.[5] This sparked an altercation between Tapia and the driver of the offending car, Samuel Lorenzo (Lorenzo).[6]

While Tapia and Lorenzo were arguing over the collision, a passenger riding in Lorenzo's car, Jorge Diep (Diep), left the vehicle and briefly went into the house located at 54 Haywood Street.[7] Shortly thereafter, Diep "jumped into the driver's seat of Lorenzo's

1. *See* State v. Garcia, 743 A.2d 1038, 1042 (R.I. 2000).
2. *See id.*
3. *See id.*
4. *See id.*
5. *See id.*
6. *See id.*
7. *See id.*

vehicle, shoved the gear into reverse, slammed his foot on the gas pedal, and bashed the vehicle into Tapia's car."[8] In response to this, Cifredo jumped out of the driver's seat of his car and began yelling at Diep to stop.[9] Rather than stopping, Diep proceeded to run over Cifredo with Lorenzo's car, "trapping him underneath the car and dragging him several hundred feet down the road until [Cifredo's] body finally dropped free of the chassis."[10] Cifredo was taken by ambulance to Rhode Island Hospital, where he immediately underwent hours of emergency surgery for his injuries.[11]

The defendant, Garcia, witnessed the incident and accompanied the family and friends of Cifredo to the hospital.[12] While awaiting an update on Cifredo's condition, Garcia reportedly "came screaming on the ramp, [and] told everyone . . . they [were] going to get them for what they did to Will."[13] Garcia also reportedly stated that "he [had previously] burned [a] crackhead's house down because he owed him $600."[14] After saying this, Garcia left the hospital with Tapia and others, and proceeded by car back to the Haywood Street area where the previous incident occurred.[15] Once there, witnesses saw Garcia and Tapia walk in the direction of the house that Diep had entered earlier that day carrying a container filled with gasoline, and ten minutes later heard the two men boast that they had poured gasoline throughout the house located at 54 Haywood Street and left it ablaze.[16]

While neither Lorenzo nor Diep actually lived at 54 Haywood Street or were injured by the fire, the defendant's act of arson did result in the deaths of Carlos Chang, Hilda DeRosario and their four children.[17] The next day, after receiving word that the police were questioning possible witnesses to the defendant's crime, Garcia fled to New York City.[18] Nine days later he was discovered by police while trying to escape through a window of his mother-in-

8. *Id.*
9. *See id.*
10. *Id.*
11. *See id.*
12. *See id.*
13. *Id.*
14. *Id.*
15. *See id.* at 1042-43.
16. *See id.* at 1043.
17. *See id.*
18. *See id.*

law's apartment in the Bronx.[19] Afterwards, a jury convicted Garcia of arson, conspiracy to commit arson and the felony murder of the Chang family.[20] He was sentenced to two concurrent terms of life imprisonment without the possibility of parole, plus ten years to serve, followed by four consecutive life sentences.[21]

Garcia appealed his conviction, claiming that the police statements and testimony of witnesses were the result of police coercion and should have been suppressed.[22] The defendant also argued that the trial justice erred in admitting the prior recorded testimony of an unavailable witness without also admitting into evidence the witness's later testimony attempting to recant the prior statement.[23] Additionally, Garcia asserted that character evidence of prior wrongs committed by the accused was improperly admitted by the prosecution to prove that the defendant's current actions were in conformity therewith.[24] Garcia also averred that his sentence of life imprisonment without the possibility of parole was excessive.[25]

ANALYSIS AND HOLDING

Coerced Testimony

The court held that the police statements and consistent trial testimony of two witnesses were not coerced by the police, and that the defendant's right to due process was not violated by the introduction of this testimony against him at his trial.[26] The court considered the totality of the circumstances surrounding how this evidence was gathered and presented at trial, and concluded that the testimony offered against Garcia was not the product of coercion.[27] First, the court noted that potential witnesses do not enjoy the same due process protections as do suspected criminals being held for interrogation, and that even when a witness is coerced into implicating a person, "the mere fact that a witness has given the

19. *See id.*
20. *See id.*
21. *See id.*
22. *See id.*
23. *See id.* at 1046.
24. *See id.* at 1047.
25. *See id.* at 1056-57.
26. *See id.* at 1043.
27. *See id.* at 1044.

police such a statement during the investigation of a crime does not necessarily prevent the witness from testifying voluntarily at trial in a manner consistent with the pretrial statement."[28]

After independently reviewing the facts surrounding the police statements of two witnesses who implicated Garcia, the court held that while some questionable police tactics had been used initially with each of these respective witnesses, the actual statements that they each made implicating Garcia were made on different occasions in which no police coercion was alleged.[29] Further, the court noted that no police coercion of either witness was alleged during the time period between their police statements and later testimony at the bail hearings and trial, that both witnesses testified voluntarily at these later proceedings and that they were free at that point to alter their statements.[30] The court concluded that the trial justice's finding that the witnesses' testimony was not coerced contained no clear error, and that the lower court's decision not to suppress the statements and testimony did not establish that the defendant's federal constitutional rights were denied.[31] The supreme court also held that the mere fact that these witnesses may have entered into non-prosecution, plea-bargaining or immunity agreements with the authorities in exchange for their testimony did not destroy its voluntariness and did not render it coerced.[32]

Admissibility of Prior Testimony of Unavailable Witness and His Purported Recantation

The supreme court held that the trial justice properly admitted the prior testimony of Jose Cifredo, William Cifredo's brother.[33] Jose Cifredo was arrested in the days following the fire, and later inculpated Garcia in the crime of arson through both a written statement and his bail hearing testimony.[34] Later, Jose Cifredo recanted his testimony against Garcia at a voir dire hearing.[35] At Garcia's trial Jose Cifredo invoked his constitutional privilege against self-incrimination, and became unavailable to

28. *Id.*
29. *See id.* at 1044-45.
30. *See id.*
31. *See id.* at 1044.
32. *See id.* at 1046.
33. *See id.*
34. *See id.*
35. *See id.*

testify as a witness against Garcia.[36] The court held that the trial justice properly allowed the prosecution to read Jose Cifredo's bail hearing testimony in accordance with Rhode Island Rule of Evidence 804(b)(1), because compelling Cifredo to testify at Garcia's trial would have "required him to concede under oath that he had lied in his earlier police statement and in his sworn bail hearing testimony," subjecting him to prosecution for filing a false police statement and perjury.[37]

The court also held that the trial justice did not err in denying the defendant's motion to admit Cifredo's subsequent voir dire testimony, wherein Cifredo attempted to recant this earlier statements regarding Garcia.[38] Addressing this issue, the court noted the trial justice's conclusion, based on his observation of the witness, "[that Cifredo] just did not want to testify, and more particularly, he did not want to testify against his cousin, Mr. Tapia, who was still involved in the case at that time."[39] Because Cifredo's recantation was not corroborated by "circumstances clearly indicat[ing] the trustworthiness of the statement," and was, in fact, contradicted by his previous statement to the police, the supreme court upheld the trial court's decision to exclude this testimony in accordance with Rhode Island Rule of Evidence 804(b)(3).[40] The court also rejected the defendant's claim that Cifredo's bail hearing testimony was coerced, stating that virtually no evidence was offered in support of this assertion.[41]

Prior Uncharged Wrongs of the Accused

The majority of the court upheld the trial justice's decision to admit in evidence witness testimony regarding Garcia's claim that he committed a prior act of arson at an earlier date.[42] Although recognizing that defense counsel originally objected to this testi-

36. *See id.*

37. *Id.* at 1046 (quoting R.I. R. Evid. 804(b)(1)). The Rule states that when a witness is unavailable to testify at trial "[r]ecorded testimony given as a witness at another hearing of the same or a different proceeding, [is admissible] if the party against whom the testimony is now offered, . . . had an opportunity to develop the testimony by direct, cross, or redirect examination." *Id.*

38. *See id.* at 1046-47.

39. *Id.* at 1047.

40. *Id.* (quoting R.I. R. Evid. 804(b)(3)).

41. *See id.* at 1047.

42. *See id.* at 1048.

mony during the trial as violating Rhode Island Rule of Evidence 404(b), the majority emphasized that the objection was withdrawn, and could not now be a point of error on appeal.[43] However, the majority noted that defense counsel did secure a jury instruction on the inadmissibility of character evidence to prove a propensity inference against the accused, and did object to the prosecutor's improper argument in his closing that the defendant acted in conformity with his character.[44] The majority addressed the merits of the evidence issue, and concluded that testimony about the defendant's alleged prior bad act of arson was properly admitted by the trial justice.[45] The majority held that the character evidence of the defendant's statements regarding his prior crime of arson was not introduced to prove that the defendant acted in conformity with his character, but rather to prove motive, the "settled purpose" of the accused to achieve revenge through arson, and his "malicious intent to burn down 54 Haywood Street that very night."[46] Further, the majority emphasized that it was Garcia's statement itself, and not whether he had in fact committed the prior act of arson, that was relevant in proving his motive, settled purpose and malicious intent.[47] The majority also upheld the admission of Garcia's prior statement because it was "an important part of the factual background" concerning how a conspiracy to commit the crime of arson was formulated between the defendant, Tapia and others.[48]

The majority recognized that Garcia's statement about his prior act of arson was also relevant to prove that the defendant acted in conformity with his character on February 26, 1993. However, the court reasoned that "the mere fact that the jury is capable of using prior-bad-act evidence for such purposes does not mandate

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43. *See id.* Rule 404(b) states:

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

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

44. *See Garcia,* 743 A.2d at 1049.

45. *See id.* at 1050-53.

46. *Id.* at 1050.

47. *See id.*

48. *Id.* at 1051.

its exclusion under Rule 404(b) because that rule does not 'require exclusion of otherwise legally probative evidence simply because such evidence might also suggest past criminal activity.'"[49] The majority concluded that Garcia's statement was independently relevant to prove motive and settled purpose, and was thus properly admitted by the trial justice.[50] However, the majority suggested that "the better practice" when evidence of prior bad acts of the accused is admitted under one of the exceptions to Rule 404(b) is for the trial justice to immediately provide the jury with a limiting instruction "without waiting for one of the parties either to request such an instruction or to object to the trial justice's failure to do so."[51] Here, the trial justice originally followed the admission of Garcia's statement with a proper limiting instruction regarding the inadmissibility of character evidence to prove the defendant acted in conformity therewith.[52] The majority noted that the prosecutor violated this instruction by arguing to the jury in his closing argument that what Garcia was doing that night "was acting in conformity about [sic] what he had done," and that defense counsel properly objected to this argument.[53] However, the court held that the trial justice's failure to sustain the objection or offer another limiting instruction was harmless error.[54]

The court determined that the defendant's other arguments were without merit, and upheld the full length of his sentence without possibility of parole.[55] The court argued that Garcia's sentence was supported by section 11-23-2(2) of the Rhode Island General Laws, since Garcia's crime constituted conduct "committed in a manner creating great risk of death to more than one person," and no evidence of mitigating factors, such as remorse, was produced in the defendant's favor at trial.[56]

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49. *Id.* (quoting State v. Gordon, 508 A.2d 1339, 1348 (R.I. 1986)).

50. *See id.* at 1052.

51. *Id.* at 1053.

52. *See id.* at 1048-49, 1054.

53. *Id.* at 1054.

54. *See id.* at 1054-55.

55. *See id.* at 1056-57.

56. *Id.* at 1057 (quoting R.I. Gen. Laws § 11-23-2(2) (1956) (1997 Reenactment)).

The Concurrence and Dissent

Chief Justice Weisberger wrote a separate opinion concurring with the majority as to the first two issues in the case, but dissenting as to the third issue.[57] The Chief Justice asserted that this evidence was in fact character evidence introduced by the prosecution to prove that the defendant acted in conformity therewith on the date in question in direct violation of Rule 404(b), and would have held that the trial justice erred in admitting such a statement in evidence.[58] The Chief Justice rejected the majority's argument that the evidence could have been admitted to show motive, plan or design, reasoning that the statement concerned a prior incident in New York and had no relationship with the defendant's motive, plan, or design to commit arson on the date in question.[59] The Chief Justice argued that the trial justice should have excluded the defendant's statement regarding his prior bad act during the pretrial motions in limine.[60] Chief Justice Weisberger would have held that the trial justice's failure to provide a limiting instruction following the prosecution's impermissible inference in closing constituted reversible error, and would have awarded the defendant a new trial in which the character evidence was completely excluded.[61]

CONCLUSION

In *State v. Garcia*, the Rhode Island Supreme Court held that witness testimony against the defendant was not coerced, that the prior testimony of an unavailable witness was properly admissible, that the purported recantation of this testimony by the same witness was properly held inadmissible because of insufficient corroboration and that the statement of the accused regarding a prior bad act was properly admitted under the recognized exceptions to Rule 404(b) to prove the defendant's motive, settled purpose and malicious intent to commit the crime in question. The trial justice's failure to provide a second limiting instruction after the pros-

57. *See id.*
58. *See id.* at 1057-61.
59. *See id.* at 1060.
60. *See id.* at 1061.
61. *See id.*

ecution argued an impermissible propensity inference in closing arguments was not reversible error.

Lucy H. Holmes

Criminal Law. *State v. Manocchio,* 743 A.2d 556 (R.I. 2000). There is no inherent power in the superior court to order the expungement of certain Bureau of Criminal Identification (BCI) records, particularly in light of clear statutory guidelines for the expungement of records.

FACTS AND TRAVEL

In *State v. Manocchio*,[1] respondent Louis Manocchio (Manocchio) filed a motion on June 16, 1998, to expunge entries in the BCI records that related to him.[2] The records contained entries involving the dismissal of some criminal charges, his release from incarceration and a deferred sentence he had received.[3] The court reasoned that the expungement request fell within the court's general supervisory authority over these matters; therefore, the court granted the request to expunge.[4] The state argued that the strict terms of Rhode Island General Laws sections 12-1-12, 12-1-12.1 and 12-1.3-1 prevented the granting of this request.[5] The supreme court issued a writ of certiorari and ordered the parties to show cause why the petition should not be summarily decided; after cause was not shown, the supreme court decided the issue.[6]

ANALYSIS AND HOLDING

The Rhode Island Supreme Court decided that the lower court had no inherent authority to expunge the records.[7] The state successfully argued that the court had no power to do what it did.[8] First, the state argued that section 12-1-7 requires that records should be maintained on individuals who, for example, have been convicted of a felony or are well-known and habitual criminals.[9] The state contended that the respondent was a well-known and habitual criminal and that there was a duty, therefore, to maintain the challenged records.[10]

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1. 743 A.2d 556 (R.I. 2000).
2. *See id.*
3. *See id.*
4. *See id.*
5. *See id.*
6. *See id.*
7. *See id.*
8. *See id.*
9. *See id.*
10. *See id.*

More importantly, the state argued that the plain language of section 12-1-2 did not allow the lower court judge to expunge the records.[11] Section 12-1-2 of the Rhode Island General Laws clearly prevents the destruction of records if the person was previously convicted of a felony.[12] The court reasoned that because the respondent had previously received a five-year suspended sentence for assault and robbery, he was a convicted felon when the later charges were dismissed.[13] The state further relied upon section 12-1-12.1(a) in support of its arguments, which provides for the sealing of records in a case in which the person has been acquitted or exonerated, provided that they have not previously been convicted of a felony.[14] The respondent had agreed to plead guilty to conspiracy to commit murder in 1968 and, therefore, he was not eligible to have his records sealed or destroyed pursuant to sections 12-1-12 or 12-1-12.1(a).[15] In addition, the respondent was not a first time offender, which prevented another possible avenue for expungement.[16] Because of the respondent's prior criminal involvement, the court reasoned that there was no argument that he had exhibited good moral character, which is a requirement for the expungement process.[17] The court noted, in fact, that neither the respondent nor the hearing justice contended that there was any statutory authority for the court's actions.[18]

The state further argued that there was no inherent power of the superior court to expunge without the express delegation of lawmaking authority by the Rhode Island General Assembly or a statute.[19] The supervisory power provided to the superior court to govern proceedings before them is limited by rules that are constitutionally authorized.[20] For further support of the state's argument, the supreme court cited another supreme court decision where the court declined to exercise its supervisory role in creating an exclusionary rule for improperly used expungement records,

11. *See id.* at 557.
12. *See id.*
13. *See id.*
14. *See id.*
15. *See id.*
16. *See id.*
17. *See id.*
18. *See id.*
19. *See id.*
20. *See id.* (citing State v. DiPrete, 710 A.2d 1266, 1276 (R.I. 1998)).

deeming that it was not fit to create rules when the Rhode Island General Assembly had declined to do so.[21]

The extent of the jurisdiction of the courts is prescribed by law of the Rhode Island General Assembly.[22] The Rhode Island General Assembly has provided for the superior court's jurisdiction over equity actions, actions at law and criminal actions, as well as actions of the kind involved in this proceeding.[23] However, there is also a clear statutory scheme for the maintaining, handling, sealing and expunging of BCI records.[24] Thus, the lower court has no statutory authority to act; if it could, the statutes would have no value.[25] Therefore, the court had no statutory authority or inherent power to grant the respondent's requests for expungement.

CONCLUSION

In *State v. Manocchio*, the Rhode Island Supreme Court denied that the superior court had the inherent authority to order the expungement of BCI records. The superior court's authority is derived from statutes passed by the Rhode Island General Assembly. The Rhode Island General Assembly passed laws in which the plain meaning of the statutes was contrary to the judge's actions. Therefore, no inherent authority can exist for the judiciary in a sphere where the Legislature has not granted that authority to the court.

Stephen P. Cooney

21. *See id.* (citing State v. Jackson, 570 A.2d 1115, 1117 (R.I. 1990)).
22. *See id.*
23. *See id.*
24. *See id.* at 558.
25. *See id.*

Criminal Law. *State v. Tucker*, 747 A.2d 451 (R.I. 2000). The Rhode Island Supreme Court held that the superior court did not exceed its authority under section 12-19-9 of the Rhode Island General Laws when it partially revoked a defendant's original suspended sentence and ordered the defendant to serve a portion of the sentence, while retaining the remainder of the suspended sentence and the defendant's unserved probation period.

FACTS AND TRAVEL

On June 3, 1996, defendant Christopher G. Tucker (Tucker) entered a plea of nolo contendere to charges that he unlawfully obtained more than $500 under false pretenses. The superior court sentenced him to six years in prison, which it suspended.[1] The court also sentenced Tucker to six years of probation.[2] On April 8, 1998, the superior court found that Tucker had violated the terms of his probation, and ordered him to serve eighteen months of his previously suspended sentence, suspending the remaining fifty-four months, and fifty-four months of probation.[3] Tucker served the eighteen months required by the court, and then filed a motion pursuant to Rule 35 of the Rhode Island Superior Court Rules of Criminal Procedure to have his sentence corrected.[4] In addition, Tucker filed a motion for entry of judgment by default consistent with Rule 55.[5] The superior court denied both of these motions.[6]

Tucker appealed only the court's denial of his Rule 35 motion, arguing that the superior court did not have the authority under section 12-19-9 of the Rhode Island General Laws[7] to both commit

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1. *See* State v. Tucker, 747 A.2d 451, 452 (R.I. 2000).
2. *See id.*
3. *See id.* at 452-53.
4. *See id.* at 453.
5. *See id.*
6. *See id.* (citing Accord State v. Ducharme, 601 A.2d 937, 946 (R.I. 1991) (stating that "the appropriate procedure for challenging an improper or illegal sentence is to seek a revision of that sentence initially in the Superior Court pursuant to Rule 35")).
7. The statute provides as follows:

> Upon a determination that the defendant has violated the terms and conditions of his or her probation the court, in open court and in the presence of the defendant, may remove the suspension and order the defendant committed on the sentence previously imposed, or on a lesser sentence, or impose a sentence if one has not been previously imposed, or may continue the suspension of a sentence previously imposed, as to the court may seem just and proper.

him to serve a sentence of eighteen months and continue the remainder of his original suspended sentence.[8] Tucker asserted that the statute limits judges hearing probation violations to either revoking previously suspended sentences completely and ordering the defendant to serve the term of the sentence in prison, or continuing the remainder of the suspended sentence.[9] Because any revocation of a suspended sentence following a probation violation relates back to the sentence for the underlying offense, the defendant also contended that the superior court's reinstatement of his suspended sentence after completing a prison term violates the constitutional bar against double jeopardy.[10]

ANALYSIS AND HOLDING

The supreme court first noted that Tucker had failed to file his Rule 35 motion requesting that his sentence be corrected within the required 120 days from the date that his sentence was modified by the superior court.[11] As a result, the superior court would have lacked the authority to reduce or correct Tucker's sentence pursuant to the court's discretionary power under Rule 35 to relieve the defendant of an illegally imposed or overly harsh sentence.[12] However, the court concluded that because Tucker was asking for relief from an illegal sentence rather than one illegally imposed, Rule 35's 120-day time limit did not impede the superior court's ability to correct an illegal sentence, and did not bar this case from consideration on the merits by the supreme court.[13]

The court then turned to Tucker's argument, and concluded that the superior court acted within the scope of its authority in ordering a continuation of Tucker's remaining suspended sentence after requiring Tucker to serve eighteen months of that sentence in prison.[14] The court analyzed the open discretionary language of section 12-19-9 of the Rhode Island General Laws, and determined that the General Assembly intended to give violation-hearing

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R.I. Gen. Laws § 12-19-9 (1956) (1994 Reenactment).

8. *See Tucker*, 747 A.2d at 453.

9. *See id.*

10. *See id.*

11. *See id.*

12. *See id.* (citing State v. Letourneau, 446 A.2d 746, 748 (R.I. 1982) (noting that the 120-day time limit is jurisdictional and cannot be enlarged)).

13. *See id.*

14. *See id.*

judges wide latitude in choosing which of the provided disposition options to impose on a probation violator.[15] Although judges hearing probation violation cases cannot impose "additional probationary period[s] after the execution of a suspended sentence,"[16] the court found that the "second option" under section 12-19-9, which allows the suspended sentence to be removed upon the imposition of a lesser sentence for the probation violator, provides these judges with broad discretion to decide whether a probation violator should have his suspended sentence "removed in whole, in part, or not at all."[17]

The court upheld the superior court's imposition of eighteen months of incarceration for Tucker, with the remaining months of his sentence suspended with probation, as this sentence constituted a lesser amount of physical incarceration than Tucker would have received if the suspension of his original six-year sentence was revoked.[18] This holding is consistent with the court's previous statement that "[t]he reduction contemplated by Rule 35 is a shortening of the period of *imprisonment*."[19] The court noted that the superior court's imposition of fifty-four months of probation following Tucker's prison term was not an addition to the amount of probation originally imposed on Tucker in his 1996 sentencing, and recognized that such an addition, if imposed, "would have constituted an illegal sentence to the extent of the overage."[20] Here, the violation-hearing judge imposed a sentence within the authorization of section 12-19-9 by revoking a portion of Tucker's suspended sentence and continuing the suspension of the remaining portion of the original sentence, including the remaining unserved months of probation.[21]

The court reviewed two recent decisions that are consistent with this holding. In *State v. Heath*,[22] the defendant was originally sentenced to five years' imprisonment, with six months to

15. *See id.* (referring to the General Assembly's use of the words "may" and "as to the court may seem just and proper" in R.I. Gen. Laws § 12-19-9 (1956) (1994 Reenactment)).

16. *Id.* at 454 (quoting State v. Taylor, 473 A.2d 290, 291 (R.I. 1984)).

17. *Id.*

18. *See id.*

19. *Id.* (quoting State v. O'Rourke, 463 A.2d 1328, 1331 (R.I. 1983)).

20. *Id.* (citing *Taylor*, 473 A.2d at 291).

21. *See id.*

22. 659 A.2d 116 (R.I. 1995).

serve and the remainder of the sentence suspended with probation.[23] On three separate occasions the defendant was adjudged to have violated the terms of his probation.[24] In the first instance, the violation-hearing judge ordered the defendant to serve six more months of his original sentence and continued to suspend the remainder.[25] After the second probation violation, the judge hearing the matter committed the defendant to serve another six months of his originally suspended sentence, but through a clerical error did not indicate that the remainder of the defendant's sentence was to be suspended.[26] Following the defendant's third probation violation, the defendant objected to the third violation-hearing judge correcting the previous clerical error by regarding the remaining portion of his sentence as having been suspended.[27] The defendant argued that the third violation-hearing judge had exceeded his authority under section 12-19-9 by correcting the oversight.[28] When the supreme court heard Heath's argument, it held that the superior court had acted within its authority in correcting the clerical error, and "did not comment adversely upon the first violation-hearing judge's decision to require the defendant to serve six months in prison and to continue the suspension for the remaining four-year balance of his original sentence."[29]

The court also pointed to *State v. Rice*,[30] in which the supreme court approved of a probation violation judge's decision to split two original and concurrent fourteen-year sentences with probation into an order for the defendant to serve two years in prison and a twelve-year suspended sentence with probation.[31] In *Rice*, the court held that violation-hearing judges may remove a suspended period from an original sentence, provided that they work within the time-frame of the original sentence, and do not add to or decrease the length of the original sentence.[32] Further, the court commented in *Rice* that probation violators should be encouraged

23. *See Tucker*, 747 A.2d at 454 (citing *Heath*, 659 A.2d at 116).
24. *See id.* (citing *Heath*, 659 A.2d at 116).
25. *See id.* (citing *Heath*, 659 A.2d at 116).
26. *See id.* (citing *Heath*, 659 A.2d at 116).
27. *See id.* (citing *Heath*, 659 A.2d at 116).
28. *See id.* (citing *Heath*, 659 A.2d at 117).
29. *Id.* (citing *Heath*, 659 A.2d at 117).
30. 727 A.2d 1229 (R.I. 1999).
31. *See Tucker*, 747 A.2d at 454 (citing *Rice*, 727 A.2d at 1231-32).
32. *See id.*

to admit probation violations in order to decrease the likelihood of receiving an order from a violation-hearing judge to serve the entire amount of his remaining original sentence in prison.[33] The court recognized that this comment in *Rice* and its decision in *Heath* had constituted its implied approval of probation violation judges' actions regarding the partial revocation of an originally suspended sentence, and acknowledged the court's intention to clarify its position expressly in this opinion.[34]

The court discounted Tucker's interpretation of section 12-19-9 of the Rhode Island General Laws, saying that such an "all-or-nothing interpretation" would encourage defendants with lengthy suspended sentences to violate their probation on a minor offense thereby having the bulk of their suspended sentence extinguished.[35] The court rejected such an interpretation, saying that it would frustrate one of the main purposes for which section 12-19-9 was enacted, to establish probation as "conditional liberty that may be revoked if [defendants] violate the terms of their probation agreement."[36]

Addressing Tucker's double jeopardy argument, the court concluded that the defendant was not placed in double jeopardy through his probation revocation hearing, because the hearing itself operates as a continuation of the original proceeding against the defendant.[37] Since the hearing does not constitute a new proceeding, the defendant "is not twice placed in jeopardy for the same offense when the facts litigated at the hearing are later used to support a criminal prosecution."[38]

CONCLUSION

In *State v. Tucker*, the Rhode Island Supreme Court determined that the superior court did not exceed its authority under section 12-19-9 of the Rhode Island General Laws when it revoked part of the defendant's original suspended sentence and instituted an order for the defendant to serve a portion of that original sen-

33. *See id.* at 455 (citing *Rice*, 727 A.2d at 1232).
34. *See id.*
35. *Id.*
36. *Id.* (quoting State v. Gobern, 423 A.2d 117, 1179 (R.I. 1981)).
37. *See id.*
38. *Id.* (quoting State v. Chase, 588 A.2d 120, 122 (R.I. 1991) (citing Hardy v. United States, 578 A.2d 178, 181 (D.C. App. 1990)).

tence in prison, while continuing to suspend the remainder of the sentence, with the defendant's remaining term of probation from his original conviction. The court also concluded that the defendant was not placed in double jeopardy when his original conviction was referred to at his probation revocation hearing.

Lucy H. Holmes

Criminal Law. *State ex rel. Town of South Kingstown v. Reilly*, 745 A.2d 745 (R.I. 2000). Under Rhode Island Department of Health Regulations, a drunk driving suspect must be given two breathalyzer tests, the second not to be taken until at least thirty minutes after the first. Although police measured the thirty-minute time span in minutes, not seconds, the test results were admissible.

FACTS AND TRAVEL

In September 1998, the South Kingstown Police arrested the defendant for suspicion of driving under the influence of alcohol.[1] The defendant consented to a breathalyzer test.[2] At 1:33 a.m., the police administered the first breathalyzer, which showed a blood alcohol level of .182%.[3] At 2:03 a.m., the police administered the second breathalyzer, which showed a blood alcohol level of .173%.[4] At the time of this action, the legal blood alcohol level limit was 0.1%.[5]

The defendant filed a pre-trial motion in district court to suppress the breathalyzer results.[6] The defendant's suppression motion alleged that the breathalyzer test results were invalid because of police failure to observe Rhode Island Department of Health regulations for administering breathalyzer tests.[7] Under these regulations, two breathalyzer tests must be given to a suspect.[8] The second test is not to be given until thirty minutes after the first.[9] The defendant argued that since the breathalyzer machine used did not record time in seconds, there was no proof as to whether or not exactly thirty minutes had elapsed between the two blood tests, and therefore the test results should be inadmissible.[10] The trial judge agreed and granted the motion to suppress.[11] The

1. *See* State *ex rel.* Town of South Kingstown v. Reilly, 745 A.2d 745, 746 (R.I. 2000).
2. *See id.*
3. *See id.*
4. *See id.*
5. *See id.* Since this case was decided, the legal blood alcohol level has been reduced to 0.08%. *See* R.I. Gen. Laws § 31-27-2 (1956) (2000 Reenactment).
6. *See id.*
7. *See id.*
8. *See id.* at 747 (citing R.I. Code R. 14 060 CRIR 014-2).
9. *See id.* (citing R.I. Code R. 14 060 CRIR 014-10).
10. *See id.* at 746.
11. *See id.*

Town of South Kingstown petitioned the Rhode Island Supreme for writ of certiorari, which was granted.[12]

ANALYSIS AND HOLDING

On certiorari, the supreme court quashed the district court order suppressing the breathalyzer results.[13] The court held that the regulation in question did not require the time between breathalyzer tests to be measured in seconds, but only in minutes.[14] Furthermore, the motion to suppress should not have been granted in this case because the defendant failed to show that the validity of the test results had been affected in any way.[15]

The court conceded that under its earlier holding in *State v. Snyder*,[16] the admissibility of a chemical test in a criminal drunk driving case depends upon compliance with the relevant regulations promulgated by the Rhode Island Department of Health.[17] These regulations state that the second test is given "when at least thirty (30) minutes have elapsed following the taking of the first breath sample."[18] As indicated by those regulations, the purpose of taking a second breathalyzer test at least thirty minutes after the first is to validate the results of the first test.[19] The regulation on its face does not require the thirty-minute interval to be measured in seconds, but only in minutes.[20] Since the police administered the first test at 1:33 a.m., and the second test at 2:03 a.m., the court held that the police had complied with the requirement of a thirty-minute interval.[21] Furthermore, that second test showed that the defendant's blood alcohol level was still well over the legal limit.[22] The court thus concluded that the second test validated the results of the first, and evidenced that the defendant had been driving while under the influence.[23] Therefore, the police had not violated the regulation.

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12. *See id.*
13. *See id.* at 747.
14. *See id.*
15. *See id.*
16. 692 A.2d 705 (1996).
17. *See Snyder*, 692 A.2d at 706.
18. *Id.*
19. *See Reilly*, 745 A.2d at 747 (citing R.I. Code R. 14 060 CRIR 014-10).
20. *See id.*
21. *See id.*
22. *See id.*
23. *See id.*

Additionally, the court noted that a mere failure to observe testing regulations does not automatically entitle a defendant to an order suppressing the test results. In *Snyder*, the court had held that while the police had failed to follow a procedural checklist for administering chemical tests, the results were not automatically inadmissible.[24] Instead, the court had required the defendant to demonstrate that the failure to follow the checklist had adversely affected the validity of the results.[25] Similarly, the court reasoned, the defendant in this case had never demonstrated that the failure to measure the thirty-minute interval in seconds had affected the results of the test in any way. Therefore, even if the failure to measure the thirty-minute interval in seconds rather than minutes had been a "technical" violation of testing regulations, the defendant would still have not been entitled to an order suppressing his test results.[26]

CONCLUSION

In *State ex rel. Town of South Kingstown v. Reilly*, the Rhode Island Supreme Court interpreted the Department of Health regulations regarding chemical tests administered to those suspected of driving under the influence. Under these regulations, in order to validate the results of a chemical test, a second test must be given no less than thirty minutes after the first. The court held that that this thirty-minute interval between tests need only be measured in minutes, rather than seconds. Furthermore, on the facts alleged here, even if the police's failure to measure the thirty-minute interval in seconds had been a violation of the testing regulations defendant was still not entitled to a suppression order. The court reaffirmed and extended its earlier holding that a defendant seeking suppression of chemical test results cannot merely point to a violation of the testing regulations; the defendant must also show that the alleged violation affected the validity of the test results. Because the defendant here had not demonstrated that the failure to measure the thirty-minute interval in seconds rather than min-

24. *See id.* (citing *Snyder*, 692 A.2d at 706 (R.I. 1997)).

25. *See id.* (citing *Snyder*, 692 A.2d at 706 (R.I. 1997)).

26. *See id.*

utes actually affected the validity of the results, the trial justice should not have granted an order suppressing the test results.

Vicki J. Bejma

Criminal Law. *Toole v. State*, 748 A.2d 806 (R.I. 2000). In *Toole v. State*, the Rhode Island Supreme Court held that unless there is an actual or potential conflict of interest at the time of trial, the public defender (PD) is free to represent a defendant. The court also held that mere tactical decisions, though ill-advised, do not by themselves constitute ineffective assistance of counsel. Finally, the court must give a defendant the opportunity to establish, when applying for post-conviction relief, that there are genuine issues of material fact. The defendant has the burden of establishing that there are such issues; if he fails to meet his burden, the trial justice may dismiss the application without an evidentiary hearing.

FACTS AND TRAVEL

This is the third time the Rhode Island Supreme Court has heard an appeal arising from the conviction of James Toole (Toole), a former Pawtucket police officer, of five counts of child molestation on February 5, 1993, in Rhode Island Superior Court.[1] Toole had been accused of the sexual molestation of his biological daughter.[2] The daughter testified at trial that sexual activity was initiated by her father nearly every day from the time she was approximately four years old until she was seventeen and a half.[3] Toole was convicted of three counts of first-degree sexual assault upon a child under the age of thirteen and of two counts of first-degree sexual assault by force and coercion.[4]

The court sentenced Toole to five concurrent life sentences.[5] Toole appealed, and the convictions were affirmed.[6] Defendant then applied for post-conviction relief, but the superior court denied application without an evidentiary hearing.[7] Toole appealed this denial.[8] The Rhode Island Supreme Court remanded back to the superior court, holding that the trial court was required to give Toole an opportunity to reply to the court's proposed dismissal of his post-conviction application for relief.[9] However, the trial jus-

1. *See* Toole v. State, 748 A.2d 806, 806 (R.I. 2000).
2. *See* State v. Toole, 640 A.2d 965, 968 (R.I. 1994).
3. *See id.*
4. *See Toole*, 748 A.2d at 807.
5. *See id.*
6. *See id.*
7. *See id.*
8. *See id.*
9. *See id.*

tice did not have to conduct an evidentiary hearing if, from Toole's reply, the trial justice determined that no genuine issue of material fact existed.[10] Upon remand, the trial justice issued a second memorandum and order that again denied Toole's application for post-conviction relief without an evidentiary hearing.[11] Again, Toole appealed.

ANALYSIS AND HOLDING

On appeal, Toole argued three points. First, Toole argued that PD Richard Casparian had a conflict in representing Toole because Toole was a witness for the prosecution in a case against another PD client, Michael Richardson (Richardson).[12] Toole had been a Pawtucket police officer and had participated in the arrest of Richardson for murder and, ironically, child molestation.[13] The court followed precedent set in *Hughes v. State,*[14] which held that "the PD may not represent multiple clients if the representation of one client materially limits the representation of another, unless the clients consent after consultation."[15] However, there must be an actual or potential conflict *at the time the PD represented the client.*[16]

Here, there was no actual or potential conflict at the time of Toole's trial because the Richardson case had ended months before with a plea bargain, and Toole was never even required to serve as a witness in that case.[17] "In such a situation no conflict should be imputed to the PD."[18]

Second, Toole argued that the PD provided "ineffective assistance of counsel in failing to call the victim's pediatrician as a witness and in failing to preserve certain issues through proper objection at trial."[19] In reviewing a claim for ineffective assistance of counsel the court has stated that the benchmark issue is whether "counsel's conduct so undermined the proper functioning

10. *See id.*
11. *See id.* at 806.
12. *See id.* at 808.
13. *See id.* at 808.
14. 656 A.2d 971 (R.I. 1995).
15. *Toole,* 748 A.2d at 808 (quoting *Hughes,* 656 A.2d at 972).
16. *See id.*
17. *See id.*
18. *Id.* at 808-09 (citing People v. Trichilo, 230 A.2d 926 (N.Y. 1996)).
19. *Id.* at 809.

of the adversarial process that the trial cannot be relied on as having produced a just result."[20] The court has also held that "the burden is placed on the defendant to show that the trial counsel's errors violated his or her Sixth Amendment guarantee to counsel,"[21] and that the deficient performance of counsel prejudiced the defense.[22] The court has made clear, however, that "mere tactical decisions, through ill-advised, do not by themselves constitute ineffective assistance of counsel."[23]

One allegation of ineffective assistance of counsel concerned the failure of the defense counsel to call the victim's pediatrician to testify.[24] The allegation failed because some of the sexually abusive conduct would not have produced physical signs and the pediatrician would not have been able to testify that, in his expert opinion, no sexual abuse had occurred.[25] As a result, testimony from a pediatrician would not have been enough to change the verdict because the prosecution introduced substantial evidence of Toole's guilt at trial including statements made by Toole's son, and incriminating admissions by Toole himself.[26]

Toole's second allegation of ineffective assistance of counsel concerned counsel's failure to object at certain unspecified times.[27] The court found that defense counsel's failure to object may have reflected legitimate defense strategy, and such tactics do not amount to constitutionally ineffective counsel.[28] Any error in not raising these objections was harmless.[29]

Third, the trial justice erred in not holding an evidentiary hearing concerning counsel's alleged failure to provide effective counsel.[30] The court found that in light of Toole's failure to establish ineffective assistance of counsel he had failed to demonstrate the existence of genuine issues of material fact that would warrant an evidentiary hearing.[31] A trial judge may dismiss an application

20. *Id.* (quoting Tarvis v. Moran, 551 A.2d 699, 700-01 (R.I. 1988)).
21. *Id.* (quoting Tarvis v. Moran, 551 A.2d 699, 700-01 (R.I. 1988)).
22. *See id.*
23. *Id.* (citing State v. D'Alo, 477 A.2d 89 (R.I. 1984)).
24. *See id.*
25. *See id.* at 810.
26. *See id.*
27. *See id.*
28. *See id.*
29. *See id.* at 811 (citing *D'Alo*, 477 A.2d at 97).
30. *See id.* at 810.
31. *See id.*

for post-conviction relief whenever he finds no genuine issue of material fact exists.[32] The burden then shifts to the defendant to show that genuine issues of material fact were in dispute.[33] Here, Toole failed to articulate specifically the existence of such genuine issues of material fact.[34]

CONCLUSION

In *Toole v. State*, the Rhode Island Supreme Court held that unless there is an actual or potential conflict of interest at the time of trial, the Public Defender is free to represent a defendant. The court also held that mere tactical decisions, though ill-advised, do not by themselves constitute ineffective assistance of counsel. Finally, the court must give a defendant the opportunity to establish, when applying for post-conviction relief, that there are genuine issues of material fact. The defendant has the burden of establishing that there are such issues; if he fails to meet his burden, the trial justice may dismiss the application without an evidentiary hearing.

Joseph Proietta

32. *See id.*
33. *See id.* at 810-11.
34. *See id.* at 811.