RHODE ISLAND CRIMINAL DEFENSE

A Practice Manual, 8th Edition

Purpose and Scope

This manual contains a summary of the important cases touching upon every major procedural facet of criminal defense representation in Rhode Island District and Superior state courts. From arraignment to appeal, you will find the essential cases, statutes and practice tips. Also included is a summary of potential immigration consequences for the vast majority of Rhode Island criminal offenses, a Table of Cited Cases, and an Appendix with samples of pre-trial motions.

Acknowledgments

A special word of thanks to Brett Beaubien, Esq. for his outstanding assistance updating both the 7th and 8th editions of this manual.

Dedication

This manual is dedicated to veteran criminal defense attorney John F. Cicilline, Esq. Long considered the Dean of Rhode Island criminal defense lawyers, Jack has dedicated his professional life to the zealous representation of the accused. In five decades of practice, Jack has tried state and federal criminal cases in over 20 states. Indeed, many of the landmark cases cited in this manual are due to his efforts. Jack, thanks for your dedication, your guidance, and most of all, your example.

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BAIL: GUIDELINES, HEARINGS AND REVOCATION

Practice Tip: All misdemeanors offenses and most felonies require the setting of bail at a defendant's arraignment or initial appearance in District or Superior Court.[1] The only exceptions are capital offenses, specific offenses that trigger a potential hold without bail or bail/probation violation matters. The right to bail is codified in the Rhode Island Constitution, state statutes, the Supreme Court's bail guidelines and the District and Superior Court's Rules of Criminal Procedure.

R.I. CONST. art. I, § 9: Right to Bail – *Habeas Corpus*

All persons imprisoned ought to be bailed by sufficient surety, unless for offenses punishable by imprisonment for life, or for offenses involving the use or threat of use of a dangerous weapon by one already convicted of such offense or already convicted of an offense punishable by imprisonment for life, or for offenses involving the unlawful sale, distribution, manufacture, delivery, or possession with intent to manufacture, sell, distribute or deliver any controlled substance or by possession of a controlled substance punishable by imprisonment for ten (10) years or more, when the proof of guilt is evident or the presumption great. Nothing in this section shall be construed to confer a right to bail, pending appeal of a conviction. The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion, the public safety shall require it; nor ever without the authority of the general assembly.

Bail Guidelines

I. General Principles.

- The purpose of bail is to assure that the defendant will appear in court and keep the peace and be of good behavior.

- In all non-capital or drug distribution offenses, the setting of bail at the initial appearance in District Court or arraignment in Superior Court is mandatory. Bail cannot be denied in these cases. In all felony cases where bail is set or denied in District Court, this decision is subject to review by a Superior Court judge pursuant to Rule 46(i) of the Superior Court Rules of Criminal Procedure. A Superior Court judge's decision not to set bail is subject to review in the Supreme Court pursuant to a writ of habeas corpus. The bail guidelines come into play in determining the amount of bail that should be set.

II. Misdemeanors and Non-Capital Felonies:

1. There is a presumption of personal recognizance unless there is no reasonable assurance of appearance or the defendant presents a danger to the community.

[1] Misdemeanor offenses are 'arraigned' in District Court. Most felony offenses are presented before a District Court judge for an 'initial appearance.' The official arraignment of a felony offense does not take place until Superior Court.

2. If personal recognizance is not sufficient, further conditions shall be the least restrictive as possible to assure appearance and community safety. A release on conditions requires an order of the court.

3. Monetary conditions are allowed only if no other conditions will assure appearance or community safety. The court may not impose monetary conditions solely for the purpose of detention. Monetary conditions are a technique for release not detention, therefore the court shall consider the defendant's financial ability to post bond.
4. Cash or surety bail may be imposed only if one or more conditions exist:

    a. The court is reasonably satisfied defendant will not appear.

    b. The court is reasonably satisfied defendant will engage in other criminal contacts.

    c. The defendant is a bail, probation or parole violator or has outstanding warrants for failure to appear.

5. If cash or surety bail is required, the court shall state the reasons for such bail. The reasons shall be set forth on a document prepared by State Court administer.

III. Capital Offenses/Drug Distribution Charges.

1. The court shall proceed in accordance with Rule 5(a); RIGL §12-13-1.1 and §12-13-6 and Article I, Section IX of the R.I. CONST. Pursuant to §12-13-1.1, if the state opposes bail, the court must schedule a bail hearing.

2. Where there is no opposition and state does not object to bail, the court shall proceed in accordance with section II (i.e. with the setting of bail in non-capital offenses.)

IV. Pre-release screening. The following information shall be provided to the Court:

1. Marital status
2. Name and address of dependents
3. Present employment
4. Under care of physician or medication
5. Physical or mental conditions affecting behavior
6. Education
7. Prior criminal record and facts indicating danger to community
8. Prior court appearances or non-appearances
9. Ties to the community
10. Financial resources

V. Guidelines for Amount of Bail.

1. Cash or surety bail shall not exceed the guidelines provided below unless it can be shown that special circumstances exist.

    - Bail shall not be pre-determined by the nature of crime but instead an individualized decision will take into account the special circumstances of each defendant.

    - A defendant should not be required to post bail on each count in a multiple count complaint unless the charges could be severed for trial.
        a. Misdemeanors: $1000 w/ surety or $100 cash.
        b. 5 year felonies: $5000 w/ surety or $500 cash.
        c. 10 year felonies: $10,000 w/ surety or $1000 cash.
        d. 20 year felonies: $20,000 w/ surety or $2000 cash.
        e. 20+ year felonies: $50,000 w/ surety or $5000 cash.

2. Whenever bail exceeds the guidelines, the court shall articulate reasons on the record (first, the reason for cash or surety bail and second the reason for exceeding). Reasons for departing from the guidelines include:

    - Likelihood of conviction and likely sentence.
    - Outstanding warrants or detainers.
    - Previous record of non-appearance.
    - Physical or mental condition affecting defendant's behavior.

Primary Purpose of Bail

State v. Abbott, 322 A.2d 33, 35 (R.I. 1974). "The primary purpose of bail, be it of the pretrial or the post conviction variety, is to assure a defendant's appearance in court at the appointed time."

Mello v. Superior Court, 370 A.2d 1262 (R.I. 1977) (Dorris, J. dissenting). "The right to bail is a cornerstone of our criminal justice system…The practice of admission to bail as it has evolved in Anglo-American law, is not a device for keeping persons in jail upon mere accusation until it is found convenient to give them a trial. On the contrary, the spirit of the procedure is to enable them to stay out of jail until a trial has found them guilty." Id. at 1267, Citing Stack v. Boyle, 72 S. Ct. 1, 5 (1951) (concurring opinion).

Practice Tip: At initial appearances, the alleged facts of a case tend to dominate the discussion and amount of bail when in fact the primary purpose of bail is to simply ensure the defendant's appearance which may not at all be influenced by the alleged facts.

Discretion to Set Bail

Witt v. Moran, 572 A.2d 261 (R.I. 1990). Setting bail is always within the court's discretion, regardless of the offense, and cannot by prohibited by statute.

> "Bail and the revocation of bail are within the judicial sphere of government and cannot be entirely delegated to the Legislature. Even if bail may be denied, therefore, the trial justice must exercise his or her discretion in deciding whether to grant bail and consider the factors that we set out in Abbott. In deciding whether to grant bail, the trial justice must make findings of fact on the record that relate to the individual defendant's dangerousness." Id. at 266.

Review of Decision

A District Court's decision regarding bail is reviewable in Superior Court in a *habeas corpus* petition pursuant to R.I. GEN. LAWS §10-9-19, as well as SUP. CT. R. CRIMINAL P. 46(i), which governs the court's general supervisory power over felony offenses. Generally speaking, a miscellaneous petition pursuant to Rule 46(i) is the quickest way to get the matter before the Superior Court. A Superior Court's decision regarding bail is reviewable by the Supreme Court on a writ of *habeas corpus* or *certiorari*.

Right to Speedy Hearing

Mello v. Superior Court, 370 A.2d 1262, 1266 (R.I. 1977). A person arrested and held without bail must be brought before a justice within forty-eight hours. If the court holds the defendant without bail, a bail hearing date must be set within ten business days, excluding weekends and holidays. The practice in both District and Superior Court is no more than 10 business days. In District Court, the bail hearing is generally 'with witnesses.' In Superior Court, witnesses will be required to attend the hearing only if it was designated as 'with witnesses.'

Bail Hearing Evidentiary Standard

When a bail hearing is conducted for a potential hold without bail offense (ex. capital or drug distribution offense), the court is required to make a two-tiered finding after a bail hearing:

> Under tier one, the court must weigh the evidence, in the light most favorable to the state, without assessing credibility, to determine if 'proof of guilt is evident or the presumption great' that a non-bailable offense was committed and that the defendant committed it. If tier one is satisfied, the court may hold the defendant without bail unless discretion is exercised under tier two.
>
> 'Proof of guilt evident or presumption great' is a standard higher than probable cause and equivalent to the reasonable satisfaction standard of a violation hearing.
>
> - Massey v. Mullen, 366 A.2d 1144 (R.I. 1976).

- "the standard of proof at a bail hearing was, for all intents and purposes, the same as that at a violation hearing." Id. at 1147.

- "to interpret the words 'when the proof of guilt is evident or the presumption great' as signifying no more than probable cause would render Art. I, § IX meaningless, since in no event may an accused be lawfully imprisoned without a preliminary showing of probable cause." Id. at 1148.

Practice Tip: As a practical matter, since credibility is not at issue, tier one is usually an easy prong for the state to meet so long as witnesses are available to testify as to the elements of the offense. Arguments after bail hearings tend to focus on tier two. Defense counsel goes first followed by the state.

Under tier two, a court may exercise its discretion to set bail in light of defendant's ties to the community, respect for the law, and the likelihood of conviction at trial.

- State v. Abbott, 322 A.2d 33, 35 (R.I. 1974). Sets out the types of evidence to be considered at bail hearings in general:

  1. The habits of the individual regarding respect for the law in regard to whether the defendant's release would pose a threat to the community.
  2. Local attachments to the community by way of family ties, business, or investments.
  3. The severity of the likely sentence imposed and the question of whether the defendant would remove himself or herself from the jurisdiction of the court.

- SUPER. CT. R. CRIM. P. 46(c): Terms (of Release on Bail)

  If the defendant is admitted to bail, the terms thereof shall be such as in the judgment of the court will insure the presence of the defendant, having regard to the nature and circumstances of the offense charged, the weight of the evidence against the defendant, the financial ability of the defendant to give bail, the character of the defendant, and the policy against unnecessary detention of defendants pending trial.

Massey v. Mullen, 366 A.2d 1144 (R.I. 1976). A bail hearing, unlike a violation of probation hearing, is forward-looking; therefore, the state's evidence must be admissible at trial.

- "…the state must make out a case that demonstrates not only a factual probability of guilt but it must produce evidence that is legally sufficient to support a conviction." Id. at 1148.

Gillissie v. Vose, December 20, 1996 unpublished Supreme Court Order. The defendant may elect to call witnesses and introduce evidence on his own behalf.

- "…the hearing justice may permit the petitioner to present such evidence as may be appropriate, including testimony of defense witnesses and any rebuttal thereto, to permit the hearing justice to exercise his discretion on the question of bail…"

Practice Tip: This is the crucial distinction between a bail hearing and other types of hearings, particularly probation and bail violation hearings. At a bail hearing, the evidence must be legally admissible pursuant to the Rhode Island Rules of Evidence. Hearsay in particular is subject to far stricter requirements. However, when a bail hearing is combined with a probation or bail violation hearing, the hearing judge must balance these two competing evidentiary standards when making findings.

Post-Conviction Bail

State v. Abbott, 322 A.2d 33 (R.I. 1974). Sets forth the criteria for setting bail after conviction.

- "Having in mind the natural reluctance to incarcerate a person prior to final conviction … Consideration should be given to (1) whether the appeal is taken for delay or in good faith on grounds not frivolous but fairly debatable; (2) the habits of the individual regarding respect for the law insofar as they are relevant on the question of whether an applicant's release would pose a threat to the community; (3) local attachments to the community by way of family ties, business or investment; (4) the severity of the sentence imposed, and circumstances relevant to the question of whether a defendant would remove himself from the jurisdiction of the court." Id. at 35.

- "In cases where a short sentence has been imposed, consideration must be given to the question of whether or not a denial of bail will nullify the right of appeal. With these guidelines in mind, we look at the record before us." Id.

- The R.I. Supreme Court set bail (despite the imposition of a ten year jail term for kidnapping and rape) citing the following facts: "There is no evidence which indicates any justifiable apprehension that the defendants will flee the jurisdiction. Their conduct during the entire time their cases have been before the Superior Court shows a willingness to abide by the punishment imposed by the Superior Court in the event their appeals are unsuccessful. Apart from the incident presently under review, the absence of any past criminal record demonstrates a likelihood that they will conduct themselves in a proper manner during the time their appeals are pending." Id.

State v. Feng, 421 A.2d 1258 (R.I. 1980). "Our inherent power to grant bail pending review of a habeas challenge to a final conviction is incorporated in a review of the merits of an application for post-conviction relief. Hence, an applicant who seeks release pending appellate review of an application for post conviction relief should move this court to admit him to bail." Id. at 1265.

- Post-conviction bail "shall be sparingly exercised" as it is "an extraordinary measure." The "lack of presumption of innocence, combined with the state's interest in enforcing the conviction," is "a formidable barrier for those who seek interim release while they pursue their collateral remedies." Id.

Bail Violation Hearing

Practice Tip: There is no great dichotomy in Rhode Island Criminal procedure than the bail violation hearing. While your client may have been initially released on personal recognizance, judges will not hesitate to revoke bail for allegedly committing a new offense while out on bail - despite the presumption of innocence on both offenses. Bail violation hearings have morphed into negotiations over jail time instead of an assessment as to what conditions are necessary to assure the appearance of the defendant at trial. As a practical matter, a defendant facing a bail violation cannot be locked up for longer than 90 days without a trial in the original bailed offense. While negotiations tend to start with revocation, the most extreme sanction for a bail violation, remind the court the existence of other sanctions, namely, an increase in bail or the imposition of other bail conditions, such as counseling, community service or home-confinement.

SUPER. CT. R. CRIM. P. 46(g): Forfeiture (of Bail)

(1) Declaration. If there is a breach of condition of a recognizance, the court upon motion of the attorney for the State shall declare a forfeiture of the bail.
(2) Setting Aside. The court may direct that forfeiture be set aside, upon such conditions as the court may impose, if it appears that justice does not require the enforcement of the forfeiture.

(3) Enforcement. When a forfeiture has not been set aside, the court shall on motion enter a judgment of default and execution may issue thereon. By entering into a recognizance the obligors submit to the jurisdiction of the court and irrevocably appoint the clerk of the court as their agent upon whom any papers affecting their liability may be served. Their liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court, who shall forthwith mail copies to the obligors to their last known addresses.

(4) Remission. After entry of such judgment, the court may remit it in whole or in part under the conditions applying to the setting aside of forfeiture in paragraph (2) of this subdivision.

(5) Settlement. The Attorney General may settle with any obligor liable upon a forfeited recognizance upon such terms and in such manner as he or she shall deem most advantageous to the interest of the State.

Bridges v. Superior Court, 396 A.2d 97 (R.I. 1978). Under Rule 46(g), any individual arrested while on bail for another offense may be held without bail for ten business days (not counting weekends or holidays) and given a bail violation hearing. If the court is reasonably satisfied that the defendant did not keep the peace or be of good behavior, it may revoke bail for up to ninety days, increase bail, or both.

- The requirements of due process apply at a bail revocation hearing, with all the rights and standards of a probation revocation hearing.

- "[E]vidence, even though illegally obtained, is admissible at a bail revocation hearing if it is factually reliable."

Mello v. Superior Court, 370 A.2d 1262 (R.I. 1977). "[W]e conclude that a defendant facing bail revocation is jeopardized at least as much as one facing revocation of parole, or probation, or imposition of sentence for breach of a deferred sentence agreement. Therefore, the rights afforded defendants in these latter situations must attach to a defendant in a bail revocation proceeding." Id. at 1266.

State v. Werner, 667 A.2d 770 (R.I. 1995). Sanctions for violating conditions of bail are confided to the sound discretion of the trial justice. Declaring forfeiture of full bond amount of $250,000, when defendant failed to appear at trial-calendar call, was not an abuse of trial justice's discretion. Although the judge knew defendant was quickly apprehended and the government incurred losses of only $200 in securing defendant, defendant's breach was willful and bondsperson did not significantly participate in apprehension of defendant.

- When determining whether to set aside a bail forfeiture "the factors a trial justice may consider are the cost, the inconvenience, and the prejudice suffered by the state as a result of a defendant's breach of a condition of his or her recognizance, whether the surety was provided by family and friends rather than by a bondsperson, and any additional mitigating circumstances that may be present." Id. at 774.

- "Additional factors a court may consider include the issues of whether the defendant's breach of the bond condition was willful; whether a professional bondsperson, acting as a surety, participated in a defendant's apprehension; and whether a defendant failed to appear, thus interfering with the prompt administration of justice." Id.

Pre-Trial Motions

Preliminary Hearings in District Court

Practice Tip: Preliminary hearings are limited to non-capital felony cases pending in District Court. Since the case is awaiting review and the filing of a criminal information by the Attorney General, they present an excellent opportunity to confirm the existence of probable cause as well

as potential avenues of investigation. As a practical matter, your client will be waiting four to six months (or longer) for the case to be reviewed and charged by the Attorney General and confirmation of probable cause should take place while subject to bail restrictions and possible bail revocation. 5(c) hearings can be conducted with a single witness and hearsay is admissible. Defense counsel has the right to call witnesses but credibility is not a factor.

Super. Ct. R. Crim. P. Rule 5. Proceedings Before the District Court

(c) Preliminary Examination. The defendant shall not be called upon to plead. If the defendant waives preliminary examination, the judge of the District Court shall forthwith hold him to answer in the Superior Court. If the defendant does not waive examination, the judge shall hear the evidence within a reasonable time. The defendant may cross-examine witnesses against him or her and may introduce evidence in his or her own behalf. If from the evidence it appears to the judge that there is probable cause to believe that an offense has been committed and that the defendant has committed it, the judge shall forthwith hold the defendant to answer in the Superior Court; otherwise the judge shall discharge the defendant. The judge shall, where authorized by statute, admit the defendant to bail as provided in these rules. After concluding the proceeding the judge shall transmit forthwith to the clerk of the Superior Court for the appropriate county all papers in the proceeding and any bail taken by him or her.

Pre-Trial Motions in Superior Court

9.1 Motion to Dismiss

Practice Tip: Superior Court Rule 9.1 Motion to Dismiss is the mechanism to challenge the probable cause of any charges filed by way of criminal information in Superior Court. In 2008, the legislature amended the statutory provision allowing a defendant's motion to dismiss an information (R.I.G.L. §12-12-1.7), extending the amount of time to file the motion from ten (10) days to thirty (30) days. Therefore, Rule 9.1 and §12-12-1.7 are duplicative and serve the same function.

Super. Ct. R. Crim. P. Rule 9.1. Informations: Motion to Dismiss

A defendant who has been charged by information may, within thirty (30) days after he or she has been served with a copy of the information, or at such later time as the court may permit, move to dismiss on the ground that the information and exhibits appended thereto do not demonstrate the existence of probable cause to believe that the offense charged has been committed or that the defendant committed it. The motion shall be scheduled to be heard within a reasonable time.

Related Statutes

R.I.G.L. §12-12-1.7. Motion to Dismiss Information

Within thirty (30) days after a defendant is served with a copy of an information charging him or her with an offense, he or she may move in the superior court to dismiss the information on the ground that the information and exhibits appended to it do not demonstrate the existence of probable cause to believe that the offense charged has been committed or that the defendant committed it. Upon the filing of the motion to dismiss the court shall schedule a hearing to be held within a reasonable time.

R.I.G.L. §12-12-1.8. Hearing to Determine Probable Cause

At the probable cause hearing the information and exhibits appended to it shall be before the court. The defendant may call witnesses and may introduce evidence bearing on the question of the existence of probable cause to charge him or her. The state may not call witnesses, introduce evidence, or otherwise supplement the exhibits appended to the information unless the court grants leave to do so.

R.I.G.L. §12-12-1.9. Determining Whether Probable Cause Exists

After conducting the hearing the court shall determine from an examination of the information and exhibits appended to it, and in light of any evidence presented at the hearing, whether there exists probable cause to believe that the offense charged has been committed and that defendant committed it. A finding of the existence of probable cause may be based in whole or in part upon hearsay evidence or on evidence which may ultimately be ruled to be inadmissible at the trial.

R.I.G.L. §12-12-1.10. Dismissal of Information – Effect

If the court dismisses the information on the ground that the state has not demonstrated the existence of probable cause to believe that the offense charged has been committed or that defendant committed it the state may not after dismissal proceed against the defendant for the same offense, unless:

(1) On appeal the order of dismissal is reversed; or

(2) The court, upon motion of the state and a finding of mistake, inadvertence, surprise, excusable neglect, the discovery of new evidence which by due diligence could not have been discovered at the time the hearing on probable cause was held, or any other reason justifying the relief, enters an order permitting the state to proceed against the defendant for the same offense.

Rule 9.1 Standard and Burden of Proof

State v. Baillargeron, 58 A.3d 194 (R.I. 2013). "In assessing a motion to dismiss an information, a motion justice is charged with 'examin[ing] the information and the attached exhibits to determine whether there [is] probable cause to believe that the offense charged [was] committed and that [the accused] has committed it." Id. at 197. "A motion justice's review with respect to

the existence of probable cause (vel non) is limited to 'the four corners of the information package.'" Id. "[T]he probable-cause standard to be applied is the same as that for arrest." Id. "Probable cause 'exists when the facts and circumstances within the police officer's knowledge and of which he has reasonably trustworthy information are sufficient to warrant a reasonable person's belief that a crime has been committed and that the person to be arrested has committed the crime.'" Id. at 197-98. "In reviewing such a motion to dismiss, the 'trial justice is to allow the state the benefit of every reasonable inference.'" Id. at 198.

Related Case Law

State v. Strom, 941 A.2d 837, 842 (R.I. 2008). The state appealed from a Family Court order, entered sua sponte, dismissing a criminal information filed against the defendant. The Supreme Court vacated the order, holding that a trial justice's sua sponte dismissal of a criminal information violates Rule 9.1 and deprives the state of a fair proceeding.

- The Supreme Court held that the procedural safeguards of Rule 9.1 must be adhered to in order for an information to be dismissed. "The fact that defendant neglected to file a timely motion to dismiss effectively deprives the trial justice of any authority to dismiss the criminal information. The defendant's failure to comply with the procedural requirements for filing a motion under Rule 9.1 results in a waiver of that right." Id. at 841.

State v. Ceppi, 91 A.3d 320, 331 (R.I. 2014). The defendant, having been found guilty in a jury-waived trial of one count each of domestic felony assault and domestic simple assault, appealed, inter alia, the trial justice's denial of his Rule 9.1 motion to dismiss. The Supreme Court held that "any deficiency that may have existed in the criminal information package * * * does not rise to the level of an absence of probable cause and was harmless beyond a reasonable doubt—in light of the fact that, following a trial, defendant was eventually found guilty of both counts charged in the criminal information."

State v. Murray, 44 A.3d 139, 140 (R.I. 2012). The defendant appealed the denial of his motion to correct an illegal sentence. The Supreme Court characterized the defendant's appeal as an attack "on the propriety of his conviction." In so characterizing, the Court held that, "by virtue of his knowing and voluntary decision to enter a plea of nolo contendere, defendant unequivocally has waived all non-jurisdictional defects in the criminal information."

12(b)(2) Motions to Dismiss

Practice Tip: Certain affirmative defenses, such as double jeopardy, lack of jurisdiction or defects in the charge, must be raised within 30 days of arraignment in Superior Court. Sometimes such defenses are not apparent during the initial stages of a case due to lack of discovery. It is vital to preserve your right to assert such defenses early in the event they become contested at a later stage of the case.

R.I. Rule Sup. Ct. 12(b)(2) The Motion Raising Defenses and Objections.

(2) *Defenses and Objections Which Must Be Raised.* The defense of double jeopardy and all other defenses and objections based on defects in the institution of the prosecution or in the indictment, information, or complaint, other than that it fails to show jurisdiction in the court or to charge an offense, may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment, information, or complaint to charge an offense may be raised by suggestion of the parties or the court at any time during the pendency of the proceeding.

(3) *Time of Making Motion.* The motion shall be made no later than thirty (30) days after the plea is entered, except that if the defendant has moved pursuant to Rule 9.1 to dismiss, it shall be made within thirty (30) days after entry of an order disposing of that motion; but in any event the court may permit the motion to be made within a reasonable time after the plea is entered or a Rule 9.1 motion has been determined.

State v. Shelton, 990 A.2d 191, 203 (R.I. 2010). In a murder prosecution, counsel for the defendant did not preserve for review his argument that several of the counts violated the Double Jeopardy Clauses of the United States and Rhode Island Constitutions. "Such a defense "must be raised in a pretrial motion to dismiss under Rule 12(b)(2) of the Superior Court Rules of Criminal Procedure…Under Rule 12(b)(2), the failure to raise the defense of double jeopardy or merger "constitutes a waiver thereof." Although the rule also provides that "the court for cause shown may grant relief from the waiver," *id,* we have held that "the strong policy favoring the pretrial presentation of a double-jeopardy motion bars its use at such a late post-trial date absent some compelling reason…"

Motions to Suppress

In General:

Super. Ct. R. Crim. P. Rule 47. Motions.

An application to the court for an order shall be by motion. A motion other than one made during a trial or hearing shall be in writing unless the court permits it to be made orally. It shall state with particularity the grounds upon which it is made and shall set forth the relief or order sought. It may be supported by affidavit. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

Contents/Timeliness/Issue Preservation

State v. DeWolfe, 402 A.2d 740 (RI 1979). "…defendant's written suppression motion submitted to the court below neither mentions the search warrant nor the affidavit. Nor did defendant orally supplement his motion at the hearing with any explanation why he thought the search warrant was invalid or the affidavit insufficient. Alleging mere conclusions – that the warrant and affidavit were 'not sufficient' – is not enough. … As one court has remarked, '[evidentiary] hearings need be held only when the moving papers allege facts with sufficient definiteness, clarity, and

specificity to enable the trial court to conclude that relief must be granted if the facts alleged are proved.'" Id. at 743.

State v. Dustin, 874 A.2d 244 (R.I. 2005). Defendant convicted of two counts of possession appealed the denial of a pre-trial motion to suppress. After the motion was denied, defendant stipulated to the record (regarding the evidence he previously sought to suppress) and waived his right to a jury trial. R.I.S.C. affirmed.

- The primary issue considered by R.I.S.C. was whether defendant waived his right to appeal by stipulating to the record rather than proceeding to a trial.

- Although it is well settled that a defendant who enters a conditional plea of guilty or *nolo contendere* waives his or her right to appeal the hearing justice's denial of any pretrial motions to suppress, "the adversarial nature of the proceedings below were sufficient to preserve [for appeal] the hearing justice's denial of defendant's pretrial motion to suppress." Id. at 247.

State v. Mlyniec, 15 A.3d 983, 997 (R.I. 2011). Midtrial, defendant made an oral motion to suppress a statement that police allegedly took from defendant after he had invoked his right to counsel. R.I.S.C. held that review was waived, reasoning that "defendant had the necessary information to be able to make this argument prior to trial…but he clearly failed to do so.… We are of the opinion that the motion therefore was untimely and was appropriately denied."

- In all criminal trials "efforts to suppress evidence must be, by motions, made and heard prior to trial.… This rule is necessary because postponement of the suppression hearing until after trial has begun would subvert the state's right to appeal [the] suppression, because jeopardy then would have attached." Id.

State v. Chum, 54 A.3d 455 (R.I. 2012). Judge denied defendant's pre-trial motion to suppress incriminating statements he made to police, but he could not challenge the denial on appeal because the prosecutor only mentioned the confession in his opening statement and never admitted it into evidence.

- In his opening statement, the prosecutor promised the jury that he would prove the case "with the defendant's words." Specifically, he told them that the defendant admitted "that he approached the house with a friend… [and] he ordered Chhit to shoot the guys. … You'll hear about the defendant giving that statement."

- However, the confession was never mentioned during the prosecution's case-in-chief, so it was not actually admitted as evidence at trial. Despite the comments made by the prosecutor in his opening statement, "it affords [the defendant] no harbor because statements of counsel are not evidence." Instead of the suppression issue, defense counsel should have objected to the state's failure to present the evidence promised in its opening statement, but counsel failed to object and preserve that issue.

Practice Tip: It is critical that defense counsel make a thorough review of all potential pre-trial motions and file them prior to trial to preserve issues for pre-trial argument and appellate review. If in doubt, file the motion so long as there is some good faith basis in order to preserve the issue. The motion can always be passed without hearing or argument.

Motion to Suppress Tangible Evidence – Standard and Burden of Proof

Standing

State v. Porter, 437 A.2d 1368, 1371 (R.I. 1981). "The burden of establishing the requisite standing to challenge the admissibility of evidence seized rests squarely on the defendant."

- This is the threshold issue; without having established standing in the tangible evidence, a defendant cannot raise a challenge that such evidence was illegally searched and seized.

Burden of Proof

State v. Marshall, 387 A.2d 1046, 1048 (R.I. 1978). "[I]t is the state's burden to prove that the requirements of a warrantless search or seizure have been met." The standard is preponderance of the evidence.

State v. Tavarez, 572 A.2d 276, 279 (R.I. 1990). "We are not here dealing with a challenge to the state's introduction of confessions or statements of a defendant… Rather we are here faced with a situation in which the state seeks to introduce reliable, tangible evidence that by its very presence upon defendant's person constituted the commission of a felony… [W]e decline to impose the clear and convincing standard in respect to cases involving the establishment of reasonable suspicion or probable cause for Fourth Amendment purposes. We believe that the "fair preponderance" standard employed by the [United States] Supreme Court… places a sufficient burden upon the state at a Fourth Amendment Suppression hearing. There the state must establish the factual predicate to justify the introduction of totally reliable tangible evidence."

State v. Shelton, 990 A.2d 191, 200 (R.I. 2010). "[T]he state bears the burden of proving, by a preponderance of the evidence, that a defendant has freely and voluntarily given consent to a search."

State v. Barkmeyer, 949 A.2d 984, 997 (R.I. 2008). In the context of a motion to suppress evidence seized as the result of third party consent, "[t]he burden of establishing common authority and the effectiveness of a third party's consent rests on the state. At a suppression hearing, the state bears the burden of establishing valid consent 'by a fair preponderance of the evidence.'" (internal citations omitted).

Motion to Suppress Defendant's Statements

State v. Humphrey, 715 A.2d 1265, 1274 (R.I. 1998). Only those statements made voluntarily are admissible. "A statement is involuntary if it is extracted from the defendant by coercion or improper inducement, including threats, violence, or any undue influence that overcomes the free will of the defendant. The determination of whether or not a confession was freely and voluntarily made must be made in light of the totality of the circumstances surrounding the challenged statement."

State v. Bido, 941 A.2d 822, 835 (R.I. 2008). "When ruling on a motion to suppress a confession, the trial justice should "admit a confession or a statement against a defendant only if the state can first prove by clear and convincing evidence that the defendant knowingly, intelligently, and voluntarily waived his [or her] constitutional rights expressed in Miranda v. Arizona."

State v. Griffith, 612 A.2d 21, 25-26 (R.I. 1992). "The Miranda holding imposes a primary rule that no statement obtained during custodial interrogation is admissible unless the prosecution proves that the subject knowingly and intelligently waived his rights before the statement was made. The determination of whether there has been a waiver depends in each case on 'the particular facts and circumstances surrounding that case, including the background experience, and conduct of the accused.' This issue is often closely linked to whether the confession was voluntary, and the state bears a similar burden of proving by clear and convincing evidence that a defendant waived his rights in a voluntary, knowing, and intelligent manner."

- Though closely tied in with the voluntariness of the statement generally, the preceding standard applies to the voluntariness of the defendant's statement vis-à-vis whether he or she voluntarily waived his or her Miranda rights.

State v. Apalakis, 797 A.2d 440, 446-47 (R.I. 2002). "Both the Rhode Island and the Federal Constitutions bar the use in a criminal trial of a defendant's involuntary statements. To determine whether a statement was voluntary, this Court looks to the totality of the circumstances. If, in light of all the facts and circumstances, a statement was 'the product of [a defendant's] free and rational choice,' the statement was voluntary. If, however, the statement was 'the result of * * * coercion that had overcome the defendant's will at the time he confessed,' the statement must be suppressed. The prosecution bears the burden of proving that a defendant's statements were voluntarily by at least a preponderance of the evidence. Moreover, in Rhode Island, the state must furnish clear and convincing evidence of voluntariness." (internal citations omitted).

Motion to Suppress Prejudicial Police Statements

Practice Tip: Even if a defendant's statement to police is admitted, there may be portions of it that include prejudicial statements by police, such as opinons or comments equivalent to vouching or bolstering. Counsel should make a line by line request for these statements to be redacted from any statement that will be submitted to the jury.

State v. Gaudreau, 139 A.3d 433 (R.I. 2016). This case can be read for the proposition that the R.I.S.C. is prepared to suppress and/or redact unfairly prejudicial statements made by police during recorded interviews/interrogations when their probative value is outweighed by unfair prejudice and the defendant has not made inculpatory statements.

- "Often, defendants move to suppress confessions that have not been recorded because '[b]oth the Rhode Island and the Federal Constitutions bar the use in a criminal trial of a defendant's involuntary statements.' It is a frequent argument that a videotape is the best evidence of whether a defendant's inculpatory statements have met that test." Id. at 444.

- "However, when a defendant does not challenge the admission of his own statements as being involuntary, but, as is the case here, seeks to suppress the statements of the police, trial courts must engage in a very different type of analysis. In these situations, it is our opinion that the evidence should be viewed like any other evidence; other grounds may exist for the introduction of such evidence, in its entirety or in a redacted form, pursuant to the Rhode Island Rules of Evidence. See Rule 402 of the Rhode Island Rules of Evidence" Id.

- "Ultimately, it is our opinion that the trial justice should have conducted a balancing test and carefully weighed the low probative value of the recorded comments from the officers against the prejudicial impact to defendant. But, to the extent that there was any error in admitting the videotaped interrogation, we conclude that it was harmless. Id. at 449.

- "Although we conclude that the videotaped interrogation admitted against this defendant was not so prejudicial as to require a new trial, we believe such evidence should be judiciously considered for its probative value when, as here, the defendant makes no inculpatory statements." Id. at 450.

Motion to Suppress Out-of Court or In-Court Identification

Practice Tip: While motions to suppress identifications generally fail, having the hearing will give you an early look at witness and how they'll come across before a jury. Such information can be invaluable when testimony takes place before a jury.

State v. Hall, 940 A.2d 645, 653 (R.I. 2008). "A witness's out-of-court identification is not admissible at trial if the identification procedure employed by the police was 'so unnecessarily suggestive and conducive to a substantial likelihood of misidentification that the accused was denied due process of law.'"

State v. Brown, 42 A.3d 1239, 1242-43 (R.I. 2012). "When faced with determining whether an identification procedure was improper, a trial justice must perform a two-step analysis. The trial justice first must 'consider whether the procedure used in the identification was unnecessarily

suggestive.' Only if the trial justice answers the first question in the affirmative does he or she proceed to the second step—determining 'whether in the totality of the circumstances the identification was nonetheless reliable.'" (Internal citations omitted).

- The defendant averred that the out-of-court photographic array from which he was identified was unduly suggestive, in that "only two depicted 'dark-skinned black males' and, consequently, only two of the six pictures matched [the complainant's] description of his attackers." Id. at 1242.

- The R.I.S.C. affirmed the denial of defendant's motion to suppress, based in part, on the physical similarities between the defendant and the other photos in the array; the non-suggestive manner in which the array was presented; and that the complainant identified defendant "right away." "In determining whether the photographic array poses a substantial risk of misidentification, we must 'compare the physical characteristics of each individual featured in the display to the general description of the suspect given to police by the victim." Id. at 1243.

State v. Texter, 923 A.2d 568, 574 (R.I. 2007). The following five factors should be considered when determining whether a suggestive identification is independently reliable: "[1] the opportunity of the witness to observe the criminal during commission of the crime; [2] the level of attention paid by the witness' [3] the accuracy of the witness's description of the criminal; [4] the witness's degree of confidence in the identification at the time of the confrontation; and [5] the amount of time elapsed between commission of the crime and the confrontation."

State v. Gatone, 698 A.2d 230, 236 (R.I. 1997). "[T]he subjects of a photographic array need not be 'look-alikes,' as 'long as they possess the same general characteristics [as those described by the complainant]."

- The photo array was determined not to be unnecessarily suggestive when the complainant described the perpetrator as "a Caucasian male in his thirties with medium complexion, medium to small build, weighing under 170 pounds, approximately five feet seven inches in height, and in need of a shave." Although all the photos in the array depicted clean-shaven men, they were all "Caucasian males who at least appear to be similar in age and possess similar physical characteristics." Id.

State v. Addison, 748 A.2d 814, 818 (R.I. 2000). "A pretrial identification that is found by a trial justice to require suppression does not automatically bar a later in-court identification. On the contrary, we have held that when a pretrial identification of a defendant is suppressed, a subsequent in-court identification of that defendant is not *per se* excluded unless the state's prosecutor fails to demonstrate by 'clear and convincing evidence that the in-court identification was based upon observation of the suspect other than during the pretrial identification.' This clear and convincing standard is deemed to have been satisfied when the state can demonstrate that the proposed in-court identification is based 'upon a source independent of the [tainted] identification.'"

State v. Holland, 405 A.2d 1211 (R.I. 1979). "[W]here a timely and sufficient motion is made to suppress identification testimony on the ground that the testimony has been tainted by pretrial photographic identification procedures, the motion must be heard and determined by the court outside the jury's presence in the same manner as any other motion to suppress evidence alleged to be inadmissible, because unlawfully obtained."

State v. Austin, 731 A.2d 678 (R.I. 1999). Defendant was convicted of various assault charges and appealed, arguing that the lineup procedures used by the police were unnecessarily suggestive. In affirming the conviction, the R.I.S.C. held that the police used "neutral, non-suggestive procedures," in that "[t]he members of the line-up were sufficiently similar in appearance," and "[a]ll line-up members were white males of approximately the same age, build, height while seated, and complexion." The Court stated that they "have never required that line-ups be composed of near identical people, but only that lineup members be 'reasonably similar.'" Id. at 682.

State v. Delahunt, 401 A.2d 1261 (R.I. 1979). Regarding the right to counsel at pretrial lineup proceedings, the R.I.S.C. aligned with the United States Supreme Court, holding that an accused is entitled to counsel during post-indictment lineup proceedings. However, they declined to extent the right to lineup proceedings taking place prior to "the initiation of adversary judicial criminal proceedings whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." Id. at 571 (quoting Kirby v. Illinois, 406 U.S. 682, 689 (1972)).

Motions *In Limine*

Practice Tip: Motions in limine are heard by the trial judge just prior to the start of trial. They typically involve evidentiary issues that are highlighted for the trial judge to consider and decide prior to witness testimony. It is not enough to prevail during the motion in limine stage. The trial judge may change his/her mind during the course of trial testimony. Also, defense counsel must be sure to object to any admitted testimony during the course of trial in order to preserve the issue for appeal. If the trial judge agrees to limit the testimony of state witnesses, you may request that the trial court instruct these witnesses about the limitation outside the presence of the jury. Instructions from prosecutors to their witness are not enough to ensure that the Court's ruling is followed.

State v. Gadson, 87 A.3d 1044, 1053-54 (R.I. 2014). "The preliminary grant or denial of an *in limine* motion need not be taken as a final determination of the admissibility of the evidence referred to in the motion… [F]ailure to object 'in the vital context of the trial itself (except where the *in limine* ruling was unequivocally definitive) [constitutes] a waiver of the evidentiary objection and [is] therefore an issue that may not be raised on appeal." (Internal citations omitted).

- Although the Rhode Island Supreme Court allows for the preservation of rulings on motions *in limine* in situations that are "unequivocally definitive," it is prudent to renew objections to the challenged evidence at trial.

State v. Andujar, 899 A.2d 1209 (R.I. 2006). Defendant's objection to the state's motion *in limine*, as well as his own motion *in limine*, was sufficient to preserve his argument that a past acquittal of sexual assault against the intended target of his alleged solicitation of murder should be admitted at trial, even though he did not renew the objection at trial.

- "A ruling on a motion *in limine*, unless unequivocally definitive, will not alone suffice to preserve an evidentiary issue for appellate review; a proper objection on the record at the trial itself is necessary." Id. at 1222.

- Defendant's pre-trial motion was preserved because it was unequivocally definitive. The trial justice's *in limine* ruling stated: "No one… will offer any witness, evidence, statement or argument [that] defendant was acquitted [of those charges]… You can't mention the outcome. That's the court's order. You can appeal me." The court determined this to indicate finality not subject to reconsideration at trial. Id.

State v. Ciresi, 45 A.3d 1201, 1212-13 (R.I. 2012). Where the trial justice informed defense counsel that her motion *in limine* rulings against defendant were only preliminary, counsel waived the right to appeal the rulings when he did not also object to the admission of the evidence during trial. Counsel's "overarching objection to the motion *in limine* prior to trial" did not preserve the issues. At a minimum, counsel should have "requested from the trial justice a continuing objection as to the introduction of uncharged misconduct."

- See also State v. Gianquitti, 22 A.3d 1161 (R.I. 2011). Defendant wanted to call an expert witness during his trial, and a hearing was held months before trial to decide the issue. The judge ruled to exclude the testimony, but called the ruling "preliminary in nature." Defendant waived the right to review the issue by not renewing his objection at trial or by at any point making an offer of proof regarding what the testimony would show.

State v. Silvia, 898 A.2d 707 (R.I. 2006). Trial court denied defendant's motion *in limine* seeking to bar state from using defendant's prior convictions as grounds for impeachment.

- In order "to raise and preserve for review the claim of improper impeachment with a prior conviction, a defendant must testify." Without a record of the impact of the allegedly erroneous impeachment "[a]ny possible harm flowing from… permitting impeachment by a prior conviction is wholly speculative." Id. at 719 (quoting Luce v. United States, 105 S. Ct. 460, 463-64 (1984)).

Miscellaneous Pre-Trial Motions

Super. Ct. R. Crim. P. Rule 12. Pleadings and Motions Before Trial—Defenses and Objections.
(b) The Motion Raising Defenses and Objections

1. Defenses and Objections Which May Be Raised. Any defense or objection which is capable of determination without the trial of the general issue may be raised before trial by motion.

2. Defenses and Objections Which Must Be Raised. The defense of double jeopardy and all other defenses and objections based on defects in the institution of the prosecution or in the indictment, information, or complaint other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objection then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment, information, or complaint to charge an offense shall be noticed by the court at any time during the pendency of the proceeding.

3. Time of Making Motion. The motion shall be made no later than thirty (30) days after the plea is entered, except that if the defendant has moved pursuant to Rule 9.1 to dismiss, it shall be made within thirty (30) days after entry of an order disposing of that motion; but in any event the Court may permit the motion to be made within a reasonable time after the plea is entered or a Rule 9.1 motion has been determined.

Raise or Waive Rule with Pre-trial Motions

State v. Shelton, 990 A.2d 191, 203 (R.I. 2010). "The failure to raise the defense of double jeopardy or merger in a pretrial motion to dismiss constitutes a waiver thereof.…[T]he strong policy favoring the pretrial presentation of a double-jeopardy motion bars its use at such a late post-trial date absent some compelling reason."

State v. Kluth, 46 A.3d 867 (R.I. 2012). Although defense counsel "vigorously objected to prosecution's motion to consolidate," appellate review was waived because counsel did not file a Rule 14 motion to sever.

State v. Day, 925 A.2d 962, 977 (R.I. 2007). "[A] merger argument 'is essentially a double jeopardy argument.' As such, Rule 12(b)(2) is applicable… Consequently, a defendant's failure to raise such a motion before trial precludes that defendant from thereafter raising a double jeopardy challenge." (Internal citations omitted).

State v. Sivo, 925 A.2d 901 (R.I. 2007). The R.I.S.C. held that challenges to the jury selection process fall under Rule 12(b)(2). "[A] defendant seeking to challenge the constitutionality of a grand or petit jury must file a pretrial motion pursuant to Rule 12(b)(2) and (3) of the Superior Court Rules of Criminal Procedure." Id. at 919.

17(C) Subpoenas

Practice Tip. The use of 17(c) subpoenas pursuant to Rule 17(c) of the District and Superior Court Rules of Criminal Procedure to obtain documents from third parties is an indispensable part of effective pre-trial practice. A sample 17(c)motion, order and Subpoena Duces Tecum is available in the sample motions section. In both District and Superior Court, the proper practice is as follows:

1. File a *Motion for Issuance of 17(c) Subpoena* with the court along with notice to the opposing party. Schedule for a hearing date with the clerk's office.

2. Upon grant of the motion, submit an order and request a return date for compliance. Serve the order along with a Subpoena Duces Tecum upon the third party by constable.

3. If the request includes documents subject to Rhode Island Healthcare Confidentiality Act, R.I. G.L. §5-37.3-6.1, (i.e., medical records) provide notice to the subject of the records (or their parent/guardian) along with notice of their right to challenge the subpoena and allow for 20 days prior to the return date. Include a copy of this notice to the third-party provider.

4. If the records are disputed by the opposing party, suggest an *in camera* review by the trial court prior to disclosure.

CONTINUANCES

To Secure Counsel

State v. Moran, 699 A.2d 20 (R.I. 1997). Defendant requested a continuance before trial so that his trial counsel would be available to try the case. The trial court denied the request and forced defendant to hire another attorney two days before trial. R.I.S.C. reversed and ordered a new trial.

- "Attorneys are not fungible" and a criminal defendant's choice of counsel commands a "presumption in favor of its being honored." Id. at 25.

- Factors to consider in deciding motion for continuance:

    1. Promptness of motion;
    2. Length of time requested;
    3. Age and intricacy of case;
    4. Inconvenience to parties, witnesses, counsel, jurors, and court;
    5. Legitimacy of request or "mere foot-dragging;"
    6. Whether defendant caused need for continuance;
    7. Whether other competent counsel is ready to proceed;
    8. Whether there are multiple co-defendants. Id. at 26.

State v. Ashness, 461 A.2d 659 (R.I. 1983). At the start of an armed robbery trial, the defendant requested representation by his previous public defender or that he be able to retain private counsel. His current public defender had just recently been assigned the case. The trial judge denied the motion and R.I.S.C. affirmed.

- Defendant's request came too late as he had ample time prior to the start of trial to request new counsel.

State v. Dias, 374 A.2d 1028 (R.I. 1977). The trial judge refused defendant's request for a continuance to retain private counsel. The public defender was forced to conduct a probation violation hearing immediately despite the fact that he believed private counsel would enter and thus no hearing preparations were made. R.I.S.C. reversed, ruling that the trial judge abused his discretion.

- Two factors to consider in granting a continuance are whether the defendant is intentionally delaying the case and any prejudice to the state.

State v. Caprio, 819 A.2d 1265 (R.I. 2003). Defendant in a probation violation hearing requested a continuance to obtain new counsel because his attorney unintentionally misrepresented the state's offer in a plea agreement. (Counsel said the offer was six years with fifteen months to

serve when in actuality the offer was fifteen years with six years to serve.) R.I.S.C. upheld the trial court's denial of defendant's motion.

- Decision of the trial court will not be disturbed absent an abuse of discretion.

- "'Exceptional circumstances'" are necessary to justify a delay due to an eleventh-hour discharge of counsel. Id. at 1270 (quoting State v. Monteiro, 277 A.2d 739, 742 (R.I. 1971)).

State v. Snell, 892 A.2d 108 (R.I. 2006). Five days before trial began, defendant sought to discharge his court-appointed counsel. His motion was denied then, and denied again when raised on the first day of trial. Defendant's family then told defense counsel that he was "fired," as defendant had retained private counsel. Trial court refused the request for a continuance, finding that defendant was attempting to stall the trial. R.I.S.C. affirmed.

- A defendant's "right to choose his own counsel cannot be manipulated to delay proceedings or hamper the prosecution." Id. at 120.

- "To work a delay by a last minute discharge of counsel, there must exist exceptional circumstances" and defendant "must show good cause such as a conflict of interest, a breakdown in communication or an irreconcilable dispute with his attorney." Id.

State v. Gilbert, 984 A.2d 26 (R.I. 2009). The hearing justice at defendant's probation violation hearing denied defendant's request for a continuance to obtain alternate counsel because he lacked confidence in his appointed attorney. The attorney's request to withdraw was denied as well. R.I.S.C. affirmed.

- The hearing justice considered several factors, including that the defendant waited until the second day of the hearing to make the request, the defendant's doubts lacked adequate grounds, defendant could not represent himself, and no other counsel was immediately available to represent defendant.

- Upon a request for a continuance to secure new counsel, the hearing justice's decision "requires the careful balancing of the presumption in favor of the defendant's right to trial counsel of choice and the public's interest in the prompt, effective, and efficient administration of justice." This balancing requires a fact-specific analysis of each case. Id. at 30.

- The defendant is afforded less rights at a violation hearing than a trial, including the right for a continuance to seek counsel of defendant's choice. Id.

To Prepare for Late Discovery or Severance

State v. Coelho, 454 A.2d 241 (R.I. 1982). The state filed an 11th hour supplemental discovery. The trial judge abused discretion when he denied the continuance, severed the case, and forced defendant to proceed to trial.

- Factors to consider with request for continuance in wake of untimely discovery:

    1. Reason for non-disclosure;
    2. Extent of prejudice to opposing party;
    3. Feasibility of rectifying prejudice by a continuance;
    4. Any other relevant factors. Id. at 245.

State v. Simpson, 595 A.2d 803 (R.I. 1991). In a trial of multiple defendants, it was not learned that all defendants were subjected to a neutron-activation test to determine the residue of gunpowder until the cross-examination of the lead detective. Defendants' request for a mistrial or a continuance to secure an expert was denied. R.I.S.C. reversed.

- "When, because of a failure to furnish discovery on the part of the state, a highly significant piece of information, hitherto unexpected, becomes available and when that information has a potential to alter the course of the defense completely, counsel is reasonably entitled to an effective remedy. The remedy may either be a mistrial or a continuance of sufficient duration to seek expert testimony of their own choosing and to reevaluate all the discovery material that may have a bearing upon use of the information. To require that this be done in the heat and hurly-burly of the trial process is to place a burden upon counsel, that, as illustrated in this case, can scarcely be successfully borne." Id. at 808.

State v. Chalk, 816 A.2d 413 (R.I. 2002). Trial court denied defendant's motion for a continuance despite the state's failure to disclose 700 (out of 800) pages of material that the defendant could have used to impeach one of three complaining witnesses. R.I.S.C. upheld.

- "Ordinarily, the receipt of more than 800 pages of documents relating to a key witness late in the afternoon on the day before the witness will be cross-examined would signal that a continuance would be appropriate." Id. at 421.

- Defendant was uniquely aware of the information within the documents, and had sufficient time (six months) to determine that the 100-page disclosure was incomplete.

- The trial justice examined the documents, many of which were boilerplate, and determined that the balance of the afternoon and evening was sufficient to examine them.

State v. Gordon, 880 A.2d 825 (R.I. 2005). After firing his attorney, defendant motioned for a continuance claiming insufficient time to familiarize himself with discovery materials. R.I.S.C. upheld trial court's denial.

- The trial court doubted defendant's claim of unfamiliarity with the material because he was able to knowledgeably cross-examine one of the state's witnesses. It further noted that defendant's firing of eight different court appointed attorneys was more likely the cause of any unfamiliarity than the court's denial of a continuance.

To Locate a Witness or Obtain Evidence

State v. Verry, 102 A.3d 631 (R.I. 2014). In a child abuse trial, defense counsel requested a continuance during jury selection in order to conduct genetic testing based upon recent discovery received. The trial judge denied the request for a continuance and R.I.S.C. upheld this denial.

- "In certain instances, a request for a continuance should be granted 'in order to protect the accused's constitutional right to procure the attendance of such witnesses and obtain such evidence as may be necessary to permit a full defense.' Id. at 635 (quoting *State v. Levitt,* 118 R.I. 32, 41, 371 A.2d 596, 601 (1977)). However, "[a] defendant is not entitled to a continuance * * * as a matter of course."

- "No mechanical test exists for deciding when a denial of a request for a continuance is so arbitrary as to violate due process… However, unless a defendant can satisfy certain criteria warranting a delay of trial, 'the denial of a continuance will not be deemed so arbitrary as to constitute a due process violation … The defendant bears the burden of establishing that: (1) "the [evidence] would be material"; (2) "[the] defendant used due diligence in attempting to procure" the evidence; (3) "it is reasonably certain that the [evidence] would be available on the date to which the trial was continued"; and (4) "the testimony would not be merely cumulative." Id. at 635. (quoting *State v. Firth,* 708 A.2d 526, 530 (R.I.1998)).

State v. Barbaso, 908 A.2d 1000 (R.I. 2006). Defendant requested a one-day continuance due to the unavailability of a witness to his alleged felony assault. The trial judge denied the request and R.I.S.C. affirmed.

- "The denial of a motion for a continuance constitutes an abuse of discretion only if the movant is able to satisfy all four of the criteria enumerated in Firth." Id. at 1006.

- In this case, the trial judge found the witness's testimony to be cumulative. The defendant also failed to use due diligence to procure the witness because he had known for two weeks that she was in Puerto Rico.

- "… circumstances can arise which require that a request for a continuance be honored so as to protect the accused's Sixth Amendment-based right to present favorable evidence necessary to his or defense." However, the court held that the facts of this case did not amount to a constitutional violation. Id. at 1005.

State v. Firth, 708 A.2d 526 (R.I. 1998). The trial judge did not abuse his discretion in denying defendant's request for a continuance to secure the presence of a government agent to testify about fiber analysis where the state had stipulated to the testimony.

- A motion for continuance made immediately prior to or during a trial is addressed to the sound discretion of the trial judge. Id. at 530.

- A judge's discretion should be guided by 4-part test:

    1. Is the testimony material?
    2. Did the defendant use due diligence in attempting to procure the witness?
    3. Will the requested witness be available on the future date?
    4. Is the testimony not merely cumulative? Id. at 530.

DISCOVERY VIOLATIONS

Prosecutor's Duty under Rule 16

> "The language of Rule 16 is very clear. The prosecutor must provide a defendant with specific information when requested. The prosecutor does not have the authority to interpret the rule and decide what constitutes substantial compliance or equivalent compliance. Rule 16(a)(6) requires the attorney for the state to provide a list of witnesses, not what the prosecutor thinks is the functional equivalent of a list…A list of witnesses means just that--the people who will testify at trial. It does not mean everyone the Attorney General's department or the police interview in investigating the state's case. Too much information can be as useless as no information at all."
>
> State v. Verlaque, 465 A.2d 207, 214 (R.I. 1983).

DeCiantis v. State, 24 A.3d 557 (R.I. 2011). "With respect to persons whom the state intends to call as witnesses, Rule 16 requires that the state produce any of their prior recorded statements, a summary of their expected trial testimony, and any records of their prior convictions." Id. at 570.

- "But the state's discovery obligations extend beyond the literal language of Rule 16; this Court has expressly stated that, '[w]hen evidence does not fit one of these three categories, but may nonetheless be *helpful to defendant's effective cross-examination* of a witness, a defendant's right to that evidence arises from the right of confrontation, and thus becomes an issue only when a defendant is improperly denied the ability to confront and to effectively cross-examine an adverse witness at trial.'" Id. (quoting State v. Chalk, 816 A.2d 413, 418 (R.I. 2002)) (emphasis in original).

- "In addition to the requirements imposed by Rule 16 and this Court's rulings as to discovery obligations, the Due Process Clause of the United States Constitution, as interpreted by the United States Supreme Court in Brady v. Maryland, 373 U.S. 83

(1963), and its progeny, 'requires that the state provide a criminal defendant with certain information,'" particularly if it "would be favorable to the accused and the evidence is material to guilt or punishment." Id. Brady material can include "evidence which could be used to impeach the testimony of a witness." Id. at 572.

- "We have stated that the overarching purpose of Rule 16 [of the Superior Court Rules of Criminal Procedure] is to ensure that criminal trials are fundamentally fair." Id. at 570.

Cronan ex rel. State v. Cronan, 774 A.2d 866 (R.I. 2001). "A prosecutor's obligation under Brady applies even in cases when the defendant forwards only a general request for Brady material, or even when the defendant has failed to make any Brady request at all." Id. at 879 n. 15 (citing U.S. v. Agurs, 427 U.S. 97 (1976)).

Remedies for Violation

> "Rule 16(i) provides sanctions for the failure of either party to comply with [Rule 16]. … '[The court] 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.' The phrase 'such other order as it deems appropriate' makes the declaration of a mistrial an appropriate sanction. The imposition of any Rule-16 sanction is a matter within the sound discretion of the trial justice."
>
> State v. Darcy, 442 A.2d 900, 902 (R.I. 1982).

State v. John Rainey, 175 A.3d 1169 (R.I. 2018). In a child molestation trial, the state disclosed a new 404(b) witness just after the jury was sworn. The trial judge overruled defense counsel's request to prohibit this witness from testifying despite the Court's finding of a Rule 16 violation. The trial judge did delay the presentation of this witness for three days to give defense counsel time to prepare. While the R.I.S.C.affirmed the trial judge, it rejected the state's argument that there was no Rule 16 violation because the witness was not expected to testify until she agreed to right after the jury was sworn.

> "…we reject the state's characterization of Rule 16. If this Court adopted the state's purported interpretation of Rule 16, its intended purpose of "eliminat[ing] surprise at trial and … ensur[ing] that both parties receive the fullest possible presentation of the facts prior to trial," *Langstaff*, 994 A.2d at 1219 (quoting *Garcia*, 643 A.2d at 186), would be eviscerated and its protection rendered ineffective because parties could simply wait until the eve of trial to contact witnesses, framing their testimony as "unexpected." Id. at 1180.
>
> The trial judge did not abuse his discretion by allowing a 3-day delay before this testimony was offered. The fact that defense counsel did not object to the continuance undercuts any argument of prejudice.

State v. Musumeci, 717 A.2d 56 (R.I. 1998). The trial court's dismissal of a marijuana delivery case for state discovery violations was an abuse of discretion. The defense failed to show substantial prejudice due to the state's failure to turn over a police log. R.I.S.C. sustained the state's appeal and remanded for retrial.

- There is a difference between deliberate non-disclosure (Wyche, Quintal) and negligent non-disclosure (Coelho).

- Dismissal of a case is still a remedy, but only in extreme cases. "Absent substantial prejudice and a showing that no other available discretionary measures can possibly neutralize the harmful effect … some other remedy or sanction (continuance, mistrial, evidence preclusion, reimbursement for attorney fees, referral of offending prosecutor) should generally be imposed – at least in the first instance – upon the court's learning of a material discovery violation…" Id. at 63-64.

- "…dismissal is an appropriate sanction only as a last resort and only when less drastic sanctions would be unlikely or ill suited to achieve compliance, to deter future violations of this kind, and to remedy any material prejudice to defendant." Id. at 63.

DeCiantis v. State, 24 A.3d 557 (R.I. 2011). "In accordance with Brady, if a prosecutor has suppressed evidence that would be favorable to the accused and the evidence is material to guilt or punishment, the defendant's due-process rights have been violated and a new trial must be granted." Id. at 570 (quoting State v. McManus, 941 A.2d 222, 229-30 (R.I. 2008)).

- In Rhode Island, due process and Brady are only implicated when the non-disclosure of evidence is found to be deliberate. Under those circumstances, the R.I.S.C. "has consistently held [that] deliberate nondisclosure constitutes 'grounds for a new trial regardless of the degree of harm to the defendant.'" Id. "[T]he issue of materiality is of no moment in a case of deliberate nondisclosure." Id. at 571 n. 10 citing State v. Chalk, 816 A.2d 413, 419 (R.I. 2002).

- Evidence that is inadvertently undisclosed is analyzed for "prejudicial effect" and must have had a reasonable possibility of influencing the outcome of the case before a new trial will be granted. Id. at 571. (For further details about applying these standards, see McManus, below under "Non-Disclosure").

Cronan ex rel. State v. Cronan, 774 A.2d 866 (R.I. 2001). Although Rule 16 and Brady are often interrelated, if defense counsel believes that the prosecutor has violated both Rule 16 and Brady then counsel should treat each as two distinct objections for purposes of properly preserving the issues for appeal.

- On appeal in Cronan, the defendant alleged that the prosecutors had failed to comply with Rule 16 because they ignored multiple discovery requests. He also alleged that the prosecutors had violated Brady by not disclosing medical records related to the

complaining witness's mental health. R.I.S.C. held that the defendant had preserved the Brady issue for appeal, but not the Rule 16 issue.

- The defendant had waived the Rule 16 issue because he had not moved to compel discovery, objected at trial, or otherwise alerted the trial court to the alleged discovery violations. However, the Court did consider the issue of the Brady violation. Even though defendant had "lacked specificity" and made only "vague requests for certain 'Brady material'—both during trial and in his motion for new trial," the Court found these actions sufficient to preserve the defendant's argument, analyzing it as a general request for Brady material. In this regard, Cronan highlights the importance of preserving these discovery issues by specifically objecting to undisclosed evidence on *both* Rule 16 and due process (Brady) grounds.

Non-Disclosure

Tempest v. State, 141 A.3d 677 (R.I. 2016). The State was not entitled to certiorari relief because the trial judge properly granted defendant's second amended application for post-conviction relief and vacated his conviction for a 1982 homicide because the evidence in the State's case was nearly entirely circumstantial and the former prosecutor acted deliberately in failing to disclose a witness's pretrial statements—in violation of Brady—regarding the involvement of defendant's brother (a police officer) in concealing the murder weapon and defendant's children being excited about getting a puppy where the statements were novel, clearly had impeachment value, and might have made the difference between conviction and acquittal. R.I.S.C affirmed granting of application of post-conviction relief granting defendant new trial.

- "In accordance with Brady, if a prosecutor has suppressed evidence that would be favorable to the accused and the evidence is material to guilt or punishment, the defendant's due-process rights have been violated and a new trial must be granted." * * * "With respect to such a failure to disclose, our jurisprudence "provides even greater protection to criminal defendants than the one articulated [by the United States Supreme Court]" * * * "When the failure to disclose is deliberate, this [C]ourt will not concern itself with the degree of harm caused to the defendant by the prosecution's misconduct; we shall simply grant the defendant a new trial." … "Thus, instances of deliberate nondisclosure are "[t]he easy cases[.]" … "We have said that "[t]he prosecution acts deliberately when it makes 'a considered decision to suppress … for the purpose of obstructing' or where it fails 'to disclose evidence whose high value to the defense could not have escaped … [its] attention.'" Id. at 682-83 (internal citations omitted).

- In this case, the prosecutor wrote in his notes: "more new info re: [Gordon Tempest] putting pipe in closet + dog for the kids—too late—don't volunteer new info—will cause big problems."

    - "the former prosecutor's own words—"don't volunteer"—indicate a considered decision not to offer the new information to the defense." Id at 683.

State v. Wyche, 518 A.2d 907 (R.I. 1986). In a rape case, the prosecutor failed to disclose to defense counsel until after the trial that the complainant had registered a .208 blood alcohol reading at the hospital. The prosecutor was on oral notice of this information during the trial but withheld it. R.I.S.C. granted a new trial.

- Oral notice alone was enough to trigger Rule 16 and Brady.

- "When the failure to disclose is deliberate, this court will not concern itself with the degree of harm caused to the defendant by the prosecution's misconduct; we shall simply grant the defendant a new trial. The prosecution acts deliberately when it makes 'a considered decision to suppress for the purpose of obstructing' or where it fails 'to disclose evidence whose high value to the defense could not have escaped [its] attention." Id. at 910.

Depina v. State, 2016 R.I. Super. LEXIS 102 (R.I. Super. Ct. 2016). "In cases where there is a failure to disclose evidence that is not deliberate, the Court must balance the culpability of the prosecution with the materiality of the evidence in determining whether a new trial is appropriate." Id at 17 (citing In re Ouimette, 115 R.I. 169, 177-79, 342 A.2d 250, 254-55 (1975).

State v. Horton, 871 A.2d 959 (R.I. 2005). In a first-degree child molestation case, the state provided defense counsel two of four pictures on which the complainant had circled body parts involved in the molestation, as well as videotape showing the complainant marking all four drawings. R.I.S.C. held that the state's failure to disclose all four was a violation, but upheld the trial court's decision not to sanction the state.

- "There is no doubt that under the broad reach of Rule 16, all four pictures should have been provided to the defense, and the state's failure to provide two of the pages, even if an innocent mistake, constitutes a discovery violation." Id. at 960. Whether the defense was on notice that four pictures existed was irrelevant.

- Although the trial court should have found a violation, it is well settled that the trial court is in the best position to determine whether sanctions are appropriate, and will not be reversed absent clear abuse of discretion. Id.

State v. Gonzalez, 923 A.2d 1282 (R.I. 2007). Before trial for possession and delivery of cocaine, the prosecution failed to disclose FBI reports that detailed earlier uncharged drug sales from defendant to an informant. The non-disclosure led to defense counsel unwillingly eliciting testimony of these other sales while cross-examining a police detective. The trial judge denied defendant's motion for a mistrial because both parties agreed that the non-disclosure was unintentional. R.I.S.C vacated the convictions and granted a new trial.

- Any other lesser measure than a mistrial was an abuse of the trial judge's discretion and could not counterbalance the evidence or remedy the fact that defendant's trial strategy was neutralized. Id. at 1287-89.

- "Although sanctions are not warranted for unintentional violations unless defendant proves that he was prejudiced, it is equally true that 'if no other available discretionary measures can possibly neutralize the harmful effect of improperly admitted evidence, then a mistrial should be declared.'" Id. at 1286-87 (quoting State v. Darcy, 442 A.2d 900, 902 (R.I. 1982)).

- Because the discovery violation was unintentional, a new trial would not be precluded on double jeopardy grounds. Id. at 1289. *Cf.* State v. Casas, 792 A.2d 737, 739 (R.I. 2002) (if the prosecution intentionally goads the defense into asking for a mistrial, the Double Jeopardy Clause precludes a retrial).

State v. Stravato, 935 A.2d 948 (R.I. 2007). Defendant, convicted on three counts of second-degree child molestation, motioned for a new trial when he discovered after trial that the state failed to disclose a victim impact statement in their possession. R.I.S.C. held that the trial court committed clear error in denying the motion and ordered a new trial.

- "In deliberate nondisclosure cases, prejudice to the other party is presumed" and the defendant is entitled to a new trial, regardless of any other factor. Id. at 951.

- The state acknowledged that it knew of the statement, but withheld it only because they believed its disclosure was unnecessary under Rule 16. The state also argued that the information in the statement could be found elsewhere in the disclosed materials. The Court held that this good-faith belief of compliance by the prosecution was unavailing. The evidence was of high-value to the defense and, under the definition in Wyche, constituted a "deliberate non-disclosure." Id. at 953.

- "Stated another way, the state's deliberate nondisclosure of evidence properly requested under Rule 16 *is* the prejudice. Id. at 953-54. "Equivalent compliance is not acceptable when the requested evidence falls within the clear command of Rule 16." Id. at 956.

State v. McManus, 941 A.2d 222 (R.I. 2008). Prior to trial for murder, state failed to disclose a witness's interview transcript. Defendant alleged a due process violation under Brady v. Maryland, 83 S. Ct. 1194 (1963). R.I.S.C. affirmed the trial court's finding that the non-disclosure was inadvertent and harmless.

- Brady requires that a new trial be granted following non-disclosure of information material to guilt or punishment. To satisfy the degree of materiality necessary for a Brady violation, a defendant must show that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." McManus, 941 A.2d at 230 (quoting Cronan ex rel. State v. Cronan, 774 A.2d 866, 880 (R.I. 2001)). Rhode Island presumes materiality for deliberate non-disclosure (See Stravato, above).

- In a case of an inadvertent non-disclosure, due process and Brady are not implicated and the defendant must demonstrate procedural prejudice by showing that 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." Id.

Cronan ex rel. State v. Cronan, 774 A.2d 866 (R.I. 2001). In assault case, medical records were not "suppressed" by the prosecutor within the meaning of Brady v. Maryland where the victim was the defendant's estranged wife and defendant's awareness of her mental health problems and treatment should have led him to proactively subpoena the records or independently access the medical records that his divorce attorney had already obtained for use in the couple's divorce proceedings.

- Evidence is not regarded as "suppressed" by the prosecutor "when the defendant has access to the evidence before trial by the exercise of reasonable diligence" or "if the defendant either knew, or should have known, of the essential facts permitting him to take advantage of any exculpatory evidence." Id. at 881.

State v. Werner, 851 A.2d 1093 (R.I. 2004). Defendant was not deprived of his due process right to a fair trial when the state failed to preserve a surveillance videotape that recorded the area near where he was alleged to have committed a robbery. The defendant was provided with a copy, but the state destroyed the original because it was of poor quality and did not appear to provide any footage related to the crime.

- To determine whether failure to preserve evidence violates a defendant's due process rights, Rhode Island has adopted the tripartite test established by California v. Trombetta, 467 U.S. 479 (1984) and Arizona v. Youngblood, 488 U.S. 51 (1988):

  > "This test requires a defendant to establish that the proposed evidence possesses, first, an exculpatory value that was apparent before the evidence was destroyed, and [second, is] of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. Third, a defendant also must demonstrate that the failure to preserve the exculpatory evidence amounted to bad faith on the part of the state." Id. at 1105 (citations omitted).

- R.I.S.C. determined that defendant did not meet any of the three required elements. The Court did note, though, that "there is no doubt that the Warwick police should have kept the original videotape intact until the end of the trial." Nonetheless, their "sloppy police work … did not amount to bad faith," as required to satisfied the three-prong test. Id. at 1106-07.

State v. Diefenderger, 970 A.2d 12 (R.I. 2009). Defendant on trial for robbery was not entitled to a copy of testifying accomplice's immunity agreement or transcript of immunity hearing. Prosecutor's summarization of the hearing and presiding justice's comments regarding witness's anticipated testimony were sufficient for defendant to conduct a meaningful cross-examination with respect to the grant of immunity.

DeCiantis v. State, 24 A.3d 557 (R.I. 2011). Prior to murder trial, defendant was entitled to know the uncharged crimes and other benefits provided by the state to an informant in exchange for his testimony against the defendant. Although Rule 16 only requires that the prosecution provide a defendant with a record of prior *convictions*, the uncharged crimes constituted relevant impeachment evidence under Brady to assert that witness's testimony was motivated by his own self-interest. However, in this particular case the nondisclosure was not a reversible error because it was inadvertent and not material to the outcome.

State v. Rolle, 84 A.3d 1149 (R.I. 2014). At trial, prosecutor introduced a witness statement that according to him had "inconsequential differences" than the statement he had introduced during discovery. The trial justice declared a mistrial, and defendant filed a motion to dismiss the charges against him on double jeopardy grounds.

- Where a prosecutor's misconduct is made in good-faith but the damage done to the defendant's case is otherwise irreparable, the proper remedy is a new trial, but not to dismiss the charges against the defendant completely. The defendant's motion was denied because the prosecutor's misconduct was "no more than a good-faith error in judgment." Id. at 1156.

Late Disclosure

State v. Scurry, 636 A.2d 719 (R.I. 1994). During trial, the state disclosed for the first time a B.C.I. rap sheet for a defense witness. Based upon the B.C.I., defense decided not to call a critical corroborating witness. The B.C.I. was later determined to belong to another person. R.I.S.C. ordered a new trial.

- "Due process requires that every defendant have ample and sufficient opportunity to establish the best and fullest defense available…it is imperative that defendants come to trial as well-prepared as possible to raise reasonable doubt in the minds of one or more jurors." Id. at 725.

- "…we have consistently condemned the untimely disclosure of extensive discovery material just prior to trial or in the midst of trial. Such disclosure not only makes the task of defense counsel difficult, it also reduces counsel's effectiveness by forcing changes in defense strategy mid trial." Id. at 725.

- Here, the mid-trial presentation of the wrong B.C.I. denied defendant a crucial opportunity to present the best and fullest defense.

State v. Olsen, 610 A.2d 1099 (R.I. 1992). On the second day of trial, the state mentioned in a chambers conference the existence of inculpatory phone calls made by defendant to a state witness. The state had not disclosed the specific content of these calls but had made reference to them in a discovery answer. Defendant was offered a continuance but rejected it.

- While the state should have elaborated the content of these conversations in its discovery response, the state's answer still put defendant on notice about these calls. Therefore no prejudice to defendant.

- By not accepting a continuance, the defendant undercut his argument that he was prejudiced by the state's non-disclosure. Lesson: If in doubt, ask for a continuance.

State v. Coelho, 454 A.2d 241 (R.I. 1982). The defendant in an embezzlement case was forced to go to trial despite the state's 11th hour compliance with discovery. R.I.S.C. ordered a new trial. See also, Continuances.

- Trial court must consider what is "right and equitable under all circumstances and the law" in the wake of discovery violations. Id. at 245. Test to use in determining the need for a continuance based upon untimely discovery:
    1. Reason for nondisclosure;
    2. Extent of prejudice to opposing party;
    3. Feasibility of rectifying prejudice by continuance;
    4. Any other relevant factors. Id.
- In light of these factors, trial court's refusal to grant even a brief continuance was an abuse of discretion.

State v. Simpson, 595 A.2d 803 (R.I. 1991). In an attempted murder trial, the state failed to disclose to defense counsel until after trial commenced about a negative gunshot residue test from defendants' hands. The trial court denied a request for a mistrial. R.I.S.C. ordered a new trial.

- The production of these test results in the midst of trial "completely distracted defense counsel from their former strategic plans to present the defense." Id. at 807.
- "Trial lawyers must be able to adapt strategy to evolving circumstances… However, very few trial lawyers are superhuman. When, because of a failure to furnish discovery on the part of the state, a highly significant piece of information, hitherto unexpected, becomes available and when that information has a potential to alter the course of the defense completely, counsel is reasonably entitled to an effective remedy. The remedy may either be a mistrial or a continuance of sufficient duration to seek expert testimony of their own choosing and to reevaluate all the discovery material that may have a bearing upon use of that information. To require that this be done in the heat and hurly-burly of the trial process is to place a burden upon counsel, that, as illustrated in this case, can scarcely be successfully borne." Id. At 808.

State v. Langstaff, 994 A.2d 1216 (R.I. 2010). In a child molestation sexual assault case involving a father and daughter, the state timely disclosed that one of the incidents the daughter would testify to was a shower her father took with her when she was seven years old. However, mere hours before her trial testimony, the state notified the defense that the daughter was now alleging sexual contact during the shower. In response to defense counsel's objection, the trial judge would not allow the testimony as part of the state's case-in-chief, but did allow it as Rule 404(b) evidence to show the father's lewd disposition. R.I.S.C. vacated the guilty verdict and

remanded for a new trial, holding that the testimony should not have been admitted for any purpose due to its late disclosure.

- In regard to Rule 16, the "primary purposes of the rule are to eliminate surprise at trial and to ensure that both parties receive the fullest possible presentation of the facts prior to trial." Id. at 1219 (quoting State v. Garcia, 643 A.2d 180, 186 (R.I. 1994)).

- "Since the prosecution did not disclose this evidence to defendant until the morning of the second day of trial, it was plainly inadmissible during that trial—whether as part of the prosecution's case-in-chief or as Rule 404(b) evidence." Id. at 1220

- The Court found that the prosecutor had only learned of the new information on the eve of trial and did quickly supplement his discovery to the defendant. While this indicated that the late disclosure was not deliberate, it was still clear error to admit the evidence, because it was "exactly the type of situation that Rule 16 was designed to prevent" and defense counsel was "understandably unprepared to counter such damaging evidence." Id. at 1220.

More Specific Discovery

State v. Mollicone, 654 A.2d 311 (R.I. 1995). The trial court denied defendant's motion to compel more specific discovery, expressly, which documents out of a large volume of documents the state planned to introduce at trial. R.I.S.C. upheld the trial court.

- Approximately six months prior to trial, the state provided defendant with copies of documents it planned to introduce at trial and invited defendant to examine and copy many boxes of additional materials stored in two different storage rooms.

- The court determined that Rule 16(a)(4) imposed an obligation to allow defendant "to inspect" the documents in question and that the state had fulfilled its obligation. Id. at 325.

State v. Motyka, 893 A.2d 267 (R.I. 2006). Defendant convicted of first-degree murder and first-degree sexual assault was not entitled to discovery of software package used by private laboratory as it performed DNA testing or the user manual for the fluorescent scanner used in such testing.

- Defendant was not entitled to materials because they were possessed by a third party rather than the state. Even if in state possession, the software and manual did not constitute "results or reports… of scientific tests or experiments," as required by the rule allowing defendant to discover medical and scientific evidence against him. Id. at 282.

- R.I.S.C. also held that the failure to obtain the materials did not prevent the defendant from adequately challenging the state's DNA evidence.

State v. Oster, 922 A.2d 151 (R.I. 2007). Upon defendant's motion, the trial court issued a pretrial discovery order requiring the state to detail the anticipated trial testimony of its witnesses and specify the defendant's statements that it intended to introduce at trial. The state also had to summarize and itemize the statements. R.I.S.C. held that the trial judge exceeded the bounds of her authority and vacated the discovery orders.

- "Our holding in Verlaque does not require the state to go beyond the requirements of Rule 16. The state is not obliged to refine its responses or catalogue its evidence." Id. at 167.

- "…the state may not be directed to specify the document or tape recording upon which 'the anticipated testimony is based' nor is it required to designate the portions of any statements or prior testimony the state intends to use at trial. This work is the responsibility of the defense." Id. at 164.

Surprise Testimony

Practice Tip: The Supreme Court is making clear defense counsel's obligations in matters of discovery violations. Observe all discovery deadlines, object to discovery violations at trial and accept a continuance if offered in response to surprise testimony.

State v. Darcy, 442 A.2d 900 (R.I. 1982). In a DWI death resulting case, the prosecutor elicited a damaging admission from its witness during direct examination not previously disclosed in discovery. (The witness testified that after the accident defendant had asked him if he would admit to driving). R.I.S.C. ordered a new trial.

- "It would be unfair to allow the state the tactical advantage of surprise gained by violating, whether intentionally or unintentionally, the rules of discovery." Id. at 903.

- "An attorney who expects, by reason of reliance upon the rules, that honest, accurate and complete answers will be given in response to discovery requests can scarcely be effective if his expectations are wholly shattered in the course of a trial." Id.

- "When the failure of discovery results in complete surprise on a crucial issue, then we believe that due process and effective assistance of counsel will be impacted." Id.

- "Curative instructions would have been of no assistance, and even a continuance within the trial itself (a remedy that was not requested) would not have given counsel the requisite time to reassess his defense in the light of this new evidence. Once this extremely prejudicial and unanticipated evidence was admitted, only a mistrial would have placed the defendant in a position to prepare to meet its effect at a subsequent trial." Id.

State v. Ashness, 461 A.2d 659 (R.I. 1983). At trial, the state called two witnesses not named in their answer to discovery. Court allowed their testimony over defendant's objection. R.I.S.C. affirmed.

- While calling such a witness is a violation of discovery rules, forbidding a party to call a witness is such a drastic sanction that should be imposed only if the discovery violation has or will result in prejudice to the opposing party.

- Here there was no prejudice. One witness' testimony could be gleaned from the discovery afforded and the other witness was merely for purposes of chain of custody.

State v. Diaz, 456 A.2d 256 (R.I. 1983). In a murder trial, a state witness testified for the first time about the defendant's statement that 'something bad was going to happen.' The state had not previously disclosed the existence of this statement and nothing in their response to discovery could have alerted the defense to this statement. R.I.S.C. ordered a new trial.

- "The trial of a criminal case is not to be considered a poker game in which each player holds his cards close to his vest. It is, as are all trials, a search for the truth. The prosecution's conduct is inexcusable. It was well aware in late April what Angel was going to say in May, but it summarized his future testimony in such a fashion

that nobody but a psychic could foresee that Angel's job was to establish the element of premeditation." Id. at 258.

State v. Pona, 810 A.2d 245 (R.I. 2002). On appeal, defendant argued that the trial judge should have prohibited the testimony of a state's witness on the basis of undue surprise because he was not disclosed until the day before trial, and his testimony went beyond the scope of his witness statement. (The witness statement concluded with the police officer stating that he responded to a call for backup; however, he testified about what happened at the scene after his arrival.) R.I.S.C. affirmed.

- No violation by the state because *defendant's initial discovery request was late* and the state's response was within the required time. Furthermore, the state disclosed the witness in a supplemental notice the day after he was interviewed by the state. To find a violation would discourage good faith compliance with the continuing duty of disclosure.

- The witness statement was adequate for defendant to determine what the testimony might be. Moreover, defendant failed to make a discovery objection at trial and also denied the court's offer of a continuance, conduct that undercuts any argument of prejudice to defendant.

State v. Werner, 831 A.2d 183 (R.I. 2003). The trial court allowed the state to call a witness whose existence and area of expertise were made known to defendant even though the substance of his testimony was not disclosed. R.I.S.C. upheld finding that Rule 16 was not violated.

- In an attempt to satisfy admissibility requirements for introducing photographs seized from the defendant, the state relied upon testimony of a firearms expert to establish a nexus between the weapon in the photos and the crime weapon. The judge found that defendant could not have been surprised by the testimony because the judge stated that the pictures would not be admitted until the nexus was established, the prosecution informed the court of its intent to establish the nexus, and defendant knew the witness would be called as a firearms expert.

- Although the state has a continuing duty to update its discovery during the course of the trial, it appears that defendant should have inferred the substance of the testimony.

Defendant's Discovery Obligations

State v. Burke, 522 A.2d 725 (R.I. 1987). During a rape trial, the defense supplemented its answer to discovery indicating that it would be calling two police officers to offer testimony that contradicted the complainant's. The trial judge refused to allow these witnesses to testify, citing both Rule 16 and sequestration violations. R.I.S.C. ruled that the trial judge erred in precluding these witnesses but ultimately affirmed the case noting that the error was harmless.

- The defense is under no obligation to answer the state's discovery requests when the proffered testimony is based upon facts not known until trial. "Since the defense did not know with any degree of certainty, prior to its cross-examination of the complaining witness, specifically what impeachment testimony would be offered, no violation of Rule 16 occurred in the instant case." Id. at 730.

Practice Tip: Be careful about relying too heavily on Burke. The vast majority of R.I.S.C. decisions in this area have upheld a trial court's sanctions against defense counsel for late disclosure. Rule 16 is a two-way street and defense counsel must be diligent in its discovery obligations.

State v. Engram, 479 A.2d 716 (R.I. 1984). Defense counsel waited until the morning of trial to provide supplementary discovery to the state that disclosed his intentions to call three witnesses in support of an alibi defense. As a sanction, the trial judge prohibited the witnesses from testifying. R.I.S.C. affirmed, holding that the sanction was not an abuse of discretion.

- The reciprocal nature of Rule 16 obligates the defendant to fully answer the state's discovery request, including notifying the state of his intention to rely on an alibi and the names and addresses of the corroborating witnesses. Id. at 718. Defense counsel argued that he had only recently located the intended witnesses. The trial court noted that when presented with such uncertainty, the appropriate action was to initially assert his intention to rely on an alibi and later supplement the additional information. Id. See, e.g., State v. Silva, 374 A.2d 106, 109 (R.I. 1977) (where defendant was in "substantial compliance" with alibi disclosure rule, but failed to disclose certain required details until trial, forbidding defendant to call the witness was an impermissibly "drastic sanction… in a criminal trial where one's life or personal liberty is at stake.")

- By the court's reasoning, an eleventh-hour alibi disclosure is presumed to be either fabricated or deliberately withheld. Therefore, the defendant's right to call the witness does not counterbalance the prejudice to the state, where it is unprepared to rebut the defense or make an appropriate investigation of the alibi. But see Bowling v. Vose, 3 F.3d 559 (1st Cir. 1993) (holding that although defendant in Rhode Island arson case failed to disclose reliance on alibi defense prior to trial, the alibi witness still should have been permitted because the defendant did not learn the exact time of the fire until the fire inspector was cross-examined and this gave rise to the possible alibi defense).

State v. Juarez, 570 A.2d 1118 (R.I. 1990). Defendant sought to obtain the results of a polygraph exam taken by his co-defendant, who intended to testify against the defendant at defendant's murder trial. However, the co-defendant had taken the test privately at the advice of his own attorney. As a result, R.I.S.C. held that the test results were not discoverable because they were not in possession of the State and were protected by the co-defendant's attorney-client privilege.

State v. Vocatura, 922 A.2d 110 (R.I. 2007). Following defense counsel's deliberate non-disclosure of witness's testimony, the trial justice excluded portions of the witness's testimony. R.I.S.C. held that the sanction was not an abuse of discretion.

- At trial for felony domestic assault, the defense witness testified that he observed the victim grab defendant's leg and that defendant then pulled away; this testimony directly contradicted defendant's discovery responses that witness would testify that he observed no physical contact between defendant and victim.

- Because the state had already presented its case-in-chief, the surprise testimony was prejudicial to the state's case in that it suggested victim's injuries could have occurred accidentally, a defense that the state was left unprepared to challenge.

State v. Gehrke, 835 A.2d 433 (R.I. 2003). The trial court prevented a witness for the defendant from testifying as a sanction for violation of Rule 16. The only issue on appeal was whether this sanction deprived defendant of his Sixth Amendment right to present witnesses on his behalf. R.I.S.C. upheld the exclusion as an appropriate sanction.

- The Sixth Amendment right to compulsory process for obtaining witnesses does not excuse defendant from compliance with discovery requirements. Preclusion of witness testimony for deliberate violations is not precluded.

State v. Harnois, 638 A.2d 532 (R.I. 1994). In an attempted murder trial wherein the defendant did not testify, the trial court precluded defense counsel from cross-examining a police officer as to the defendant's statements. The R.I.S.C. affirmed ruling.

- The defendant did not take the stand at trial. He may not testify by other means, including by way of the unsworn statements made to police. Id. at 1036-37.

- By choosing to exercise his Fifth Amendment right, defendant waived all rights to testify. To admit defendant's statements under either rule would be to ignore the rules' well-established and unambiguous guidelines. The defendant was seeking to offer testimony through his statements, which might raise reasonable doubt in the minds of a jury, yet would deprive the state of the opportunity of cross-examination. The rules of evidence will not be manipulated in this way.

JURY SELECTION

Batson Challenges

In the formative case of Batson v. Kentucky, 476 U.S. 79 (1986), the Supreme Court of the United States announced that although the Court's focus for the previous one hundred years largely focused on discrimination during selection of the jury venire, the Equal Protection clause also prohibits the state from discrimination based on race when exercising peremptory strikes in selection of the petit jury. Id. at 88-89.

- The Court explained that "the central concern of the… Fourteenth Amendment was to put an end to governmental discrimination on account of race." And that "Exclusion of black citizens from service as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure." Id. at 85.

- "Racial discrimination in selection of jurors harms not only the accused whose life or liberty they are summoned to try." But also, that "The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice." Id. at 87.

- The Rhode Island Supreme Court has articulated the steps necessary to successfully to assert a *Batson* claim: "the [moving party] must first make a prima facie showing that the [nonmoving party] has exercised peremptory challenges on the basis of race, then the burden shifts to the [nonmoving party] to articulate a race-neutral reason for striking the juror(s) in question, whereupon the trial court is left to determine whether the [moving party] has carried his or her burden of proving purposeful discrimination. State v. Austin, 642 A.2d 673 (1994) (quoting State v. Holley, 604 A.2d 772, 777 (R.I.1992)).

State v. Austin, 642 A.2d 673 (1994). Rhode Island Supreme Court recognizes the U.S. Supreme Court's extension of *Batson* in Powers v. Ohio, 499 U.S. 400 (1991) holding that the Equal Protection Clause also provides a criminal defendant with standing to bring *Batson* challenge where the juror(s) in question and defendant do not share the same race.

J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127 (1994). U.S. Supreme Court holds that the Equal Protection Clause prohibits discrimination in jury selection on the basis of gender, or on the assumption that an individual will be biased in a particular case solely because that person happens to be a woman or a man. "Today we reaffirm what, by now, should be axiomatic: Intentional discrimination on the basis of gender by state actors violates the Equal Protection Clause, particularly where, as here, the discrimination serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women." Id. at 130-31.

OPENING STATEMENTS

Defendant's Right to Open Without Calling Witnesses

State v. Martinez, 139 A.3d 550 (R.I. 2016). Defendant convicted at trial of several felonies, including possession of a firearm while in possession of a controlled substance with intent to deliver. After the prosecutor's opening statement, defense counsel informed the trial judge he wanted to address the jury, telling the judge he expected to develop affirmative evidence through cross-examination of the state's witnesses. The trial judge summarily denied counsel the opportunity to make a statement, without inquiring more about the nature of the evidence he intended to produce. The Rhode Island Supreme Court reversed, holding that the trial justice erred by not permitting the defendant to make an opening statement without affording him the opportunity to articulate the nature of the affirmative evidence he intended to elicit on cross-examination.

- The Court explained that Rule 26.2 of the Superior Court Rules of Criminal Procedure permits the defendant to make an opening statement in circumstances where the defendant attempts to develop affirmative evidence on cross-examination through a negative assertion so long as counsel states with specificity the nature of the evidence he or she intends to bring out on cross-examination. Id. at 554.

- Further, when defense counsel indicates that he or she intends to bring out affirmative evidence on cross-examination, it is the duty of the trial judge to inquire further about the nature of that evidence, and not summarily deny defense counsel an opportunity to make an opening statement:

  "In the case at bar, although defense counsel did not describe with specificity what evidence defendant planned to solicit on cross-examination, our review of the record demonstrates that he did not have the opportunity to do so. When defense counsel informed the trial justice that, "I expect that there's going to be things that * * * I'm going to bring out on cross [-examination] [that] the [s]tate is not going to be able to establish," it was incumbent upon the trial justice to inquire further. Instead, the trial justice summarily declared that he would not permit defendant to present an opening statement. Our review of the trial transcript leads us to conclude that the trial justice's summary determination deprived defendant of the opportunity to make an offer as to precisely what evidence he intended to elicit. It was incumbent upon the trial justice to inquire further at this juncture and to allow defense counsel to provide a more detailed explanation." Id. at 555.

Prosecutorial Misconduct During Opening Statements

State v. Colvin, 425 A.2d 508 (R.I. 1981). In a delivery of controlled substances trial, the prosecutor referred to prior uncharged drug sales by the defendant. Defendant moved to pass the case, was denied the motion, and then moved for a cautionary instruction. The trial judge cautioned the jurors that statements of counsel are not evidence. R.I.S.C. reversed defendant's conviction and remanded.

- The trial judge's instruction was insufficient to cure the prejudice: "…an admonition to the jury that opening or closing statements do not constitute evidence is insufficient to correct the prejudicial error committed in the opening statement." Id. at 512.

- Use this language to both move to pass the case and then to justify strong language in the cautionary instruction.

State v. Casas, 792 A.2d 737 (R.I. 2002). Prosecutor in a possession with intent to deliver case improperly told the jury that the state had been investigating the defendant's drug trafficking for years even though defendant had moved *in limine* to preclude the state from such references. The trial court granted a mistrial and denied defendant's double jeopardy motion to dismiss. R.I.S.C. affirmed.

- Although the trial judge had not ruled on the motion *in limine* prior to opening statements, R.I.S.C. noted that the state was on notice that the issue was "forbidden territory." Id. at 740.

- In order to prevail on a double jeopardy challenge following dismissal on grounds of prosecutorial misconduct, defendant must show that the misconduct was intended to goad defendant into moving to pass the case. Id. at 739 (citing State v. McIntyre, 671 A.2d 806, 807 (R.I. 1996)).

- Prosecutor's misconduct was unintentional because it happened early in the trial (rather than later in response to a rapidly deteriorating case), because defense counsel initially responded that he had no evidence that the misconduct was intentional, and because the prosecutor was young, inexperienced, and unfamiliar with the concept that character evidence is inadmissible to establish guilt. Id. at 740.

State v. Andujar, 899 A.2d 1209 (R.I. 2006). Defendant on trial for soliciting another to commit murder was entitled to introduce the fact of his prior acquittal for charges of sexual assault perpetrated against the same victim, following the prosecutor's reference to the prior charges during opening and closing arguments.

- Although juries are instructed that statements made in opening and closing arguments are not evidence, the prosecutor's statements created the unavoidable impression that defendant had sexually assaulted the intended victim and wanted her murdered to prevent her from testifying.

- Evidence of a defendant's prior acquittal is admissible when evidence about that conduct is introduced by the state. The acquittal may be presented to the jury either by stipulation, by the parties' testimony, or by an instruction from the trial justice. Id. at 1221-22.

State v. Chum, 54 A.3d 455 (R.I. 2012). During his opening statement, the prosecutor promised the jury that they would hear testimony about an incriminating statement the defendant gave to police admitting his involvement in a shooting. However, during the trial, the prosecutor never actually presented the promised testimony.

- Although the defendant did not properly preserve this issue for appeal, R.I.S.C. still noted the following:

  "When, as in this case, a prosecutor makes an unfulfilled promise in opening statement about the evidence that will be put before the jury, a criminal defendant has several avenues available to address the issue." For example:

  1) "Defense counsel can remind the jury during closing argument that the prosecutor promised that certain evidence would be admitted and that the evidence never materialized."

  2) Once it becomes clear that the evidence will not be presented "defense counsel can seek a mistrial or, in the alternative, a curative instruction." Id. at 461.

Practice Tip: If you think the prosecutor has committed error during opening statements, ask for a sidebar after the state's opening and place on the record the perceived error by the state as well as your remedy – mistrial and, if denied, a limiting or cautionary instruction. The R.I.S.C. will not consider the objection preserved without a request for a limiting or cautionary instruction. (See Preservation of Record, p. 93). You are not required to interrupt the opening in order to preserve the objection.

WITNESS VOUCHING & BOLSTERING

> Vouching takes place "when the government says or insinuates that it possesses special knowledge that its witness is testifying truthfully" or "if the prosecution places the prestige of the government behind the witness."
>
> State v. Chakouian, 537 A.2d 409, 412 (R.I. 1988).

> Bolstering occurs "when one witness offer[s] an opinion regarding the truthfulness or accuracy of another witness'[s] testimony." While the terms are "technically distinct," vouching and bolstering are "frequently used interchangeably" and the differences are negligible.
>
> State v. Wray, 38 A.3d 1102, 1111 (R.I. 2012).

Practice Tip: Described by Justice Flanders as "the third rail" of Rhode Island criminal procedure, few areas of criminal procedure have led to more mistrials or reversals than witnesses vouching or bolstering. It is standard practice in sexual assault trials to admit this type of testimony to enhance the credibility of the complainant. Often the findings of an expert are negligible and the purpose of this witness is to simply bolster the complainant. Other times, an expert witness or police officer is subtly vouching for prosecution witnesses. Defense counsel needs to utilize both types of objections to reign in the prejudicial impact of this testimony.

Vouching by Law Enforcement

State v. Webber, 716 A.2d 738 (R.I. 1998). In a first-degree arson case, a fire marshal's testimony that an accelerant-sniffing dog was more sensitive to the presence of accelerants than a lab test constituted impermissible vouching. R.I.S.C. vacated and remanded.

- "… a witness is not permitted to offer an opinion regarding the truthfulness or accuracy of another witness' testimony, even when the opinion does not literally address the other witness' credibility." Id. at 742 (citing State v. Haslam, 663 A.2d 902 (R.I. 1995)).

- Here, the fire marshal's testimony had the same substantive import and bolstered another witness' credibility.

State v. Miller, 679 A.2d 867 (R.I. 1996). In a rape trial, the police detective's testimony that lay witnesses sometimes have important information that has to be drawn out constituted impermissible witness vouching. R.I.S.C. vacated and remanded.

- "…the admission of Detective Carroll's testimony concerning her experience with witnesses and their tendency not to disclose important elements clearly violates the principles [against witness vouching]…in this case wherein the quantity and the quality of the evidence were closely balanced and credibility was of paramount

importance, the admission of the detective's testimony on this issue would be construed as endorsement of the mother's credibility." Id. at 873.

Practice Tip: Use this endorsement language in any close case of vouching.

State v. Lassiter, 836 A.2d 1096 (R.I. 2003). A detective testified that the state's only eyewitness to a murder was not being truthful when he first stated that he could not identify the shooter. The state introduced this testimony to bolster the credibility of the witness who subsequently identified the defendant. R.I.S.C. vacated and remanded.

- Testimony constituted impermissible vouching because "it squarely addressed and bolstered another witness's credibility." Id. at 1109 (quoting State v. Miller, 679 A.2d at 872).

State v. Rushlow, 32 A.3d 892 (R.I. 2011). Police officer improperly bolstered the testimony of sexual assault complainant by testifying that she had a "sincere" demeanor when he interviewed her shortly after the alleged assault; however, the bolstering did not constitute prejudicial error. R.I.S.C. affirmed defendant's convictions.

- Opinion testimony qualifies as inadmissible bolstering if it "has the same substantive import as if it squarely addressed and bolstered another witness's credibility." Id. at 899.

- R.I.S.C. held that the officer's testimony was impermissible bolstering because it "went beyond just simply addressing how [the complainant] physically appeared during the interview by testifying about his opinion of the veracity of her accusations."
- (Nonetheless, under appellate review, the Court declined to order a new trial because the error was not sufficiently prejudicial, particularly because the officer's statement was brief, a cautionary instruction was given, and the complainant was extensively cross-examined.)

State v. Dalton, Citation Pending (R.I. November 27, 2018). Trial court overruled objection to police officer's testimony concerning observations of the complainant that he did not appear intoxicated but did look like he was just coming out of a deep sleep. R.I.S.C. affirmed stating that brief comment was not properly preserved for appeal did not prejudice the defendant.

- "Brief statement was a non-responsive answer to the state's inquiry as to whether [officer] smelled alcohol on Jonathan's breath. The state was not asking whether [the officer] thought Jonathan had been assaulted."

State v. Wray, 38 A.3d 1102 (R.I. 2012). Trial court ruled that detective did not impermissibly bolster the credibility of identification witnesses when he testified that, when he found the

defendant, the defendant fit the description he received through police dispatch from the identification witnesses. R.I.S.C. affirmed.

- R.I.S.C. reasoned that the detective's testimony did not comment on the accuracy of the identification witnesses, "but rather on his own assessment of the defendant relative to the police-radio dispatches he received of his description, … a task that is common to his responsibilities as a police officer."

- But see State v. Nicoletti, 471 A.2d 613 (R.I. 1984), where a police officer did improperly bolster the identification witnesses by testifying that their descriptions were "fairly close … [maybe] a little too tall, but … pretty much on the money." The key distinction in Nicoletti is that the officer was directly assessing the accuracy of the identification witnesses, a role that should have been left to the jurors.

Vouching by Expert Witnesses

State v. Haslam, 663 A.2d 902 (R.I. 1995). Defendant was convicted of first-degree child molestation against his stepdaughter. At trial, the complainant's counselor testified that she was treating her for sexual abuse recovery. Counselor also testified about who the complainant claimed *didn't* molest her (implying defendant had by elimination). A DCYF worker also testified that she found the defendant's claim of a sexual assault against the complainant by another person unfounded. R.I.S.C. vacated and remanded.

- Counselor's testimony constituted impermissible witness vouching. Counselor was retained months after the alleged abuse ended and had no direct knowledge of the acts. Even if she stated no opinion about whether the abuse occurred, the fact that the complainant was seeing a counselor for two years after the alleged incident had the same substantive import and the jury would perceive that she believed her. Id. at 906.

- The counselor's testimony about who the complainant said *didn't* molest her was inadmissible hearsay not permitted by United States v. Tome, 115 S. Ct. 696 (1995), because while it was a prior consistent statement, it was made after she had a motive to fabricate.

- The DCYF worker's testimony constituted impermissible negative vouching as it implied that the defendant was not to be believed since she found his allegations unfounded. Id. at 907.

- But see State v. Watkins, 92 A.3d 172 (R.I. 2014) where RISC distinguished Haslam: "However, in Lynch, we held that a school psychologist's testimony regarding statements made during treatment of an alleged sexual assault victim did not rise to the level of impermissible bolstering that was present in Haslam. Lynch, 854 A.2d at 1033. Because the psychologist was only identified generally as a school psychologist, there was no reference to "'sexual abuse' counseling", she offered no opinion of the victim's truth or credibility, and the victim herself testified to the

events that took place, "the jury could not reasonably construe [the psychologist's] testimony as vouching for the credibility of [the victim]."

State v. Castore, 435 A.2d 321 (R.I. 1981). It was prejudicial error for a physician to express a factual opinion about whether a sexual assault occurred based upon what the patient told him as opposed to any medical tests or diagnosis. Such an opinion is beyond the realm of his medical capabilities and amounts to vouching for the patient's credibility. R.I.S.C. vacated and remanded.

- "Dr. Brauner was in effect commenting on Barbara's credibility when he concluded, despite no objective medical evidence, that she had been sexually assaulted." Id. at 326.

State v. Roderigues, 656 A.2d 192 (R.I. 1995). In a second-degree child molestation case, defendant called a social worker to testify about the complainant's smiley face drawing. On cross, the state elicited testimony that complainant was suffering post-traumatic stress disorder as a result of sexual abuse by the defendant. R.I.S.C. reversed.

- "Expert medical testimony that includes material not pertinent to diagnosis or treatment - but that corroborates details set forth in the testimony of the complainant - has the effect of buttressing the complainant's testimony." Id.

- Here, the witness was not an expert. The cross-examination exceeded the scope of direct and amounted to impermissible bolstering of the complainant.

State v. Perez, 882 A.2d 574 (R.I. 2005). Trial court denied defense counsel's motion to sequester state's rebuttal witness, a psychiatric expert intended to refute defendant's diminished capacity defense. R.I.S.C. affirmed.

- Defendant unsuccessfully argued that the presence of the state's expert in the courtroom during defendant's testimony would constitute impermissible bolstering when the expert testified later in the trial.

State v. Richardson, 47 A.3d 305 (R.I. 2012). Trial judge did not abuse his discretion by allowing a second DNA expert to testify that he "agreed in large part with the conclusions in [the first expert's] two reports."

- Defense counsel argued that the second expert impermissibly bolstered the first expert's testimony, because the witness relied exclusively on the first expert's reports and did not engage in his own independent examination of the physical evidence. R.I.S.C. held that the testimony did not qualify as bolstering because "the substance of his testimony was an opinion based on the objective scientific observations, facts, and figures contained in [the first expert's] reports."

Vouching by Other Means

State v. Diefenderfer, 970 A.2d 12 (R.I. 2009). Defendant argued that admitting witness's cooperation agreement into evidence constituted improper vouching for the witness's credibility. R.I.S.C. upheld the trial court's decision.

- Witness agreed to testify at trial in exchange for a sentencing recommendation from the state. "[T]he mere statement in the cooperation agreement that [witness] would testify truthfully coupled with her acknowledgment that she could be charged with perjury if she failed to do so does not constitute impermissible vouching and certainly does not require reversal." Id. at 34.

- However, the court noted that, in some cases, "one means through which improper vouching may occur is by admission of plea agreements phrased in a manner that suggested that the government has special knowledge that its witness is speaking the truth." Id. at 32-33 (quoting State v. Chakouian, 537 A.2d 409, 412 (R.I. 1988)).

CROSS-EXAMINATION

Practice Tip: Some trial judges are quick to sustain a prosecutor's objection to questions during cross-examination. Like vouching or bolstering, a trial court's limitations of defense counsel cross-examination has led to multiple reversals but our Supreme Court usually calls it harmless error even if properly preserved for review. Defense counsel should anticipate these objections and have the necessary caselaw in support.

Scope

> "…since the purpose of cross-examination is to impeach a witness' credibility, the general rule that confines the scope of cross-examination to facts brought out during direct examination is inapplicable when the questions are designed either to explain, contradict, or discredit any testimony given by the witness on direct examination or to test his accuracy, memory, veracity or credibility."
>
> State v. Crowhurst, 470 A.2d 1138, 1143 (R.I. 1984).

State v. Roderigues, 656 A.2d 192 (R.I. 1995). In a second-degree child molestation case, the defendant called a social worker to testify about the complainant's smiley face drawing. On cross, the state elicited testimony that complainant was suffering post-traumatic stress disorder as a result of sexual abuse received by defendant. R.I.S.C. reversed.

- State's cross-examination exceeded the scope of direct. Rule 611 limits cross-examination to "the subject matter of the direct examination…Also permitted on cross-examination are the questions designed to explain, contradict, or discredit any testimony by a given witness on direct examination, or test his accuracy, memory, veracity or credibility…When the witness is an expert who has given opinion testimony, the scope is expanded so as to allow questions touching matters testified to in direct examination as well as inquiries purposed upon testing the qualifications, skills or knowledge of the witness or the accuracy or value of his opinion, or the methods by which he arrived at or the data upon which he based his conclusion." Id. at 194.

- Here, the witness was not an expert. The cross-examination exceeded the scope of direct and amounted to impermissible bolstering of the complainant.

State v. Freeman, 473 A.2d 1149 (R.I. 1984). In a murder case in which the only witness that observed the incident was defendant's girlfriend, the trial judge's refusal to allow cross-examination as to her status as a detained arrestee on the evening she gave her second inculpatory statement constituted reversible error.

- "…the partiality of a witness is subject to exploration at trial, and is always relevant…" Id. at 1153 (citing Davis v. Alaska, 94 S. Ct. 1105 (1974)).

- Because the girlfriend's "credibility was vital in establishing defendant's guilt, the trial justice, by totally precluding the defendant from raising and probing the issues of motive, bias, or prejudice, effectively cut off the defendant's right to test [her] credibility fully and adequately." Id. at 1154.

State v. Texter, 594 A.2d 376 (R.I. 1991). The trial judge's refusal to allow cross-examination of the complainant about her husband's potential grudge against defendant was reversible error. Defendant had accused complainant's husband of stealing money from the church and threatened to report him. The accusations against defendant came shortly thereafter.

- Inquiry into this area would have made the existence of bias or motive more or less probable; therefore, the line of inquiry was relevant. Also, the complainant was the only witness against defendant, thus her credibility was a crucial issue at trial.

State v. Doctor, 644 A.2d 1287 (R.I. 1994). In a first-degree murder trial, the defense was precluded from cross-examining a state witness as to a prior inconsistent statement. The state argued and the trial judge agreed that the written statement was missing some punctuation marks that would render it consistent with the witness's testimony at trial. R.I.S.C. reversed.

- "This court and the trial court must not engage in guessing whether the police detective who typed Morris' statement mistakenly omitted a comma or what Morris may have meant by the statement. Such factual determinations are strictly within the purview of the jury or the trier of fact." Id. at 1290.

State v. Clark, 974 A.2d 558 (R.I. 2009). Trial judge granted the state's motion *in limine* to preclude the defendant from cross-examining the complainant about his alcohol consumption on the night defendant allegedly assaulted him. R.I.S.C. held that trial judge did not err in granting the motion.

- Whether alcohol consumption is an issue within the scope of cross-examination depends on the intended purpose of the questioning. When the purpose goes to credibility, neither party may question a witness to show that he or she consumed a "potentially intoxicating substance" prior to an event at issue in the case, "because of the undue potential…to cause confusion and to be unfairly prejudicial." Id. at 583 (quoting State v. Rice, 755 A.2d 127, 148-49 (R.I. 2000)).

- When the purpose is to impeach the witness's perception and memory of the event, the evidence can be introduced to show intoxication *if* the party can first produce "evidence such that different minds can naturally and fairly come to different conclusions on the question of intoxication." Id. (quoting Handy v. Geary, 252 A.2d 435, 442 (R.I. 1969)).

- At the evidentiary hearing on the issue, the trial judge in this case found that defendant's evidence of the victim's alcohol consumption (including police testimony that the victim smelled of alcohol and told the officer he drank ten to twelve beers) was not sufficient to create a dispute that the victim had reached intoxication. It was

not sufficient to overcome other testimony showing that victim could function and communicate normally.

State v. Lomba, 37 A.3d 615 (R.I. 2012). In assault case involving a claim of self-defense, trial judge limited the scope of defendant's cross-examination by prohibiting him from eliciting testimony intended to imply that the complainant was the initial aggressor. R.I.S.C. affirmed, holding that the testimony was cumulative because the same point could have been made with other testimony that was admitted.

- "The ability of a defendant to meaningfully cross-examine the state's witnesses is 'an essential element' of the due process guarantees of the United States and Rhode Island constitutions." Id. at 621.

- "However, an examiner's purview is not boundless, and cross-examination 'may be circumscribed within reasonable parameters of relevance in the sound discretion of the trial justice.'" Id. (quoting State v. Warner, 626 A.2d 205, 209 (R.I. 1993)).

- Other cases have noted that this due process right is also "tempered by the dictates of practicality and judicial economy; trial justices are authorized to exercise sound discretion in limiting the scope of cross-examination." State v. Manning, 973 A.2d 524, 530 (R.I. 2009) (quoting State v. Merida, 960 A.2d 228, 234 (R.I. 2008)).

State v. Brown, 88 A.3d 1101 (R.I. 2014). The defendant sought to introduce a police sketch under the "catch-all" hearsay exception, Rule 804(b)(5). The sketch had been composed based upon the perpetrator's description. While the defendant had been identified by an eye-witness, he did not resemble the police sketch. The R.I.S.C. held that the evidence to be introduced under Rule 804(b)(5) had to be "more probative on the point for which it is offered than *any other evidence* which the proponent can procure through reasonable efforts."(emphasis in original). Id. at 1117. The court went on to say that "special trustworthiness" needed to be shown in order to make hearsay admissible. Id. at 1118. The Court did not say that a defendant could never submit a police sketch of a suspect, just that the heavy burden to meet the hearsay exception was not met in this case.

Complainant's Prior Allegations

Practice Tip: Our Supreme Court has significantly tightened the admissibility requirements of cross examination of prior complainant allegations. The Court has gone from no need to prove false (Oliveira, 1990) to needing to show some falsity (Manning, 2009). Defense counsel should be prepared to make a solid offer of proof in a motion *in limine* setting prior to cross-examination to at least preserve the issue for review. Even after a motion *in limine* is denied, counsel must be on the record making the objection and preserving the issue for review.

State v. Manning, 973 A.2d 524 (R.I. 2009). In child molestation case, trial judge did not abuse his discretion when he prohibited defendant from cross-examining the minor complainant regarding her prior allegations of molestation against defendant.

- While a defendant need not prove the falsity of the prior accusation, he must a least present some indicia tending to show that the prior accusation was false, or he runs the risk of a determination that its probative value is outweighed by its prejudicial effect. The fact that no criminal charges ever resulted was not sufficient to prove the falsity of victim's prior allegation.

- "Significantly, defendant never argued that the prior accusation was relevant to expose any bias, prejudice, or pattern on her behalf." Id. at 534.

State v. Lynch, 854 A.2d 1022 (R.I. 2004). R.I.S.C. affirmed Trial Court's refusal to allow questioning of complainant concerning her prior accusation against a neighbor that had resulted in a conviction. The conviction had no relevance with respect to credibility of the complainant as the conviction "conclusively establish[ed] the truthfulness of her accusations."

State v. Botelho, 753 A.2d 343 (R.I. 2000). Trial court properly precluded defense counsel from questioning witness' prior allegations of sexual abuse against other men where there was insufficient evidence to show the witness had actually alleged the abuse. Witness had denied making such allegations during voir dire and defense counsel was unable to produce evidence corroborating the allegation.

State v. Pettiway, 657 A.2d 161 (R.I. 1995). Trial Court's denial of cross-examination as to the complainant's prior allegations against her mother's previous boyfriends did not mandate a new trial.

- While "a cross-examiner should be afforded ample opportunity to develop issues of bias, prejudice, and motivation properly before the jury" mere denial does not automatically mandate a new trial. In this case the defendant's confession to the crime and the otherwise unrestricted scope of cross-examination rendered the error harmless beyond a reasonable doubt.

State v. Oliveira, 576 A.2d 111 (R.I. 1990). Sexual assault charges involving an eight-year-old complainant were reversed because the trial court refused to allow evidence of the complainant's accusations against two other men. R.I.S.C. reversed, ruling that the complainant's allegations against other men were relevant towards her credibility, regardless of whether the allegations were proven false or withdrawn.

- "We believe that evidence of a complaining witness's prior allegations of sexual assault may be admitted 'to challenge effectively the complaining witness's credibility,' even if the allegations were not proven false or withdrawn. We have often stated that the credibility of a witness is always in issue. The defendant's inability to prove that prior accusations were in fact false does not make the fact that prior accusations were made irrelevant." Id. at 113.

- A defendant "must be permitted to rebut the inference a jury might otherwise draw that the victim was so naïve sexually that she could not have fabricated the charge." Id. at 113-14. Oliveira's general credibility analysis is no longer the rule. See State v. Manning, 973 A.2d 524 (R.I. 2009).

State v. McCarthy, 446 A.2d 1034 (R.I. 1982). The complainant's allegations of rape against another person that were later withdrawn were relevant at trial and should have been admitted. New trial ordered.
State v. Izzi, 348 A.2d 371 (R.I. 1975). Complainant's prior false allegations of abuse against hospital attendants were fertile areas for impeachment either directly on cross-examination or by independent evidence.

State v. Tetreault, 31 A.3d 777 (R.I. 2011). Defendant charged with maliciously beating and sexually assaulting his girlfriend sought to admit the testimony of a police detective as to his opinion of the girlfriend's character for untruthfulness. Specifically, the detective would testify that in 2003 and 2004 he responded to eleven separate complaints made by the girlfriend, and she often appeared intoxicated and "less than truthful." The trial judge precluded the testimony and R.I.S.C. affirmed.

- The trial judge reasoned that the incidents were too remote in time (over two years prior to trial), the girlfriend had since "cleaned up her act," and the girlfriend herself could be cross-examined about the allegedly untrue complaints, all of which made the detective's opinion of little probative value and outweighed by the danger of unfair prejudice.

- The judicial discretion to exclude evidence under Rule 403 "prevents a trial from deteriorating into a series of mini-trials to determine whether a witness was untruthful on unrelated prior occasions or to test the reliability of the opinion evidence." Id. at 783.

Competency of Witness

State v. Manocchio, 496 A.2d 931 (R.I. 1985). In a conspiracy to commit murder trial, the trial judge refused to allow cross-examination of the state's witness as to his memory defects. R.I.S.C. reversed, ruling that defendant's Sixth Amendment rights were infringed since this was the only witness to the murder and his credibility was the crucial issue at trial.

- "…we have clearly endorsed the principle that this discretionary authority [to limit cross-examination] comes into play only after there has been permitted as a matter of right sufficient cross-examination to satisfy the Sixth Amendment." Id. at 933.

- "…an exploration of Kelley's possible memory defects was especially warranted…It is readily apparent to us that Kelley's credibility was the only real issue before the jury. As the state's only witness with the ability to detail Manocchio's participation

in the murders, the jury's determination of whether or not to convict him rested entirely upon its assessment of Kelley's competency and veracity." Id. at 934.

State v. D'Alessio, 848 A.2d 1118 (R.I. 2004). Defendant in a murder trial was prevented from cross-examining the victim's mother about her drug use since her baby's murder and during trial. R.I.S.C. affirmed.

- "Before a defendant may question a witness about his or her present drug use, the cross-examiner must establish a proper foundation 'through, for example, a showing of reasonably contemporaneous drug use.'" Id. at 1125 (quoting United States v. Banks, 520 F.2d 627, 631 (7th Cir. 1975)).

State v. Reyes, 984 A.2d 606 (R.I. 2009). Police officer had sufficient personal knowledge to testify in murder prosecution that he thought defendant was the person who he saw with the gun. Despite defendant's contention, the officer was not incompetent for lack of personal knowledge, even though the gunman was at least forty feet away from the officer, it was night, and the officer only saw his face for one or two seconds.

- Under Rule 602, a witness's testimony is inadmissible "only if the trial justice finds that the witness could not have actually perceived or observed that to which he or she purports to testify." Id. at 614 n. 8 (quoting State v. Grant, 840 A.2d 541, 546 (R.I. 2004)).

- Rule 602 does not require that the witness's knowledge rise to the level of absolute certainty. "When the witness's personal knowledge is a close call, or when the witness's opportunity to perceive the criminal perpetrator is unclear, the issue is one of credibility, rather than personal knowledge, and the testimony should be admitted for the jury's determination." Id.

State v. Rivera, 987 A.2d 887 (R.I. 2010). Sexual assault complainant with severe developmental disability was permitted to testify, over defendant's objection, though defendant could challenge her credibility on cross-examination.

- "When there is any doubt concerning a witness's minimum credibility, it 'should be resolved in favor of allowing the jury to hear the testimony and judge the credibility of the witness themselves.'" Id. at 897 (quoting State v. Lynch, 854 A.2d 1022, 1030 (R.I. 2004)).

- "To find a witness competent to testify, the trial justice must make four determinations: 'the witness must be able to observe, recollect, communicate, and appreciate the necessity of telling the truth.'" Id. at 898 (quoting Lynch, 854 A.2d at 1029)).

- Witness's need for testimony rehearsal goes to credibility rather than competence. Inability to explain terms such as "oath" and "promise" also did not disqualify the

witness from testifying when the state could prove through other means that she understood the importance of truthfulness.

Bias, Motive, or Prejudice

State v. Parillo, 480 A.2d 1349 (R.I. 1984). In a murder trial, defendant attempted to cross-examine the state's only witness to the murder as to her motive for testifying, specifically that she was protecting her husband from prosecution. The trial judge's limitation of cross-examination was deemed reversible error. Defense counsel should have been able to cross-examine the complainant's possible motive to fabricate and her bias. Defendant entitled to present theory of defense to jury.

State v. Olsen, 610 A.2d 1099 (R.I. 1992). In a trial for breaking and entering, the trial court refused to allow the defense to cross-examine state's chief witness about her prior involvement with a boyfriend and their participation in a break-in in Warwick. This restriction violated defendant's Sixth Amendment right to confront his accusers. R.I.S.C. vacated and remanded.

- This evidence is relevant and should have been admitted because it tends to make the existence of a motive to lie more or less probable.

- The trial court's concern about this 404(b) evidence could have been overcome with a limiting instruction.

State v. Beaumier, 480 A.2d 1367 (R.I. 1984). This was a robbery trial where the state's primary witness was a Providence Police officer and friend of the defendant. According to this officer, defendant admitted to him his participation in the robbery. Defense counsel attempted to cross-examine the officer as to thefts at a lumberyard in which the officer was a suspect and under investigation. Counsel was attempting to show that the officer had a motive to fabricate defendant's admission in order to ingratiate himself with his superiors. The trial judge precluded this area of inquiry and R.I.S.C. reversed.

- "We have been especially solicitous of cross-examination for bias or motive on the part of a defendant's primary accuser." Id. at 1372.

- "The right of confrontation is concerned with the proposition that a jury be allowed to evaluate any motive that a witness may have for testifying. That right is especially precious where, as here, the motive may belong to the state's prime witness. It is clear, therefore, that the evidence concerning the investigation should have been admitted. The state, of course, would have both ample ability and ammunition to rebut the alleged motive Lewis may have had to ingratiate himself with his superiors. However, in the final analysis, it is the jury that should consider the evidence and reach its own conclusion." Id. at 1372.

State v. Bustamante, 756 A.2d 758 (R.I. 2000). Trial justice prevented defendant from cross-examining prosecution witness regarding his expectation of favorable treatment in pending juvenile charges in exchange for his testimony. R.I.S.C. held that the limitation was improper but that the error was harmless.

- Defendant "ought to be granted wide latitude by the trial justice when inquiring into the possible bias, motive, or prejudice of a witness, including the witness's subjective expectations." Id. at 766.

- To determine whether an improper limitation of cross-examination is harmless, the court examines the following factors:

    1. The relative degree of importance of the witness testimony to the prosecution's case;
    2. Whether the testimony was cumulative;
    3. The presence or absence of evidence corroborating or contradicting the testimony of the witness on material points;
    4. The extent of cross-examination otherwise permitted;
    5. The overall strength of the prosecution's case. Id.

State v. Clark, 974 A.2d 558 (R.I. 2009). Off-duty police officer charged with assaulting a prisoner was prohibited from cross-examining the victim about victim's hiring of an attorney and making demands for compensation from the town for their alleged liability. Defendant intended the questioning to show the victim's motive to fabricate. R.I.S.C. vacated and remanded.

- "At the outset, we pause to express our concern, yet again, with the state's practice, in its drive to convict, of filing broad-based *in limine* motions to exclude probative evidence in criminal cases. Too often do these motions impact the constitutional safeguards guaranteed to criminal defendants… We therefore admonish the state to wield its *in limine* sword carefully." Id. at 563-64.

- A trial judge "lacks the discretion to completely (or virtually so) prohibit defense counsel from attempting to elicit testimony regarding bias on the part of the witness." This applies to relevant testimony showing bias, even when it might be substantially outweighed by the danger of unfair prejudice. Id. at 575.

- The Court reached this result even though the victim had settled his claim with the town by the time of trial. The alleged former bias was still relevant to explain the victim's earlier statements to police and his motive not to contradict them at trial.

DeCiantis v. State, 24 A.3d 557 (R.I. 2011). When state witnesses are given incentives to testify—such as dismissed charges, uncharged crimes, or favorable plea deals—Brady requires those incentives to be disclosed to the defense in discovery because they are relevant to the witness's motive for testifying against the defendant.

- In this case, the prosecution witness's uncharged crimes that the state failed to disclose to the defense were important for impeachment purposes, because it "suggest[ed] to the jury that his testimony was motivated more by the hope of obtaining a favorable disposition with respect to his alleged crimes than by the altruistic desire to provide truthful testimony about Mr. DeCiantis' alleged crime." Id. at 572-73.

Suppressed Evidence Admissible on Cross

State v. Mattatal, 603 A.2d 1098 (R.I. 1992). Defendant was convicted of first-degree murder after a body was found in his kitchen. During cross, state impeached defendant with a tape that was previously suppressed on Fourth and Sixth Amendment grounds. The trial judge allowed the impeachment and R.I.S.C. affirmed.

- Suppressed evidence may be used to impeach defendant's direct testimony.

Offer of Proof

State v. Arciliares, 108 A.3d 1040 (R.I. 2015) Defendant convicted after jailhouse informant provided information that implicated defendant as the shooter in a murder. The defendant argued that the trial justice erred when he curtailed the extent to which the defendant was allowed to cross-examine a police detective he spoke to where the detective revealed to the defendant details of the investigation. R.I.S.C. agreed; vacated conviction for murder and remanded for new trial.

- "The defendant contends that the testimony of Det. LaForest about the ACI meeting is relevant because, as counsel put on the record at sidebar, Det. LaForest "questioned [defendant] about the events" leading up to the Barros murder. The defendant argues that this is relevant because it tends to undermine the basis of the state's theory: that Baccaire knew certain undisclosed details of the Barros murder only because defendant was the shooter and he divulged those details to Baccaire. We agree with defendant that the evidence was relevant, because, if believed by the trier of fact, it tended to make the state's theory less probable, in that it suggests that Det. LaForest's interview with defendant was an alternative way in which defendant could have learned the details of the murder; details that he later passed on to Baccaire." Id at 1049.

- "Accordingly, not permitting defendant to ask relevant questions of Det. LaForest was beyond the limits of the trial justice's discretion. Preventing defendant from eliciting the foundation for a defense that he knew the details of the murder because Det. LaForest had revealed them to him, rather than because he was the murderer, was prejudicial error because it undercut Arciliares's strongest defense." Id at 1051.

State v. Peoples, 996 A.2d 660 (R.I. 2010). Defendant was not able to make an offer of proof before presenting a third-party perpetrator defense at his trial on child molestation charges.

Unable to produce any evidence or even the identity of the alleged perpetrator, the defendant was prohibited from asking the boy's aunt whether any other men spend the night at her apartment. R.I.S.C. affirmed.

- "…where a defendant seeks in cross-examination to open up new avenues of inquiry concerning the possible motive of a third party to commit the crime of which the defendant is accused, *the trial justice may properly exclude such evidence as a collateral matter- absent an offer of proof by the defendant* tending to show the third person's opportunity to commit the crime and a proximate connection between that person and the actual commission of the crime." Id. at 665 (quoting State v. Brennan, 526 A.2d 483, 488 (R.I. 1987)) (emphasis in original).

State v. Plunkett, 497 A.2d 725 (R.I. 1985). Defendant charged with embezzling money from the town of Richmond. Her defense was that the town's accounting procedures were sloppy by nature and any discrepancies were good faith mistakes. Court refused to allow cross of state's expert witness and R.I.S.C. reversed.

- Trial court's demand for an offer of proof was inappropriate. Cross-examination is necessarily explorative and should be given reasonable latitude. Also, the questioning was relevant in the defense of a very circumstantial case.

State v. Soto, 477 A.2d 945 (R.I. 1984). In attempting to cross-examine the state's witness as to the victim's reputation for violence, the trial court required defense counsel to make an offer of proof to "produce evidence to corroborate the threats." R.I.S.C. reversed.

- Trial court "may not properly require offers of proof with respect to inquiries made during cross-examination except in unusual and peculiar circumstances." Id. at 948 (citing State v. Debarros, 441 A.2d 549, 551 (R.I. 1982)).

State v. DeBarros, 441 A.2d 549 (R.I. 1982). In a trial involving an assault at the A.C.I., defendant attempted to cross-examine the complainant as to his intent to sue the state of R.I. The trial judge refused to allow cross and R.I.S.C. reversed.

- This type of cross-examination goes to bias and the jury was entitled to it.

- Cross-examination is by necessity explorative in nature so defendant's counsel cannot be expected to give a full offer of proof.

But see: State v. Dubois, 36 A.3d 191 (R.I. 2012). Defendant was prohibited from cross-examining child molestation complainant and her family on the biases they might harbor against him in order to support his defense that there was collusion among the family members to falsely testify against him. The trial court would not allow defendant "to suggest that there was some kind of a plan or scheme without any substantiation," and defendant was unable to make any offer of proof. R.I.S.C. affirmed.

Practice Tip: Plunket, Soto and DeBarros are the cases to cite when the state attempts to limit cross-examination by demanding an offer of proof when the role of cross-examination is necessarily explorative and requires reasonable latitude.

Victim's Reputation for Violence

State v. Soto, 477 A.2d 945 (R.I. 1984). In a second-degree murder prosecution, a state witness's knowledge of the victim's reputation for violence was highly probative because self-defense was raised as an issue. R.I.S.C. reversed and remanded.

- "Evidence probative of the victim's reputation for violence is highly relevant and admissible to show, among other things, that the victim was the aggressor in a case in which self-defense is raised…The defendant's right, therefore, to elicit evidence regarding Gonzalez's reputation for aggressive and violent behavior is beyond question." Id. at 949.

- State's witness was competent to give such testimony, as he knew the victim for nine years, spent time with his family, and lived next door.

State v. Garcia, 883 A.2d 1131 (R.I. 2005). On trial for murder, defendant claimed self-defense and sought to present testimony from a witness that knew the victim had committed robberies. The defendant asserted that the victim's reputation for violent crime was relevant to who the aggressor was in the case. The trial judge precluded the testimony and R.I.S.C. affirmed.

- When self-defense is raised, evidence of the decedent's reputation for violence is highly probative, but only admissible "to establish that defendant knew of the decedent's violent tendencies and, as a result of that knowledge, had a reasonable fear of the victim that caused her to act in self-defense." Id. at 1136. In this case, the defendant did not know of the decedent's violent reputation at the time of the event.

- Evidence of victim's reputation for violence is never admissible "to prove that the victim acted in conformity on a particular occasion or to establish that the victim was the aggressor." Id.

Manufacturing Issue on Cross

State v. O'Dell, 576 A.2d 425 (R.I. 1990). On cross-examination of defendant accused of first-degree sexual assault, the state asked questions about a conversation between the complainant's daughter and defendant that were far beyond the scope of direct. The state subsequently presented a rebuttal witness to impeach defendant's credibility with testimony that was otherwise inadmissible. R.I.S.C. reversed and remanded.

- In this case, the state failed to disclose a witness statement and brought such statement forward for the first time in rebuttal as a result of the cross-examination of defendant.

- "We recognize that evidence that may not be admissible in the prosecution's case in chief may be used in rebuttal in order to counter false statements made by the accused in the course of his direct testimony…The prosecution may not manufacture an issue in the course of cross-examination for the purpose of impeaching the credibility of defendant by the use of evidence or testimony that would otherwise be inadmissible." Id. at 429.

State v. McDowell, 620 A.2d 94 (R.I. 1993). In a child molestation case with five complainants, the trial court refused to allow 404(b) testimony regarding uncharged acts with a sixth potential complainant. Prosecutor cross-examined defendant about the uncharged acts and then introduced rebuttal testimony through the potential complainant. R.I.S.C. reversed.

State v. Jones, 416 A.2d 676 (R.I. 1980). At trial on drug offenses, defendant was prejudiced by prosecutor's line of hypothetical questions about his involvement with drugs and to whom he was willing to sell drugs. Even though defendant had presented an entrapment defense, the questions were not the proper method for the prosecutor to show defendant's predisposition.

- Hypothetical questions based on a "speculative factual basis" were "fraught with impermissible prejudice" and were "especially pernicious given the inability of defendant to defend against these vague unsupported accusations except by a bald denial." Id. at 683.

Prejudicial Questions

State v. Ordway, 619 A.2d 819 (R.I. 1992). During cross-examination of defendant in a murder trial, the prosecutor asked defendant if she had also previously stabbed another boyfriend. R.I.S.C. reversed and remanded.

- Prosecutor's question was so inflammatory as to render the cautionary instructions inadequate. "The naïve assumption that prejudicial effects can be overcome by instructions to the jury, … all practicing lawyers know to be unmitigated fiction…The well was poisoned and the bell rung, and the resulting effects cannot be altered." Id. at 828.

State v. Smith, 446 A.2d 1035 (R.I. 1982). Trial justice erred in allowing the prosecutor to cross-examine defendant regarding his failure to tell the police at his arrest the explanation that he subsequently offered at trial. The questions improperly referenced defendant's post-Miranda silence during police interrogation. R.I.S.C. reversed and granted a new trial.

- "Attempting to impeach the credibility of a defendant by raising his postarrest silence violates the due-process clause of the Fifth and Fourteenth Amendments…. [A] suspect's silence is nothing more than an exercise of his Miranda right and 'it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial.'" Id. at 1036 (quoting Doyle v. Ohio, 426 U.S. 610 (1976)).

State v. Gallagher, 654 A.2d 1206 (R.I. 1995). Prosecutor's improper question to a defense witness regarding defendant's prior crimes caused enough prejudice to the defendant to warrant vacating his convictions for assault, robbery, and kidnapping and remanding for a new trial.

- Prosecutor asked the witness, "But [defendant] has been arrested many times, hasn't he?" Defense counsel objected, but witness still partially answered with, "Yep, he has been before." Despite a curative instruction and striking of the answer, the Court found that "the damage was too great to be cured."

- Evidence of unrelated, prior crimes is "irrelevant and inherently prejudicial" and is inadmissible "to prevent a jury from finding a defendant guilty based upon unrelated crimes." Id. at 1211.

- "If evidence of other crimes is admitted, all that is necessary to show prejudice is a reasonable possibility that the improper evidence contributed to a defendant's conviction… [and] if we are unable to say whether the jury would have reached the same verdict if the evidence had not been improperly admitted, we will enter a finding of reversible error." Id.

Impeachment with Prior Convictions

State v. Dowell, 512 A.2d 121 (R.I. 1986). State moved to introduce the specific nature of defendant's disorderly conduct, indecent exposure, in a rape case. The trial judge allowed it and R.I.S.C. affirmed.

- "…the details underlying a conviction used to impeach a defendant's credibility when he has become a witness in his own defense may not be presented to the jury …the prosecution is entitled to impeach a defendant's testimony and attack his credibility with the fact and the differing nature of his convictions." Id. at 123.

- Thus, the charges may be described in some detail but the facts may not be disclosed to the jury.

State v. Rocha, 834 A.2d 1263 (R.I. 2003). Trial justice deferred ruling on an advance Rule 404 motion *in limine* regarding the admissibility of defendant's prior convictions for obstruction of a police officer for giving a false name, and for disorderly conduct and resisting arrest. Although defendant claimed that the lack of ruling prevented him from testifying and presenting witnesses

for fear that the issue would come up on cross-examination, the court found that defendant could have proceeded cautiously with limited direct examination. R.I.S.C. affirmed.

State v. Silvia, 898 A.2d 707 (R.I. 2006). State was permitted to introduce evidence of defendant's prior convictions for sexual assault, which used a knife, and other crimes, in trial for murder that arose from a fatal stabbing.

- "…the trial justice has broad discretion in deciding whether or not to admit evidence of prior convictions under Rule 609." Id. at 718.

- In order "to raise and preserve for review the claim of improper impeachment with a prior conviction, a defendant must testify." Without a record of the impact of the allegedly erroneous impeachment "[a]ny possible harm flowing from… permitting impeachment by a prior conviction is wholly speculative." Id. at 719 (quoting Luce v. United States, 105 S. Ct. 460, 463-64 (1984)).

State v. Vargas, 991 A.2d 1056 (R.I. 2010). Defendant on trial for charges of child molestation could be impeached with prior convictions on four charges of possession of a stolen vehicle and federal charges of uttering and delivering forged United States Treasury checks, even though some of the convictions occurred almost twenty years prior. R.I.S.C. affirmed.

- In determining whether the prejudicial effect of a prior conviction substantially outweighs its probative value, the trial justice must weigh:

    1. The nature of the crimes.
    2. The remoteness of the convictions.
    3. The defendant's disdain for the law as represented by the extent of his or her criminal record. Id. at 1061 (citing State v. Mattatall, 603 A.2d 1098, 1117 (R.I. 1992)).

- The trial court found that the extent of defendant's criminal record made the convictions probative to impeach the defendant's projected image as a law-abiding citizen. This factor outweighed the remoteness of time.

- However, the trial court did preclude impeachment with defendant's prior conviction for third-degree sexual assault because the nature of that crime was so similar to his current charge that allowing it would be unfairly prejudicial.

State v. Gongoleski, 14 A.3d 218 (R.I. 2011). Defendant challenged his convictions for vandalism and disorderly conduct on the basis that the trial judge improperly permitted the state to impeach him with his prior convictions for assault and violation of a no-contact order. R.I.S.C. affirmed.

- "This Court on numerous occasions has upheld the admission of a defendant's prior convictions for impeachment purposes [even] when such convictions were similar or identical to the crime for which that defendant was tried." Id. at 223.

- Contrary to the federal rule, Rhode Island Rule 609 provides that the prior conviction need not involve dishonesty, false statement, or a felony to be admissible for impeachment purposes.

- "…the time between the date of the previous conviction and the date of the present trial" is "the appropriate time period to use in evaluating the remoteness of a previous conviction when determining whether or not to permit it to be used for impeachment purposes." Id. at 223 n. 7 (quoting State v. Remy, 910 A.2d 793, 797 (R.I. 2006)).

State v. McWilliams, 47 A.3d 251 (R.I. 2012). Defendant's criminal record included convictions for second-degree murder in 1984, simple assault in 1995, and several other crimes in 2003 and 2004, all of which the state used to impeach the defendant during his robbery trial. Defendant challenged only the use of the 1984 murder conviction, arguing that it was too remote in time and overly prejudicial. R.I.S.C. affirmed.

- A conviction over ten years old entitles the defendant to a hearing before the trial justice to argue that the remoteness creates undue prejudice, but "Rhode Island law recognizes no per se disqualification of a prior criminal conviction solely due to temporal remoteness." Id. at 263 (quoting State v. Coleman, 909 A.2d 929, 941 (R.I. 2006)).

- "…when a person has been convicted of a series of crimes through the years, conviction of the earliest crime, though committed many years before, as well as intervening convictions, should be admissible for impeachment purposes unless the trial justice determines that the prejudicial effect outweighs the probative value of the past conviction." Id. (quoting State v. Mattatall, 603 A.2d 1098, 1117 (R.I. 1992)).

State v. Price, 68 A.3d 440 (R.I. 2013). In a case where defendant was charged with multiple counts for possession of a controlled substance, the prosecutor asked questions about previous charges filed against the defendant. In doing so, the prosecutor inaccurately stated that the defendant had been convicted of possession with intent to deliver a controlled substance. The R.I.S.C. reversed ruling that the questions were improper for impeachment purposes, placed factually incorrect information in front of the jury, and impermissibly introduced false evidence of the defendant's previous criminal activities.

- "The implication that defendant was previously charged with a crime without an evidentiary basis for that suggestion is patently improper." Id. at 447.

CONFRONTATION

Crawford v. Washington, 541 U.S. 36, 60 (2004). "The Confrontation Clause protects the criminally accused against the admission of out-of-court statements that are testimonial in nature, unless the declarant is unavailable and the defendant has had a prior opportunity to cross-examine him."

- "We apply the Confrontation Clause only to testimonial statements, leaving the remainder to regulation by hearsay law." Id.

Ohio v. Roberts, 448 U.S. 56, 66 (1980). The Confrontation Clause does not bar admission of an unavailable witness's statement against a criminal defendant when the statement bears an "adequate 'indicia of reliability.'"

- Roberts still applies to non-testimonial hearsay.

What is Testimonial?

Crawford offers little guidance in determining whether a statement is testimonial, suggesting three possible definitions:

1. "*[E]x parte* in-court testimony or its functional equivalent." Crawford, 541 U.S. at 51 (quoting Brief for Petitioner 23).

2. "[E]xtrajudicial statements… contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions." Id. at 52 (quoting White v. Illinois, 502 U.S. 346, 365 (1992) (Thomas, J., joined by Scalia, J., concurring in part and concurring in judgment)).

3. "[S]tatements that were made in circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." Id. (quoting Brief for the National Association of Criminal Defense Lawyers *et al*., as *Amici Curiae* 3).

The only definitive *examples* of testimonial statements that the Crawford court gives are:

1. *Ex parte* testimony at a preliminary hearing.
2. Statements taken by police officers in the course of interrogations. Id. at 52. (Interrogation is meant in a colloquial sense, rather than a technical sense. Id. at 53 n.4.)

Davis v. Washington, 547 U.S. 813 (2006). provided valuable guidance in distinguishing testimonial from non-testimonial statements in the context of law enforcement interrogations.

The Court suggested that no communication with police and emergency personnel is *per se* testimonial or non-testimonial. Instead, one looks to the primary purpose of the communication.

- When the primary purpose of the interrogation is to effectively respond and assist with an ongoing emergency, the statements are non-testimonial.

- When there is no such emergency, or the emergency has passed, and the primary purpose of the interrogation is to gather information of the prior events in order to arrest and prosecute the offender, the statements are testimonial.

Michigan v. Bryant, 131 S. Ct. 1143 (2011), attempted to further clarify the meaning of "testimonial" in the context of Davis's "primary purpose" test. In this case, a dying man's identification of his shooter to responding police officers was not testimonial because, under Davis, its primary purpose was to assist police in responding to an ongoing emergency.

- The existence of an ongoing emergency is a "highly context-dependent inquiry" and must be objectively assessed based on what a reasonable person in the circumstances would have believed at the time, not with the benefit of hindsight. Id. at 1157-58.

- Primary purpose analysis "requires a combined inquiry that accounts for both the declarant and the interrogator," looking to the statements and actions of both to determine their motives. Id. at 1160.

- When police respond to an emergency, it does not necessarily end once the initial victim is safe, because the threat to first responders and the public may continue. Yet this also does not mean that the emergency is necessarily ongoing in every place and the entire time that a violent perpetrator is on the loose. Id. at 1158-59.

- "[W]hether an ongoing emergency exists is simply one factor—albeit an important factor—that informs the ultimate inquiry regarding the 'primary purpose' of an interrogation. Another factor…is the importance of *informality* in an encounter between a victim and police.…[A]lthough formality suggests the absence of an emergency…informality does not necessarily indicate the presence of an emergency or the lack of testimonial intent." Id.

Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009). Laboratory analysts' sworn certificates of analysis were presented at defendant's drug trafficking trial to establish that seized substance was cocaine. The Court held that the certificates were testimonial statements (affidavits) covered by the Confrontation Clause, and therefore, defendant had a right to cross-examine analysts.

- "The affidavits do not qualify as traditional official or business records, and even if they did, their authors would be subject to confrontation nonetheless." Id. at 2538. The constitutional right to confrontation cannot be circumscribed by merely invoking a hearsay exception.

Bullcoming v. New Mexico, 131 S. Ct. 2705 (2011) and Williams v. Illinois, 132 S. Ct. 2221 (2012) expounded upon the Court's decision in Melendez-Diaz. In Bullcoming, prosecutors admitted the forensic analysis of defendant's blood-alcohol level through the testimony of a "surrogate" analyst witness at defendant's DUI trial. The forensic analyst who prepared the report did not testify; instead, his supervisor testified in his place. However, the supervisor did not have a role in performing or observing the test, and merely testified from viewing the original analyst's report.

- The Court held that surrogate testimony by another forensic analyst was not admissible, where the second analyst did not perform or observe the laboratory analysis described in the forensic reports. The reports were testimonial and defendant had a right to confront the original analyst before the test results would be admissible.

- The Court also noted that a written statement or forensic analysis is capable of being testimonial even when it is not a sworn or signed statement. Id. at 2717.

Williams v. Illinois, 132 S. Ct. 2221 (2012) is a four-one-four plurality opinion that addressed whether the prosecution could introduce an analyst's testimonial forensic results through testimony of an expert witness. It involved a DNA expert who testified that he matched the DNA found inside a rape victim with DNA taken from the defendant. But the DNA profile he used to make the match was performed by another analyst (although the report itself was never admitted as evidence).

- The expert's testimony in this case was determined to be admissible. Five justices (four in Justice Alito's plurality opinion and Justice Thomas concurring) found that it was not testimonial, although their reasoning differed significantly.

- Because of the divided court and conflicting reasonings, the application of Williams is far less clear than Crawford's other progeny. Legal analysts have been unable to come to any clear consensus on how Williams will apply to future cases. Justice Kagan addresses the uncertainty in her dissent by cautioning lower courts that "until a majority of this Court reverses or confines [Melendez-Diaz and Bullcoming], I would understand them as continuing to govern, in every particular, the admission of forensic evidence."

The Rhode Island Supreme Court has issued several cases regarding what it interprets as testimonial under Crawford:

State v. Alston, 47 A.3d 234 (R.I. 2012). Coconspirator's statements to third party were not testimonial in nature, and thus third party's testimony about coconspirator's statements did not violate defendant's right to confront the coconspirator at his assault trial. Defendant, coconspirator, and third party were all friends and the statements were made in the context of a conversation amongst themselves.

- "A statement is testimonial if it is a solemn declaration or affirmation made for the purpose of establishing or proving some fact." Id. at 245 (quoting State v. Ramirez, 936 A.2d 1254 (R.I. 2007)).

State v. Lopez, 45 A.3d 1 (R.I. 2012). Defendant argued that his Confrontation Clause rights were violated at his trial for first-degree murder because testimony from a DNA laboratory supervisor was admitted to explain the results of DNA analysis performed by the supervisor's entire team of analysts. R.I.S.C. affirmed the trial court's admission of the evidence.

- Analysis of forensic evidence is testimonial. Nonetheless, "we hold that in this case, where defendant had ample opportunity to confront [the laboratory supervisor]—the witness who undertook the critical stage of the DNA analysis, supervised over and had personal knowledge of the protocols and process of all stages involved in the DNA testing, reviewed the notes and data produced by all previous analysts, and testified to the controls employed by the testing lab to safeguard against the possibility of testing errors—the Confrontation Clause was satisfied." Id. at 16.

- R.I.S.C. distinguished this case from Bullcoming by noting that the analyst in that case lacked sufficient first-hand knowledge of the evidence to which he was testifying. Further, the court explained that the Supreme Court cases do not stand for the proposition that defendants have a right to confront each and every person who has some contact with evidence, so defendant was not entitled to cross-examine every DNA analyst involved in the process.

- A DNA allele table created by the laboratory supervisor and admitted into evidence at trial was testimonial. The only conceivable purpose for the DNA analysis was to implicate the defendant in the crime and prove his guilt at trial. Furthermore, even though the table represented data generated by a machine, it required an expert analyst to analyze data and create the table. However, since the table was directly created by the testifying supervisor, its use at trial did not violate defendant's rights.

State v. Feliciano, 901 A.2d 631 (R.I. 2006). Days before his murder, the decedent told a close friend that he was assaulted and he identified one of the assailants. The information supported the state's theory that the assailant solicited defendant to murder the decedent. At trial, the state was permitted to present that testimony under Rule 804(c), the hearsay exception for a declaration of decedent made in good faith.

- R.I.S.C. held that Crawford did not apply because the statement to a friend was non-testimonial and not made in anticipation of a future use at trial.

State v. Pompey, 934 A.2d 210 (R.I. 2007). Police responded to a domestic assault call and were greeted at the door by the visibly upset and shaking victim, who stated "[Defendant] beat me up." The victim did not testify at defendant's probation revocation hearing and the state sought to admit her statement through the responding officer.

- Applying the interrogation test from Davis, R.I.S.C. affirmed the hearing justice's finding that the statement was "nontestimonial and made voluntarily during the initial response of the police officer to an emergency call for assistance." It was then determined to be admissible hearsay as an excited utterance.

- Even if a statement is testimonial, Crawford does not apply to probation revocation hearings "because a probation violation proceeding is not a criminal prosecution." Id. at 214.

State v. DeJesus, 947 A.2d 873 (R.I. 2008). Following his arrest for robbery and murder, defendant was questioned by his cellmate and confessed to the crime, unaware that his cellmate was a wired government informant. The informant died before trial and the state requested to admit the recorded confession in his place. Defendant argued that the recording was testimonial because the government informant made it in anticipation of prosecution and, therefore, admitting the recording violated his right to confront the informant. R.I.S.C. held that argument to be unavailing because the statements were nonhearsay.

- Crawford applies to testimonial statements only if they are offered to establish the truth of the matter asserted. The informant's statements and questions on the recording were only offered to show the context of defendant's responses. Redacting only the informant's questions also would have made it incomprehensible to the jury.

Ballard v. State, 983 A.2d. 264 (R.I. 2009). The statement of an out-of-court declarant was read into the record without the defendant having the opportunity to cross-examine declarant. The statement was testimonial hearsay under Crawford.

- However, defendant's application for post-conviction relief was denied because "Crawford should not be applied retroactively to cases that had already been decided on direct review." Id. at 269 (citing Whorton v. Bockting, 549 U.S. 406 (2007)).

- The court did note that, "Mr. Ballard's argument is based solely on the federal constitution, and we are bound by the United States Supreme Court's construction of the federal constitution," perhaps implying that they would give more consideration to this issue if argued under the state constitution.

State v. Harris, 871 A.2d 341 (R.I. 2005). The issue was whether a statement made by a witness who was unavailable at trial could be the proper subject of testimony by the police officer to whom she gave the statement.

- Because "defendant himself both elicited and opened the door to the testimony he now assigns in error… [w]e need not and therefore do not decide whether the statement at issue here was 'testimonial' as that term was used by the United States Supreme Court in Crawford." Id. at 345 n.12.

State v. Lynch, 854 A.2d 1022 (R.I. 2004). R.I.S.C. concluded that defendant opened the door to the hearsay evidence and any error was harmless. Crawford did not apply.

Because Crawford's application has proven to be very fact-dependent.:

- Argue that the hearsay statement is testimonial in nature. Under Crawford, it is no longer constitutionally sufficient that a statement falls within a hearsay exception to be admitted.

- Argue that the statement was made in circumstances under which it would be reasonably evident to an objective person that the statement would be available for use at trial. See People v. Cortes, 781 N.Y.S.2d 401, 406 (N.Y. Sup. Ct. 2004); State v. Powers, 99 P.3d 1262, 1266 (Wash. App. 2004).

- Argue that non-testimonial statements must still pass the minimal reliability standard of Roberts. See Horton v. Allen, 370 F.3d 75 (1st Cir. 2004); United States v. McClain, 377 F.3d 219 (2nd Cir. 2004); Evans v. Luebbers, 371 F.3d 438 (8th Cir. 2004); State v. Rivera, 844 A.2d 191 (Conn. 2004); Demons v. State, 595 S.E.2d 76 (Ga. 2004); State v. Vaught, 682 N.W.2d 284 (Neb. 2004).

Excited Utterances Under Crawford

R.I. R. Evid. 803(2): Excited Utterance. "A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."

Some courts have held that an excited utterance is *per se* non-testimonial because of its spontaneous nature. However, the question is unsettled in Rhode Island and the following multi-tiered analysis is recommended whenever an excited utterance is at issue:

Step 1: Argue that the court should employ a case-by-case approach to determine whether an excited utterance is testimonial under Crawford.

> Rationale: Under Crawford, the *subjective* expectations of the declarant (reacting in the moment) are irrelevant. The relevant consideration is whether it is reasonably evident to an *objective witness* that the declarant's statement would be available for use at trial. Therefore, a *per se* rule does not satisfy Constitutional requirements.

- A number of jurisdictions have expressly declined to apply a bright line rule that an excited utterance is *per se* non-testimonial.
    - An "excited utterance made at the scene of a crime does not lose its character as testimonial merely because the declarant was excited at the time it was made." Lopez v. State, 888 So.2d 693, 699-700 (Fla. Dist. Ct. App. 2004).
        - "Excited utterances can [not] be automatically excluded from the class of testimonial statements." Id. at 699.

- "Whether a statement [is testimonial] depends on the purpose for which the statement is made, not on the emotional state of the declarant." Commonwealth of Pennsylvania v. Gray, 867 A.2d 560, 576 (Pa. Sup. 2005).
    - "[W]e do not think that excited utterances can be automatically excluded from the class of testimonial statements." Id. at 577.
- "The very fact that a hearsay exception is necessary for admissibility shows that the statement is testimonial." People v. Dobbin, 791 N.Y.S.2d 897, 903 (N.Y. Sup. Ct. Co.2004).
- "We decline to join those courts that have established a bright-line rule that excited utterances can never be testimonial." Spencer v. State, 162 S.W.3d 877, 881 (Tex. App. Houston 2005).
- "We do not agree… that a statement that qualifies as an 'excited utterance' is necessarily non-testimonial." Hammon v. State, 829 N.E.2d 444, 453 (Ind. 2005).

Step 2: Whenever possible, argue that statements made to *either* a police officer *or* a government agent were made in the course of interrogation. (Statements made to non-government agents are unlikely to be testimonial.)

Generally:

- "Interrogation" is never explicitly defined in Crawford. Moreover, the court expressly notes that the term is used in its colloquial sense. Crawford, 541 U.S. at 52. However, Davis has since defined how to apply Crawford to police interrogations:
    - "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." Davis, 547 U.S. at 822.
    - "They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." Id.

Statements to Police Officers:

- Courts have considered a number of factors to determine whether statements to police officers qualify as interrogation. Generally, courts have looked favorably upon the following:
    1. Structured statements.
    2. Statements made in a formal setting.

3. Lengthier statements.
4. Statements made away from the crime scene.
5. Statements made or elicited with the intention of aiding in the prosecution of a defendant.
6. Statements that are recorded or otherwise memorialized.

- Courts have assigned varying significance to these factors and have likewise reached different conclusions about what constitutes interrogation within the meaning of Crawford.

    - A victim's written statement in an affidavit given to a police officer is always testimonial. There is no emergency in progress, the statements refer to past events, and the primary purpose of the officer's interrogation is to investigate a possible past crime. Davis, 547 U.S. at 829-30.

    - Police responded to a parking lot after a call regarding an injured man. Once there, they found a dying gunshot victim. The police asked who shot him, and the victim identified the gunman. At the gunman's murder trial, the victim's identifying statement prior to his death was properly admitted through the police officer as an excited utterance. The statement was not testimonial because police could objectively indicate that the "primary purpose of the interrogation" was "to enable police assistance to meet an ongoing emergency." Michigan v. Bryant, 131 S. Ct. 1143 (2011).

    - Statements to responding police officers from an emotionally distraught father, who discovered a neighbor molesting his 17-month-old daughter, were non-testimonial excited utterances discussing the present events and attempting to resolve the emergency. This holding was reached even though the suspect had already fled and victim was safe by the time police arrived and the statements were made. State v. Bergevine, 942 A.2d 974 (R.I. 2008).

    - Police responding to a domestic assault call were greeted at the door by the visibly upset and shaking victim, who stated "[Defendant] beat me up." The statement qualified as an excited utterance and was admissible consistent with Davis, as "nontestimonial and made voluntarily during the initial response of the police officer to an emergency call for assistance." State v. Pompey, 934 A.2d 210, 214 (R.I. 2007).

    - A statement to the police by the child victim's mother who called the police was testimonial because it was "knowingly given in response to structured police questioning." People v. Sisavath, 13 Cal.Rptr.3d 753, 757 (Cal. App. 4th 2004).

    - "[A] startled person who identifies a suspect in a statement made to a police officer at the scene of a crime surely knows that the statement is a form of accusation that will be used against the suspect. In this situation, the statement does not lose its character as a testimonial statement merely because the declarant was excited at the time it was made." Lopez, 888 So.2d at 699.

- Statements made by witnesses in response to police investigation at crime scene shortly after commission of crime were testimonial. Moody v. State, 594 S.E.2d 350 (Ga. 2004) (the court twice reaffirmed this holding in Jenkins v. State, 604 S.E.2d 789 (Ga. 2004) and Bell v. State, 597 S.E.2d 350 (Ga. 2004)). And most recently in Jackson v. State, 291 Ga. 22, 24 (Ga. 2012).

- A policeman's interview with an alleged assault victim at the hospital was interrogation because it was "structured police questioning." Wall v. State, 143 S.W.3d 846, 851 (Tex. App. Corpus Christi 2004).

- Because the purpose of police questioning was to gather evidence for a criminal prosecution, statements by the witness to officers at the hospital were testimonial. People v. West, 823 N.E.2d 82 (Ill. App. 1st Dist. 2005).

Statements to Other Government Agents:

- A witness "who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." Crawford, 541 U.S. at 51.

    - The recording of a government informant's questions to defendant and defendant's answers confessing to murder were admissible when informant died before trial. Defendant argued that the recording was testimonial under Crawford and granted him the right to confront the informant. R.I.S.C. held that the informant's questions and statements on the recording—even if made in anticipation of prosecution—were not asserted to prove the truth of any issue, but instead provided context to defendant's confession. Crawford does not apply to nonhearsay. State v. DeJesus, 947 A.2d 873 (R.I. 2008).

    - Where a statute allowed a social worker to testify in place of children in sexual abuse cases, statements made to the social worker by the children were testimonial because they were for the purpose of testifying against defendant. Snowden v. State, 846 A.2d 36 (Md. Spec. App.2004).

    - Seven-year-old child made the same statement to his mother, a police detective, and a child abuse investigator, but only the statement to his mother was non-testimonial. In re Rolandis G., 817 N.E.2d 183, 190 (Ill. App. 2d. Dist. 2004).

    - Victim's statement to emergency room doctor that defendant had tied and raped her was testimonial, because the primary purpose was to prove what happened the previous day rather than meet an ongoing emergency. However, the erroneous admission was harmless where defendant also gave a detailed, unrefuted confession. People v. Spicer, 884 N.E.2d 675 (Ill. App. 1st Dist. 2007).

Statements in 911 Calls:

- Although not law enforcement officers, 911 operators are agents of law enforcement to whom Crawford and Davis apply. Davis, 547 U.S. at 823 n. 2.

- "The initial interrogation conducted in connection with a 911 call, is ordinarily not designed primarily to 'establis[h] or prov[e]' some past fact, but to describe current circumstances requiring police assistance." Id. at 827.

- However, "a conversation which begins as an interrogation to determine the need for emergency assistance, and is not subject to the Confrontation Clause, may evolve into testimonial statements subject to the Confrontation Clause once that purpose has been achieved; trial courts should… redact or exclude the portions of any statement that have become testimonial." Id. at 828.

    - In Davis, a domestic battery victim called 911 and was initially engaged in a non-testimonial interrogation detailing what caused the ongoing emergency, describing events as they occurred, and providing information about herself and the assailant for the purpose of obtaining police assistance to resolve the emergency. When the emergency ended and the operator began asking structured questions to establish what had occurred, the interrogation had turned testimonial.

- Approximately half of the courts deciding this issue have determined that statements to a 911 operator are testimonial.

- One court cited several reasons: (1) the statement was for the purpose of establishing a crime, (2) a reasonable witness would believe that the statement would be used by prosecutors, and (3) a 911 call is an interrogation by the government. Dobbin, 791 N.Y.S.2d at 897.

- The principal rationale is that the 911 operator is asking for information that will likely be used to prosecute a crime.

    - The 911 call of rape victim's emotionally distraught father, made immediately following the crime, was admissible under the excited utterance and present sense impression exceptions. Crawford was inapplicable because the statements detailed only the present events in the face of an ongoing emergency, consistent with Davis. State v. Bergevine, 942 A.2d 974 (R.I. 2008).

    - "When a 911 call is made to report a crime and supply information about the circumstances and the people involved, the purpose of the information is for investigation, prosecution, and potential use at a judicial proceeding; it makes no difference what the caller believes." Cortes, 781 N.Y.S.2d at 415.

- "The statements on the 911 tapes are preserved as official documents." Id.

- When a witness called to report that defendant was violating a restraining order, the statement was testimonial because the purpose of the call was to aid in defendant's "apprehension and prosecution." Powers, 99 P.3d at 1265.

- The court found some statements to be testimonial and others to be non-testimonial based on the questions asked by the operator. Specifically, statements concerning the nature of the attack, and the complainant's medical needs, age, and location were non-testimonial. Statements concerning the assailants and the stolen possessions were testimonial. West, 823 N.E.2d at 82.

Dying Declarations

Crawford, 541 U.S. at 56, n.6. The Crawford decision specifically discusses the dying declaration hearsay exception, as it is the sole historical instance where testimonial hearsay statements were admitted against the accused without confrontation. "Although many dying declarations may not be testimonial, there is authority for admitting even those that clearly are." Id.

- "We need not decide in this case whether the Sixth Amendment incorporates an exception for testimonial dying declarations. If this exception must be accepted on historical grounds, it is *sui generis.*" Id.

Michigan v. Bryant, 131 S. Ct. 1143, 1151 n. 1 (2011). Bryant reiterated the Court's earlier comments in Crawford, suggesting that it may one day carve out a dying declaration exception to the Confrontation Clause, but again declined to decide that issue here because it was not properly before the Court.

"The [Michigan] trial court ruled that the statements were admissible as excited utterances and did not address their admissibility as dying declarations… [In Crawford] we first suggested that dying declarations, even if testimonial, might be admissible as a historical exception to the Confrontation Clause. We noted in Crawford that we 'need not decide in this case whether the Sixth Amendment incorporates an exception for testimonial dying declarations.' Because of the State's failure to preserve its argument with regard to dying declarations, we similarly need not decide that question here." Id. (citations omitted).

Other Hearsay Exceptions

Present Sense Impression

Roy v. U.S., 871 A.2d 498 (D.C. 2005). A racist statement made by co-defendant was admitted as a present sense impression. The court determined it was not testimonial because it was "not for the purpose of accusation or prosecution."

State v. Bergevine, 942 A.2d 974 (R.I. 2008). Where an individual describes events to a 911 operator while they are occurring, the statements can qualify as a present sense impression and are admissible if non-testimonial.

Statements Against Interest

Woods v. State, 152 S.W.3d 105 (Tex. Crim. App. 2004). Remarks by two witnesses that were declarations against penal interest were admitted because they were "casual" and "spontaneous."

Declaration of Decedent Made in Good Faith

State v. Feliciano, 901 A.2d 631 (R.I. 2006). Under Rule 804(c), the hearsay exception for a declaration of a decedent made in good faith, the state was able to admit a friend's testimony of statements the decedent made to him days before being murdered. The non-testimonial hearsay corroborated the state's theory about defendant's involvement in the murder conspiracy.

- An out-of-court statement must pass a three-part test to be admitted under Rule 804(c):

    1. The statement must satisfy 804(c); that is, it must be "made in good faith before the commencement of the action and upon the personal knowledge of the declarant."
    2. Under an objective standard, the circumstances must not display the earmarks of a testimonial statement, per Crawford.
    3. The statement must pass the residual "indicia of reliability" requirement of Roberts. Id. at 641.

- R.I.S.C. noted that Rhode Island is the only state that recognizes this hearsay exception in criminal trials. Nonetheless, R.I.S.C. declined to hold that Crawford unreservedly prohibits this exception in criminal cases.

Business Records

Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527 (2009). "Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because—having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial." Id. at 2539-2540.

- "But that is not the case if the regularly conducted business activity is the production of evidence for use at trial.… [A forensic] analysts' certificates—like police reports

generated by law enforcement officials—do not qualify as business or public records for precisely the same reason." Id. at 2538.

U.S. v. Cameron, 699 F.3d 621 (1st Cir. 2012). Child pornography reports generated by online services provider and submitted to national reporting organization for forwarding to law enforcement were testimonial, such that—even if they qualified under the business records hearsay exception—defendant had a right to confront the persons who prepared the reports. The reports were prepared specifically for use in assisting law enforcement with the investigation and prosecution of sex offenders.

- Tip reports that were passed on to law enforcement by national reporting organization after receiving child pornography reports from online service provider were also testimonial, such that defendant had a right to confront the persons who prepared the reports.

- Records of data retrieved from an online service provider's account management tool, log-in tracker, and connection logs were non-testimonial business records and their admission did not violate the Confrontation Clause. The data was collected automatically for business purposes and not to assist law enforcement.

Statements Made for Purpose of Medical Diagnosis

State v. Watkins, 92 A.3d 172 (R.I. 2014). A defendant convicted of first and second degree sexual assault appealed his ten count conviction. Hearsay evidence from one doctor, recounted by another doctor at trial was impermissibly allowed, but was so slight when considered against the abundance of other evidence that it amounted to harmless error.

- Hearsay to be admitted under Rule 803(4), Statements for Purposes of Medical Diagnosis or Treatment, must be beneficial to the diagnosis or treatment of the patient, and unconnected statements are inadmissible.

- "Therefore, '[t]he test for determining admissibility hinge[s] on whether what has been related by the patient will assist or is helpful in the diagnosis or treatment of [the patient's] ailment.' *State v. Gaspar*, 982 A.2d 140, 151 (R.I. 2009) quoting *In re Andrey G.*, 796 A.2d 452, 456 (R.I. 2002)). 'Statements that narrate details unconnected with either diagnosis or treatment, however, are inadmissible unless they fall under another hearsay exception.' *Id.*" Id. at 187.
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In re T.T., 892 N.E.2d 1163, 1177 (Ill. App. 1st Dist. 2008). Statements for the purpose of medical diagnosis are inadmissible if testimonial.

- "To the extent [the witness'] statements responded to [the doctor's] questions regarding the nature of the alleged attack, the physical exam, and complaints of pain or injury, such statements remain governed by the medical treatment hearsay

exception statute. However, [the witness's] accusatory statements identifying respondent as the perpetrator do implicate the core concerns protected by the confrontation clause."

Catch-All

State v. Brown, 88 A.3d 1101 (R.I. 2014). The defendant sought to introduce a police sketch under the "catch-all" hearsay exception, Rule 804(b)(5). The sketch had been composed based upon the perpetrator's description. While the defendant had been identified by an eye-witness, he did not resemble the police sketch. The R.I.S.C. held that the evidence to be introduced under Rule 804(b)(5) had to be "more probative on the point for which it is offered than *any other evidence* which the proponent can procure through reasonable efforts."(emphasis in original). Id. at 1117. The court went on to say that "special trustworthiness" needed to be shown in order to make hearsay admissible. Id. at 1118. The Court did not say that a defendant could never submit a police sketch of a suspect, just that the heavy burden to meet the hearsay exception was not met in this case.

DEFENSE WITNESSES

State v. Price, 68 A.3d 440 (R.I. 2013). In a case where defendant was charged with multiple counts for possession of a controlled substance, the prosecutor asked questions about previous charges filed against the defendant. In doing so, the prosecutor inaccurately stated that the defendant had been convicted of possession with intent to deliver a controlled substance. The R.I.S.C. reversed ruling that the questions were improper for impeachment purposes, placed factually incorrect information in front of the jury, and impermissibly introduced false evidence of the defendant's previous criminal activities.

- "The implication that defendant was previously charged with a crime without an evidentiary basis for that suggestion is patently improper." Id. at 447

State v. McDowell, 620 A.2d 94 (R.I. 1993). The trial court refused to allow defendant's son to testify about a conversation he had with the complainant in which she threatened to bring another charge against defendant as a result of an argument with the son. This testimony was clearly relevant to argue that the complainant's allegations were fabricated. R.I.S.C. reversed.

State v. Benoit, 697 A.2d 329 (R.I. 1997). The trial court precluded the defense from introducing character witnesses to testify that defendant was trustworthy with children. R.I.S.C. remanded the case for the trial judge to determine the admissibility of the character evidence given the proper foundation, and the likely affect on the verdict. After hearing, a new trial was ordered.

- "We believe that evidence of good character on the part of an accused may well be a significant element in his or her defense. Generally, the crime of sexual molestation depends upon the credibility of the complaining witness as opposed to the credibility of the defendant. Therefore, excluding evidence of good character in respect to a pertinent trait cannot generally be considered harmless." Id. at 331.

State v. Werner, 851 A.2d 1093 (R.I. 2004). Trial justice did not abuse his discretion by denying defendant's motion to present expert testimony on the subject of eyewitness identification at his trial for robbery. Defendant was also denied his request to take a polygraph test and have the results admitted at trial.

- When a party seeks to present controversial expert testimony, "trial justice should exercise a gatekeeping function and hold a preliminary evidentiary hearing outside the presence of the jury in order to determine whether such evidence is reliable and whether the situation is one on [*sic*] which expert testimony is appropriate." Id. at 1100 (quoting State v. Quattrocchi, 681 A.2d 879 (R.I. 1996)).

- In this case, R.I.S.C. determined that the defendant had not presented enough support to warrant the need for an evidentiary hearing. The trial judge believed that the jury would give too much weight to the expert's testimony, and that the unreliability of

eyewitness identification could be addressed in cross-examination and jury instructions. The Court also declined to follow the minority view that allows a case-by-case analysis of using polygraph evidence. Having not been established as scientifically reliable, Rhode Island requires "the categorical exclusion of polygraph evidence."

- "When confronted with novel scientific evidence, a trial justice must determine whether the evidence is based on ostensibly reliable scientific reasoning and methodology." Id. at 1103.

State v. Vocatura, 922 A.2d 110 (R.I. 2007). Defense counsel proffered testimony, on behalf of the defendant, that the victim had called counsel and admitted that her injuries were caused by a fall down the steps and not by a domestic assault.

- Defense counsel's testimony was not subject to exclusion on the grounds that counsel was unable to lay a proper foundation, because he was prepared to testify that he recognized victim's voice from numerous contacts he had with her in the past.

- However, defense counsel's testimony was barred under rule of professional conduct prohibiting a lawyer from acting "as advocate at a trial in which the lawyer is likely to be a necessary witness." To present the testimony, counsel should have requested to withdraw from the case.

State v. Moreno, 996 A.2d 673 (R.I. 2010). In kidnapping and assault trial, judge excluded defense witness's testimony regarding her assessment of the complainant's reputation for untruthfulness in the community. The witness attested to knowing the complainant well as a friend from school and work, but acknowledged that they had not spoken for over a year. The trial judge ruled that her testimony fell "far below the standard" required under Rule 608(a).

- Testimony regarding another witness's reputation in the community for veracity is generally admissible. However, the party seeking to admit reputational evidence can be required to establish a foundation for admissibility either by means of an offer of proof or by requesting a voir dire examination.

- In determining whether a proper foundation exists for the character witness's testimony, the trial judge considers: (1) the personal knowledge of the witness's reputation in the community, (2) the timeliness of that knowledge, and (3) its proximity to the time of trial. Id. at 680-81 (citing State v. Cote, 691 A.2d 537, 540-41 (R.I. 1997)). Counsel "need not elicit from the proffered witness specific instances of untruthfulness." Id. at 681.

- R.I.S.C. did not directly address if the trial court erred on this issue, instead finding that the judge's error, if any, was harmless in this case because there was "voluminous [additional] evidence" to demonstrate the complainant's untruthfulness.

- *Practice tip*: If evidence as to reputation is denied, attempt to admit opinion evidence, which requires lesser foundational proof than reputation evidence.

Defendant's Statements/Harnois Limitations

State v. Harnois, 638 A.2d 532 (R.I. 1994). In an attempted murder trial wherein the defendant did not testify, the trial court precluded defense counsel from cross-examining a police officer as to the defendant's statements made to police. The R.I.S.C. affirmed ruling that a defendant may not introduce his own self-serving statements made to police without taking the stand.

- The defendant did not take the stand at trial. He may not testify by other means, including by way of the unsworn statements made to police. Id. at 1036-37. By choosing to exercise his Fifth Amendment right, defendant waived all rights to testify. To admit defendant's statements under either rule would be to ignore the rules' well-established and unambiguous guidelines. The defendant was seeking to offer testimony through his statements, which might raise reasonable doubt in the minds of a jury, yet would deprive the state of the opportunity of cross-examination. The rules of evidence will not be manipulated in this way. Id.

Practice Tip: The state has attempted to apply the Harnois holding to statements made to a defendant but this has been overruled by the R.I.S.C. in the following two cases.

State v. Dennis, 893 A.2d 250 (R.I. 2006). While contesting the voluntariness of his confession, defendant sought to admit the statements of the police interrogator that he 'almost believed' the defendant as affecting his decision to give a statement. The trial judge denied this line of questioning based on the state's argument that this was barred by Harnois. The R.I.S.C. reversed and remanded holding that statements made by the police to a defendant are not precluded by Harnois.

State v. Arciliares, 108 A.3d 1040 (R.I. 2015). At a murder trial where the state's use of an A.C.I. informant was part of their case in chief, defendant sought to introduce the statements of the police investigator made to defendant on the theory that police gave him details of murder which he simply relayed to the informant. The state objected arguing that this was a Harnois type situation and the trial judge precluded this line of questioning. The R.I.S.C. reversed ruling that, just as in Dennis, the statements made to a defendant are not barred by Harnois.

- "a non-testifying defendant could not introduce his own statements through the testimony of investigating officers …" Id. at 264 (citing Harnois, 638 A.2d at 535-36). However, as is the case here, the defendant in Dennis sought to ask police detectives about statements the defendant alleged the detectives made to him during questioning. Id. The Dennis scenario, asking a detective to recount his own statements that he made at a meeting with the defendant, is exquisitely similar to that of defendant and Det. LaForest. Therefore, the holding in Harnois is here, as it was in Dennis, "inapposite to the situation." Arciliares, 108 A.3d. at 1050.

IN-COURT DEMONSTRATIONS

State v. Wiley, 567 A.2d 802 (R.I. 1989). In-court demonstration by the prosecution resulted in reversible error when it took place under circumstances not substantially similar to those that existed at the time of the alleged incident. The trial judge also erred when he gave his personal estimates of the results of the courtroom demonstration.

- A proponent of a courtroom demonstration must lay a preliminary foundation as to the similarity of conditions.

- The trial judge may not comment on the results of any in-court experiment because the results are within the sole province of the fact finder.

State v. Perry, 574 A.2d 149 (R.I. 1990). The trial judge's refusal to allow a courtroom demonstration of a video camera operation was affirmed. The conditions in court were not substantially similar because the equipment was different and the officer involved had aged.

State v. Werner, 851 A.2d 1093 (R.I. 2004). At robbery trial, complainant testified that she had observed the defendant for twenty seconds during the commission of the crime. During closing arguments and over defendant's objection, the prosecutor was permitted to conduct a "time experiment" to demonstrate the significance of this testimony, where he told the jurors to pick someone in the courtroom and focus on them while he counted for twenty seconds.

- The following day, the trial judge realized that he should not have allowed the time experiment, and cautioned the jurors not to rely on it because the conditions during the crime (weather, confusion, excitement, etc.) could not be replicated in a courtroom.

- Nonetheless, R.I.S.C. affirmed on appeal. The Court distinguished this case from Wiley (see above) by noting that here it was the prosecutor and not the judge making the statement, it occurred during closing argument rather than testimony so it was not evidence, and the judge dispelled any prejudice with his cautionary instruction.

EVIDENTIARY OBJECTIONS

Based on our well-settled "raise or wave" rule, an objection without explanation is insufficient to preserve an issue on appeal."
State v. Moten, 64 A.3d 1232, 1239 (R.I. 2013).

Objections as to Form

Argumentative

Asked and Answered (Cumulative)

Assuming Facts Not in Evidence

Beyond the Scope of Direct or Cross

Compound Question

Cumulative (Asked and Answered)

Confusing, Ambiguous, Vague

Foundation

Improper Impeachment

Leading

Misleading

Mischaracterized Evidence

Objections as to Answer

Authentication

Best Evidence

Calls for Conclusion

Calls for Hearsay Answer

Calls for Opinion

Incompetent to Testify

Narrative

Non-Responsive to Question

Prejudicial Value Outweighs Probative Value

Privileged

Relevance

Speculative

Practice Tip: Always state the specific grounds for your objection. If the matter was previously heard and decided by motion *in limine*, reference and incorporate the previous grounds asserted. Our Supreme Court may consider the issue waived if only a general objection is lodged.

PRESERVATION OF THE RECORD

Objections

SUPER. CT. R. CRIM. P. 51: Exceptions Unnecessary

Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which the party desires the court to take or his or her objection to the action of the court and his or her grounds therefor if requested; and if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice the party. With the consent of the court a party may object to an entire line of testimony, or to the entire testimony of a witness, or to testimony on a single subject matter, and if such objection shall be overruled, it shall not be necessary for the party to repeat his or her objection thereafter, but every part of such testimony thereafter introduced shall be deemed to have been duly objected to and the objection overruled.

R.I. R. EVID. 103. Rulings on Evidence

(a) Effect of Erroneous Ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

1. *Objection*. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

2. *Offer of Proof*. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

(b) Record of Offer and Ruling. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

(c) Hearing of Jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

State v. Morey, 722 A.2d 1185 (R.I. 1999). In a child-molestation case, the prosecutor attempted to elicit information from the complainant's mother about his prior consistent statements. Defense counsel made two isolated objections when the prosecutor laid the foundation for the

statements, but did not object to the specific questions that elicited this information. R.I.S.C. ruled that the issue was not properly preserved for appeal.

- "Thus, the two isolated objections were not made in a timely manner when the specifically challenged testimony was being elicited. Therefore, the defendant's challenge to the testimony of Mrs. White was not preserved properly in the record and cannot be the subject of our review on appeal." Id. at 1188.

State v. Moten, 64 A.3d 1232 (R.I. 2013). In a trial for first degree child abuse, the treating physician called in an ophthalmologist, who made statements to the primary physician, which the primary physician then related at trial. This was objected to by defense counsel, but only as a general "objection" and not as a specific hearsay objection. The court held that these general objections were insufficient to preserve the issue on appeal.

> Pursuant to the "raise or wave" rule (see State v. Wiggins, 919 A.2d 987 (R.I. 2007) below) the court held that the hearsay objection issue had not been preserved for appeal. Based on our well-settled "raise or wave" rule, an objection without explanation is insufficient to preserve an issue on appeal." Id. at 1239.

State v. Gallagher, 654 A.2d 1206 (R.I. 1995). If the trial judge sustains an objection and gives a cautionary instruction, the only manner to preserve the issue for appeal is to move for a mistrial.

- Prosecutor asked a prejudicial question during the cross-examination of a defense witness, to which defendant objected. The judge sustained the objection and instructed the jury to disregard the question and answer. "Consequently the trial justice committed no error since he gave all the relief which was requested and cannot be faulted for failing to give relief by way of a mistrial in the absence of a request therefor." Id. at 1212.

State v. Hazard, 785 A.2d 1111, 1115-16 (R.I. 2001). "When a trial justice sustains an objection to a line of inquiry on cross-examination and opposing counsel fails to make an offer of proof, fails to request any voir dire of the witness, and fails to articulate any reason why the court should reconsider its ruling, then that party cannot, on appeal, question the trial justice's ruling in sustaining the objection as reversible error." Here, the prosecutor objected to defense counsel's line of questioning, and defense counsel failed to satisfy this requirement to preserve the issue.

Cronan ex rel. State v. Cronan, 774 A.2d 866 (R.I. 2001). Although often interrelated, discovery violations that implicate both Rule 16 and Brady must be treated as two separate objections in order to preserve both for review.

- In this case, the defendant waived the Rule 16 issue because he had not moved to compel discovery, objected at trial, or otherwise alerted the trial court to the alleged discovery violations. However, the Court did consider the issue of the Brady violation. Even though defendant had "lacked specificity" and made only "vague requests for certain 'Brady material'—both during trial and in his motion for new

trial," the Court found these actions sufficient to preserve the defendant's argument, analyzing it as a general request for Brady material.

State v. Arroyo, 844 A.2d 163 (R.I. 2004). Through use of a continuing objection made on state's direct exam, during what defense counsel considered to be improper expert testimony by a police detective, defendant was able to preserve for appeal his issue of improper bolstering that occurred during the state's re-direct of the officer.

State v. Disla, 874 A.2d 190 (R.I. 2005). Trial justice denied defendant's motion for judgment of acquittal and he was convicted of delivery of a controlled substance and conspiracy to deliver. R.I.S.C. vacated defendant's conspiracy conviction.

- When renewing a Rule 29 motion following the state's rebuttal witness, defense counsel did not specify the grounds for objection, but merely assented when the court asked, "same grounds?" Although in this case the nature of the objection was clear to the trial court, R.I.S.C. cautioned counsel should "specify clearly for the record the nature of their objections or motions to preserve their clients' rights on appeal." Id. at 196.

State v. Snell, 892 A.2d 108 (R.I. 2006). Defendant argued that he was compelled to appear in his prison uniform before the jury and it prejudicially created an inference that he possessed a criminal disposition. R.I.S.C. agreed that defendant's constitutional right to a fair trial was violated, but held that defendant failed to preserve the issue for appeal.

- "…the failure to make an objection to the court as to being tried in such clothes, for whatever reason, is sufficient to negate the presence of compulsion necessary to establish a constitutional violation." Defendant's "silence precludes any suggestion of compulsion." Id. at 116 (quoting Estelle v. Williams, 425 U.S. 501, 512-13 (1976)).

- A defendant's objection to wearing a prison uniform at trial is timely if made before any prejudice can emanate from his appearance in the uniform. Thus, it must be made prior to his appearance before the jury.

State v. Remy, 910 A.2d 793, 800 (R.I. 2006). "A defendant is required to make a request for cautionary instructions or move for a mistrial in order to preserve for review by this Court a question concerning alleged prejudicial error in a closing argument; a mere objection is insufficient. A defendant need not request a cautionary instruction or move for a mistrial to preserve such an issue for appeal, however, if the request for cautionary instructions would have been futile or the attempt to cure the prejudice would have been ineffective."

State v. Grullon, 984 A.2d 46 (R.I. 2009). Defendant objected to state's request to admit a bag of cocaine into evidence due to lack of evidence to establish chain of custody. The trial judge

conditionally admitted the bag and stated that defendant could renew the objection if chain of custody evidence was insufficient. When defendant failed to renew his objection, he waived any right to challenge the bag's admission on appeal.

- Additionally, for ineffective assistance of counsel to be arguable on direct review, defendant must raise an objection about his trial counsel or any conflict of interest during trial. Otherwise, it is reserved strictly for application of post-conviction relief.

State v. Tower, 984 A.2d 40 (R.I. 2009). Defendant alleged on appeal that he was wrongly convicted of violating a no-contact order, because a Superior Court clerk that testified at his trial inaccurately stated the period when the no-contact order expired. R.I.S.C. held that defendant's wrongful conviction claim could not be reviewed because he did not challenge the testimony at trial.

State v. Steele, 39 A.3d 676 (R.I. 2012). Defendant was barred from arguing on appeal that he received ineffective assistance of counsel at his post-conviction relief hearing, because he did not raise the issue of ineffective assistance during his post-conviction relief hearing.

- "We recognize that it may seem infeasible to raise such an argument at the post conviction relief hearing, since the argument focuses on the conduct of the attorney during the post conviction relief hearing itself. However, it is an established rule in Rhode Island that this Court will not review issues that are raised for the first time on appeal."

State v. Nelson, 982 A.2d 602 (R.I. 2009). Defense counsel properly preserved issue of improper judicial interrogation for review. Although defendant never objected during the interrogation, he did so out of courtesy to the judge and requested to be heard at sidebar immediately after, where he then stated his objection and placed his specific reasons for objection on the record.

State v. Wiggins, 919 A.2d 987 (R.I. 2007). In probation revocation hearing, defendant failed to preserve his allegation that the hearing justice erred by vacating, *sua sponte*, defendant's admission to probation violation in exchange for a lighter sentence. Defense counsel did not raise an objection when the admission was vacated or at the violation hearing. R.I.S.C. affirmed.

- The court articulates one very narrow exception to their well-settled "raise or waive" rule: "This Court will review unpreserved assignments of error, as an exception to our raise-or-waive rule, when they implicate 'basic constitutional rights,' and further satisfy three conjunctive elements: 'First, the error complained of must consist of more than harmless error. Second, the record must be sufficient to permit a determination of the issue.... Third, counsel's failure to raise the issue at trial must be due to the fact that the issue is based on a novel rule of law of which counsel could not reasonably have known at the time of trial.'" Id. at 991 n. 3 (quoting State v. Feliciano, 901 A.2d 631, 647 (R.I. 2006)).

State v. Ciresi, 45 A.3d 1201 (R.I. 2012). For objections during a witness's testimony, there is no exception to the raise-or-waive rule based on counsel's belief that continued articulation of objections during the testimony would be futile. (The "futility exception" applies only to requests for cautionary instructions and motions for a mistrial following overruled objections.)

State v. Murray, 44 A.3d 139, 141 (R.I. 2012). Defendant agreed to a plea deal but later appealed, arguing that he was improperly charged because his offense did not meet the elements of the charged statute. By virtue of knowingly and voluntarily entering a plea of nolo contendere, "defendant unequivocally has waived all nonjurisdictional defects in the criminal information. 'When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.'" Id. at 141 (quoting Torres v. State, 19 A.3d 71, 79 (R.I. 2011).

- The Court acknowledged that there may be some rare exceptions to this rule. For example, "[it] does not bar appeal of claims that the applicable statute is unconstitutional or that the indictment fails to state an offense." Id. (quoting Torres, 19 A.3d at 79).

State v. Kelly, 20 A.3d 655 (R.I. 2011). Even when counsel objects or motions to exclude evidence prior to trial and is denied by the judge, counsel still must object when the state presents that evidence at trial in order to preserve the issue for review.

State v. Rosario, 14 A.3d 206 (R.I. 2011). Defendant alleged that the prosecution manufactured an issue on cross-examination of the defendant, but failed to preserve the issue for review.

- The prosecutor first asked defendant if he liked the arresting officer (who he knew from previous incidents), a question which the R.I.S.C. agreed was "not inappropriate." Defendant replied, "Yes…I respect authority." The prosecutor then asked if he respected all authority and all police officers, and defendant again responded affirmatively. Then the prosecutor pulled out a complaint that defendant once filed against the Providence police, at which point defense counsel immediately objected. Despite being blindsided, R.I.S.C. held that the issue was waived because defense counsel should have objected earlier in the line of questioning.

In re Jazlyn P., 31 A.3d 1273, 1280-81 (R.I. 2011). R.I.S.C. noted in this case that "a general objection at trial will not suffice to preserve an issue for appeal when the context does not supply the specific ground for the objection," while simultaneously cautioning that if "the introduction of evidence is objected to for a specific reason, other grounds for objection are waived and may not be raised for the first time on appeal." Therefore, each potential basis for a single objection should be stated on the record.

Offers of Proof

Super. Ct. R. Crim. P. 26: Evidence

(b) Record of Excluded Evidence. In an action tried by a jury, if an objection to a question propounded to a witness is sustained by the court, the examining attorney may make a specific offer of what he or she expects to prove by the answer of the witness. The court shall require the offer to be made out of the hearing of the jury. The court may add such other or further statement as clearly shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. In actions tried without a jury the same procedure may be followed, except that the court upon request, shall take and report the evidence in full, unless it clearly appears that the evidence is not admissible on any ground or that the witness is privileged.

State v. Brennan, 526 A.2d 483 (R.I. 1987). An offer of proof can be made on either direct or cross-examination. The court can *require* an offer of proof on cross-examination when defense counsel seeks "to open up new avenues of inquiry concerning the possible [ability and] motive of a third party to commit the crime of which the defendant is accused." Id. at 488.

State v. Martinez, 824 A.2d 443 (R.I. 2003). Defendant in a rape case was precluded from cross-examining state's forensic scientist and forensic serologist about whether DNA testing (that was not performed) might have excluded defendant and implicated the person defendant claimed was responsible. R.I.S.C. affirmed.

- Defendant made no offer of proof that the complainant engaged in sexual intercourse with someone else; therefore, the line of questioning regarding DNA analysis was too speculative to be allowed.

State v. Wright, 817 A.2d 600 (R.I. 2003). Defendant in a felony murder trial was precluded from cross-examining a witness regarding other parties shown on a video surveillance tape. R.I.S.C. affirmed.

- Defense counsel failed to make an offer of proof "showing the third person's opportunity to perpetrate the crime and a proximate connection between that person's presence on the scene and the actual commission of the crime." Id. at 610.

State v. Gomes, 881 A.2d 97 (R.I. 2005). Defendant in a murder trial was precluded from offering evidence intended to show that the police were biased against defendant and that someone else had a motive to commit the murder. R.I.S.C. affirmed.

- "To be admissible, evidence of another person's motive to commit the crime with which a defendant is charged must be introduced in conjunction with other evidence tending to show the third person's opportunity to commit the crime and a proximate

connection between that person and the actual commission of the crime." Id. at 111 (quoting State v. Gazerro, 420 A.2d 816, 825 (R.I. 1980)).

State v. Gomes, 881 A.2d 97 (R.I. 2005). "The offer of proof must contain '[(1)] evidence of another person's motive to commit the crime with which a defendant is charged * * * in conjunction with other evidence tending to show [(2)] the third person's opportunity to commit the crime and [(3)] a proximate connection between that person and the actual commission of the crime.'" Quoting Rivera v. State, 58 A.3d 171, 181 n. 7 (R.I. 2013).

State v. Peoples, 996 A.2d 660 (R.I. 2010). Unable to produce any evidence or even the identity of an alleged third-party perpetrator, defendant was not able to make a satisfactory offer of proof necessary to present the defense at his trial on child molestation charges. The trial justice, therefore, prohibited defense counsel from asking the victim's aunt whether any other men spent the night at the apartment she shared with the child. R.I.S.C. affirmed.

Whether the court can require an offer of proof on cross-examination in other circumstances is unclear. Compare State v. Doctor, 690 A.2d 321 (R.I. 1997) (defense counsel *should have* made an offer of proof on cross-examination so as to assist the trial judge), to State v. Plunkett, 497 A.2d 725 (R.I. 1985), and State v. DeBarros, 441 A.2d 549 (R.I. 1982) (Rule 26(b) reversible error for trial judge to require an offer of proof on cross-examination).

- When making an offer of proof on either direct or cross examination, be as specific as possible as to the grounds for the question, the foundation for the answer, and the need for such evidence as to your theory of defense.

- If the judge excuses the jury from the courtroom and the witness remains on the stand, try and get the offer of proof under oath from the witness (as SUPER. CT. R. CRIM. P. 26 allows in a bench trial) especially if he/she is favorable to the defense.

State v. Cote, 691 A.2d 537 (R.I. 1997). In a child molestation case, defense counsel sought to offer testimony as to the complaining witness's reputation for truthfulness within the community. The trial judge refused to allow the evidence, ruling that it was inadmissible hearsay. R.I.S.C. ruled that while such evidence is admissible under Rule 608, defense counsel failed to establish the necessary foundational elements in his offer of proof.

- "…it remained the obligation of defendant either to provide all the necessary elements of foundation in his offer of proof or to have requested a *voir dire* examination of Chagnon outside the presence of the jury. In this case counsel fulfilled neither obligation. Since the offer of proof was inadequate, we cannot fault the trial justice for having rejected it. In instances when the offered testimony suggests or poses a question about its materiality or competency, the offer of proof must indicate the facts on which relevancy or admissibility of the testimony depends." Id. at 541-42.

Jury Instructions

Practice Tip: The proper preservation of objections to jury instruction cannot be overstated. Request written copies of the trial judge's proposed instructions prior to the charging conference and carefully review them. Pattern instructions should be reviewed and, when necessary, customized to the facts of the case. Requested instructions need to be in writing and objections placed on the record, both before and after disputed instructions are given, to properly preserve the issue.

SUPER. CT. R. CRIM. P. 30: Instructions

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the request. At the same time copies of such request shall be furnished to adverse parties. If a defendant relies upon an affirmative defense, or justification, or matter in mitigation and wishes the court to instruct the jury with respect to such, he or she shall so advise the court in writing no later than at the close of the evidence. No party may assign as error any portion of the charge or omission therefrom unless the party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which the party objects and the grounds of the party's objection. Objections shall be made out of the presence of the jury.

State v. Souza, 425 A.2d 893, 900 (R.I. 1981). "In Rhode Island we do not require that a trial justice read a patterned instruction. It is customary for the trial justice in this state to speak to the jury in ordinary conversational terms, frequently without written notes, in order to achieve the maximum effect of communicating ideas through the use of words. Jury instructions are not given in a vacuum. They must relate to the circumstances of the case and, particularly in respect to supplemental charges, may depend upon the length of deliberation and the questions that have been asked by the jurors."

Timing of Objection

State v. Hallenbeck**,** 878 A.2d 992 (R.I. 2005). "The requirement in Rule 30 that the objection to an instruction be made before the jury retires (and that it be made with clarity and specificity) is crucial because, once alerted to the perceived error in the instruction that has been given, the trial justice has an opportunity to cure the alleged deficiencies before the jury retires for deliberations." Id. at 1006 (quoting State v. Crow, 871 A.2d 930, 935 (R.I.2005)).

State v. Hazard, 797 A.2d 448 (R.I. 2002). State conceded that defense counsel made a timely objection to "reasonable doubt" jury instruction, but argued that he waived his right to review by failing to explicitly state his basis for the objection. R.I.S.C. determined that the objection was preserved despite this failure, because the trial judge clearly understood the basis of the objection.

- Defense counsel stated, "I ask you to exclude the word 'any' because I think, Judge, that word—," to which the judge interrupted, "Denied. Anything else?" The court determined that this interruption proved the judge understood the objection's basis. Id. at 469 n. 9.

Sufficiency of Objection

State v. Dalton, Citation Pending (R.I. November 27, 2018). Trial court overruled objection to police officer's testimony concerning observations of the complainant that he did not appear intoxicated but did look as if just coming out of a deep sleep. R.I.S.C. affirmed stating that brief comment was not properly preserved for appeal.

- "Significantly, following his objection, defendant did not move to strike Carlone's answer or pass the case. If a general objection at a precise moment were sufficient to constitute a "specific objection," a trial justice would be required to divine the reason for the objection, essentially reading the mind of the objecting counsel. Also, if every well-timed "Objection" could be considered as a specific objection, specificity requirement would be rendered meaningless. We therefore conclude that defendant's mere "Objection," without providing any detail as to its basis, did not suffice to preserve the issue of the admissibility of Carlone's testimony for our substantive review."

State v. Hanes, 783 A.2d 920 (R.I. 2001). Defendant did not renew his objection to the jury instructions following a supplemental charge. R.I.S.C. determined that counsel's objection to the original charge was sufficient to preserve the issue for review.

- R.I.S.C. has stated repeatedly that objecting to the court's failure to give an instruction requested by the defense simply by referring to the number is insufficient to preserve the issue for appellate review. Counsel must submit an alternative request to preserve the issue for appellate review. Therefore, it is imperative to submit requests to charge and to do so in a timely fashion.
- When objecting to the trial judge's failure to give a requested instruction, remember to:
    1. Cite the specific requested jury instruction.
    2. State the grounds for the giving of the instruction.
    3. Cite any case law that supports the instruction.

- When objecting to the trial judge's instructions, remember to:
    1. Cite the specific instruction or portion of instruction.
    2. State the grounds as to why the instruction should not have been given.
    3. Cite any applicable case law.
    4. If applicable, state an instruction that should have been given in its place.
    5. Raise a new objection after the Court's supplemental instruction if inadequate.

State v. Tillery, 922 A.2d 102 (R.I. 2007). Defendant argued on appeal that the trial justice erred by directing a verdict for assault with a dangerous weapon by reciting all the reasons a firearm is a dangerous weapon. R.I.S.C. held that defendant did not preserve his argument for appeal

because, although he objected to the original instruction, he indicated his acquiescence to the judge's supplemental instruction by making no further objection.

- "We may assume that defense counsel's silence after the supplemental instruction was given was logically deemed by the trial justice to be an indication that defense counsel was satisfied that the supplemental instruction had remedied the defendant's problem with the original instruction…. [I]t is clear that there is no adverse ruling for this Court to review." Id. at 109-10.

- But see State v. Enos, 21 A.3d 326, 333 n. 11 (R.I. 2011). When counsel expressly requested a mistrial for prejudicial testimony (rather than just objecting, as was done in Tillery) then the issue was preserved for appeal, even though he did not renew his objection after the trial justice instead gave an unrequested cautionary instruction.

State v. Figuereo, 31 A.3d 1283, 1289 n. 6 (R.I. 2011). "The raise or waive rule is not some sort of artificial or arbitrary Kafkaesque hurdle. It is instead an important guarantor of fairness and efficiency in the judicial process."

- Following this comment, R.I.S.C. held that defendant had waived her right to challenge a jury instruction that was denied at trial—at trial she asked the judge to instruct that "a witness who is confident that he correctly identified the perpetrator may be mistaken," but R.I.S.C. deduced that she made a "very different request" on appeal by phrasing it as "an eyewitness's certainty is not a reliable indicator of eyewitness accuracy." The difference in wording waived the issue.

Sufficiency of Evidence Supporting Instruction

State v. Soler, 140 A.3d 755 (R.I. 2016). Defendant was convicted of assault with a dangerous weapon and vandalism. R.I.S.C. held defendant was entitled to self-defense jury instruction on assault charge; testimony that defendant struck a knife from victim's hand with a bat warranted self-defense instruction in assault trial. R.I.S.C. vacated conviction and remanded for new trial.

- "A self-defense jury instruction is warranted when "the record as a whole * * * contain[s] at least a scintilla of evidence supporting the defendant's theory." * * * "However slight and tenuous the evidence may be on which the self-defense hypothesis is advanced, it is nevertheless there for the jury's consideration, and the fair-trial concept requires that the jury consider it under an appropriate instruction." Id. at 762-63 (internal citations omitted).

Denial of Counsel Explaining Instruction

State v. Harnois, 638 A.2d 532 (R.I. 1994). In an attempted murder trial, defense counsel was precluded by the trial court from defining reasonable doubt during his closing argument to the jury. The R.I.S.C. affirmed.

- We take this opportunity to declare specifically that only the court has the authority and the responsibility to define "reasonable doubt" and any other rule of law. Id. at 535.

Request for Lesser-Included Offenses

State v. Turner, 655 A.2d 693 (R.I. 1995). In a breaking and entering case, Defense counsel's request for a lesser-included offense of trespass was denied by the trial judge despite the fact that evidence of a break was equivocal at best. R.I.S.C. reversed.

- It is well established that a criminal defendant is entitled to an instruction on a lesser included offense if such an instruction is warranted by the evidence. Citing State v. Messa, 594 A.2d 882, 884 (R.I. 1991).

- An instruction on the lesser included charge is required only when an actual and adequate dispute exists concerning the distinguishing element of the greater and lesser offenses. Messa, 594 A.2d at 884. After a thorough examination of the record we believe a genuine dispute exists over whether a break occurred. At best, the evidence produced by the state on this issue was equivocal.

Motion to Pass the Case/Request for a Mistrial

- A motion to pass the case and declare a mistrial is a remedy often requested by defense counsel in these situations:

    1. When extraordinarily prejudicial and inadmissible evidence is divulged to the jury by the State.
    2. Improper questioning of a witness, especially the defendant, by the prosecutor.
    3. Discovery or Brady violations occur.
    4. The jury is hopelessly deadlocked.
    5. Instances of prosecutorial misconduct.
    6. Fundamental errors that call into question the reliability and integrity of the court's fact-finding process.

- The denial of a motion to pass and to declare a mistrial will not be preserved for appellate review unless defense counsel requests in the alternative a limiting or cautionary instruction or requests some other alternative form of relief from the court. For example:

    "Your honor I would respectfully submit the motion to pass is the only remedy that will cure the prejudice that inures to my client as the result of …"

    "But if the court sees fit to deny my motion to pass, then in the alternative I would request that the court give the following cautionary or limiting instruction to the jury..."

- With inadmissible evidence or improper questioning the alternative remedy is a *cautionary instruction*, i.e. to ignore the information presented.

- When prejudicial evidence has been admitted for a limited purpose [e.g. 404(b) character evidence, 609 convictions] the remedy is a *limiting instruction*, i.e. that the record can only be used for credibility and not propensity.

- With a discovery or Brady violation the alternative remedy that you should request is a *continuance*.

State v. Rosario, 14 A.3d 206 (R.I. 2011). In considering defendant's motion to pass, the trial justice must assess the "prejudicial impact" of the alleged harm. "[I]n assessing the prejudicial impact of contested evidence, the trial justice should consider whether the evidence was of such a nature as to cause the jurors to become so inflamed that their attention was distracted from the issues submitted to them or prevent their calm and dispassionate examination of the evidence. As we have observed, however, there is no fixed formula for determining prejudice. Rather, potentially prejudicial evidence must be viewed in the context in which it appeared and in light of the attendant circumstances." Id. at 215 (citations omitted).
State v. Enos, 21 A.3d 326, 333 n. 11 (R.I. 2011). Defense counsel's request for a mistrial based on a prejudicial remark made by a prosecution witness was properly preserved for review, even

though he did not renew his objection after the trial justice instead gave an unrequested cautionary instruction.

- But see State v. Higham, 865 A.2d 1040, 1046-47 (R.I. 2004), where the defendant's attorney requested a mistrial or, in the alternative, a curative instruction. The judge opted to give a curative instruction and counsel did not renew his objection. Counsel thereby acquiesced to the effectiveness of the instruction and waived his objection.

State v. Gallagher, 654 A.2d 1206 (R.I. 1995). Moving for a mistrial is the only method of preserving an objection for appellate review once the trial judge sustains an objection and gives a cautionary instruction.

- Prosecutor asked a prejudicial question during the cross-examination of a defense witness, to which defendant objected. The judge sustained the objection and instructed the jury to disregard the question and answer. "Consequently the trial justice committed no error since he gave all the relief which was requested and cannot be faulted for failing to give relief by way of a mistrial in the absence of a request therefor." Id. at 1212.

Dismissal of Case after Mistrial Granted

State v. DeCarlo, P1/2010-0644A February 24 (R.I. Super. 2012)(Darrigan, J. unpublished). Defense motioned for dismissal on some nine instances of prosecutorial misconduct. Trial Judge granted the motion noting that the "prosecutor went out her way, knowingly, purposefully, and intentionally on three separate occasions to introduce facts before this jury that she knew absolutely were forbidden by rule of this court." And "the prosecutor was over zealous and made improper comments bent more on conviction than justice." And "the egregiousness, the number and the cumulative effect of this act of transgression left this defendant absolutely no other alternative or conclusion other than to be provoked or goaded into making" the motion to dismiss.

State v. Casas, 792 A.2d 737 (R.I. 2002). Prosecutor in a possession with intent to deliver case improperly told the jury that the state had been investigating the defendant's drug trafficking for years even though defendant had moved *in limine* to preclude the state from such references. The trial court granted a mistrial and denied defendant's double jeopardy motion to dismiss. R.I.S.C. affirmed.

- Although the trial judge had not ruled on the motion *in limine* prior to opening statements, R.I.S.C. noted that the state was on notice that the issue was "forbidden territory." Id. at 740.

- In order to prevail on a double jeopardy challenge following dismissal on grounds of prosecutorial misconduct, defendant must show that the misconduct was intended to goad defendant into moving to pass the case. Id. at 739 (citing State v. McIntyre, 671 A.2d 806, 807 (R.I. 1996)).

- Prosecutor's misconduct was unintentional because it happened early in the trial (rather than later in response to a rapidly deteriorating case), because defense counsel initially responded that he had no evidence that the misconduct was intentional, and because the prosecutor was young, inexperienced, and unfamiliar with the concept that character evidence is inadmissible to establish guilt. Id. at 740.

State v. Rolle, 84 A.3d 1149 (R.I. 2014). At trial, prosecutor introduced a witness statement that according to him had "inconsequential differences" than the statement he had introduced during discovery. The trial justice declared a mistrial, and defendant filed a motion to dismiss the charges against him on double jeopardy grounds.

- Where a prosecutor's misconduct is made in good-faith but the damage done to the defendant's case is otherwise irreparable, the proper remedy is a new trial, but not to dismiss the charges against the defendant completely. The defendant's motion was denied because the prosecutor's misconduct was "no more than a good-faith error in judgment." Id. at 1156.

MOTION FOR JUDGMENT OF ACQUITTAL & MOTION TO DISMISS

SUPER. CT. R. CRIM. P. 29: Motion for Judgment of Acquittal and Motion to Dismiss

(a) Motion for Judgment of Acquittal.

1. Motion Before Submission to Jury. Motions for a directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or on its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, after the evidence on either side is closed, if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the State is not granted, the defendant may offer evidence without having reserved the right.

2. Reservation of Decision on Motion. If a motion for judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury, and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict.

(b) Motion to Dismiss. In a case tried without a jury, a motion to dismiss may be filed at the close of the state's case to challenge the legal sufficiency of the state's trial evidence.

State v. Sundel, 402 A.2d 585 (R.I. 1979). "In considering a defendant's motion, the trial justice must view the evidence and the reasonable inferences of which it is susceptible in the light most favorable to the state; and the motion should be granted if the evidence, so viewed and without regard to either its weight or credibility, is not sufficient to warrant a jury in finding that guilt has been established beyond a reasonable doubt."

State v. Diaz, 654 A.2d 1195 (R.I. 1995). The denial of a motion for judgment of acquittal is preserved for appeal only if the defense rests its case at that point or if the motion is renewed by the defense at the conclusion of all the evidence.
State v. Grullon, 371 A.2d 265 (R.I. 1977). When defendant's motion for acquittal at the close of the state's case is denied, and defendant proceeds to present his or her own evidence, the motion is preserved for appellate review only if defendant renews the motion at the close of the presentation of all the evidence.

State v. Reyes, 984 A.2d 606 (R.I. 2009). Defendant's failure to move for judgment of acquittal at the close of the state's case did not foreclose appellate review of his motion for judgment of acquittal filed at the close of the defense case.

- Applying this case in conjunction with Diaz and Grullon (see above) reveals that to preserve a motion for judgment of acquittal for appellate review, the defense must always make the motion after presenting its case. Defense counsel need not also make the motion after the state's case, but, if he does, it must be renewed after the defense case to preserve the issue, unless the defendant presents no case of his own.

State v. Andreozzi, 798 A.2d 372 (R.I. 2002). Defendant convicted of simple assault appealed the trial justice's denial of his Rule 29 motion. R.I.S.C. affirmed.

- Although defendant moved for a judgment of acquittal at the close of the state's case, he failed to renew his motion at the close of the evidence. Thus, defendant failed to preserve the issue for appeal.

State v. McKone, 673 A.2d 1068 (R.I. 1996). "Judges do not return verdicts, juries do, and there is no jury available to a trial justice in a jury-waived trial that can respond to any order of verdict direction. Our long established trial procedure practice has been, and remains, 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."

State v. Oliveira, 882 A.2d 1097 (R.I. 2005). Defendants motioned for judgment of acquittal on first degree felony murder charges arguing that the evidence could not prove defendants' participation (or attempted participation) in felony manufacture, sale, delivery, or other distribution of a controlled substance as required by the felony murder statute. Rather, defendant argued, the evidence supported an attempt to purchase, obtain, acquire, or receive a substantial quantity of a controlled substance with intent to deliver. Trial court denied but R.I.S.C. vacated defendants' conviction on that count.

- The issue was whether attempted possession with intent to deliver satisfied the statutorily required predicate offense of manufacture, sale, delivery, or other distribution. In the absence of a clear and unambiguous statutory language, "the policy of lenity in the construction of criminal statutes requires that the less harsh of two possible meanings be adopted." Id. at 1110.

State v. Disla, 874 A.2d 190 (R.I. 2005). Trial justice denied defendant's Rule 29 motion and he was convicted of delivery of a controlled substance and conspiracy to deliver. R.I.S.C. vacated defendant's conspiracy conviction.

- When renewing a Rule 29 motion following the state's rebuttal witness, defense counsel did not specify the grounds for objection, but merely assented when the court asked, "same grounds?" Although in this case the nature of the objection was clear to the trial court, R.I.S.C. cautioned that counsel should "specify clearly for the record the nature of their objections or motions to preserve their clients' rights on appeal." Id. at 196.

- Although the state conceded that defendant's motion should have been granted, R.I.S.C. was obligated to conduct a thorough, independent review of the evidence. "'It is the uniform practice of this Court to conduct its own examination of the record in all cases where the … [state] confesses that a conviction has been erroneously obtained.'" Id.

State v. Rieger, 763 A.2d 997 (R.I. 2001). Trial court denied defendant's motion for judgment of acquittal although a medical examiner testified that the complainant's injury could not have happened the way he testified. R.I.S.C. affirmed.

- Although the trial court found the medical examiner's testimony "compelling," R.I.S.C. noted that "a victim's testimony alone is sufficient to sustain a conviction, and we have affirmed a trial justice's determination that a jury could find a defendant guilty solely on the basis of such evidence." Id. at 1001.

State v. Berroa, 6 A.3d 1095 (R.I. 2010). In bench trial proceeding, the trial judge erred by not granting defendant's motion to dismiss his drug possession and conspiracy charges following the presentation of the state's case. The defendant was arrested with two other individuals, both possessing cocaine, but none was found on defendant's person. The focus on the defendant originated from the tip of an informant, whose information about defendant proved to have numerous inaccuracies. Therefore, evidence was not sufficient to establish constructive possession of drugs or a conspiracy between the parties, even in the light most favorable to the state.

- A finding of guilt based on circumstantial evidence "will be warranted only if those facts and circumstances, taken together, are not only consistent with the hypothesis that defendant was guilty, but also are inconsistent with any reasonable hypothesis that he was innocent…. If [the] pyramiding of inferences becomes speculative, [then] proof of guilt beyond a reasonable doubt will not be found." Id. at 1100, 1104.

State v. Richardson, 47 A.3d 305 (R.I. 2012). Prevailing on an acquittal motion is a heavier burden for a defendant than is prevailing on a motion for a new trial, because a judge deciding an acquittal motion must view all evidence in favor of the state but a judge deciding a motion for new trial may weigh conflicting evidence.

- "[U]nless a defendant can show that the presented evidenced failed to support his or her conviction upon the motion-for-a-new-trial standard, a defendant necessarily will be unable to establish [that] he or she was entitled to a judgment of acquittal." Id. at 317 (quoting State v. Pineda, 13 A.3d 623, 640 (R.I. 2011)).

REBUTTAL WITNESSES

Purpose

State v. Stewart, 663 A.2d 912 (R.I. 1995). In the prosecution of a second-degree murder case, the state called an expert as a rebuttal witness to the defense experts. Over defense counsel's objections, the expert was allowed to offer an opinion as to cause of death. R.I.S.C. affirmed.

- "…the proper function and purpose of rebuttal testimony is to explain, repel, counteract, or disprove the evidence of the adverse party…The decision to permit rebuttal testimony lies in the discretion of the trial justice, whose decision will not be overturned absent an abuse of that discretion." See State v. Simpson, 520 A.2d 1281, 1284 (R.I. 1987).

Manufacturing Issue on Cross

State v. O'Dell, 576 A.2d 425 (R.I. 1990). The state failed to disclose a witness statement and brought the statement forward for the first time in rebuttal as a result of the cross-examination of defendant. R.I.S.C. vacated and remanded.

- The state cannot manufacture an issue on cross-examination of the defendant for the purpose of impeaching the credibility of defendant through rebuttal witnesses.

- "We recognize that evidence that may not be admissible in the prosecution's case in chief may be used in rebuttal in order to counter false statements made by the accused in the course of his direct testimony…The prosecution may not manufacture an issue in the course of cross-examination for the purpose of impeaching the credibility of defendant by the use of evidence or testimony that would otherwise be inadmissible." Id. at 429.

State v. McDowell, 620 A.2d 94 (R.I. 1993). The trial judge's admission of previously barred 404(b) evidence through the state's rebuttal witnesses was reversible error. The state manufactured the issue in cross-examination in order to introduce otherwise impermissible testimony in rebuttal and was therefore barred from introducing this evidence. R.I.S.C. reversed.

State v. Filuminia, 668 A.2d 336 (R.I. 1995). The state could properly introduce defendant's employment records in rebuttal. The records were not collateral as they impeached defendant's testimony that he was at work when the sexual assaults supposedly took place. R.I.S.C. affirmed.

State v. Briggs, 886 A.2d 735, 751 (R.I. 2005). The state sought to discredit the alibi testimony of three witnesses by implying that they had a motive to fabricate the alibi in aid of the defendant. Defendant wanted to rebut this implication by admitting hearsay testimony, under the

"prior consistent statements" exception, which showed that the witnesses had previously given the same alibi information to a private investigator. The trial court found that the motive already existed in their minds at that time and precluded the rebuttal testimony because prior consistent statements "must have been made before the alleged influence, or motive to fabricate, arose." R.I.S.C. affirmed.

State v. Gaspar, 982 A.2d 140 (R.I. 2009). Detailed testimony by defendant's ex-girlfriend regarding the "rough or aggressive sex" that she and defendant regularly engaged in during their relationship was too unduly prejudicial under Rule 403 to be admitted at defendant's trial for sexual assault, even if it was relevant for rebuttal to impeach defendant's assertion that he had no interest in aggressive sex and that the sex with complainant was consensual. R.I.S.C. vacated and remanded for a new trial.

- Additionally, while the state referred to the ex-girlfriend as a rebuttal witness, they used her in their case-in-chief in order to undercut the defendant's anticipated testimony. The Court noted that because the "testimony was elicited as part of the state's case-in-chief, we need not consider whether some or all of her testimony would have been properly admissible in rebuttal; that would depend on what defendant testified to—if indeed he chose to testify." Id. at 149 n. 13.

State v. Cook, 45 A.3d 1272 (R.I. 2012). During sexual assault trial, evidence related to defendant's prior uncharged sexual misconduct was admissible to rebut defendant's defense of consent.

- However, in affirming the trial court, R.I.S.C. did note that they were distinguishing this case from "this Court's previous holdings that in sex offense cases, because of the potential of prejudice, evidence of other misconduct must be used sparingly by the state and only when reasonably necessary," finding it reasonably necessary in this case. Id. at 1281.

State v. Rosario, 14 A.3d 206 (R.I. 2011). Defendant's testimony during cross-examination opened the door to rebuttal evidence that had been otherwise inadmissible. The defendant had known of the arresting officer prior to being arrested for the charged offenses, leading the prosecutor to ask the defendant if he liked the officer. Defendant responded, "Yes, I like him. He is an officer. I respect authority." To rebut this statement the prosecutor confronted defendant with statements he once made in a complaint about the Providence police. Defense counsel's objection was overruled. R.I.S.C. affirmed.

- The Court determined the prosecutor's initial question to be "rather innocuous and not inappropriate" and that defendant had opened the door by taking it a step further to say "I respect authority" rather than answering the question directly.

But see: State v. Mercurio, 89 A.3d 813 (R.I. 2014). Defendant's testimony during cross-examination of his opinion of the police did not open the door to rebuttal evidence where the

prosecutor was the one to ask a leading question, as opposed to the defendant giving an open-ended answer in Rosario above.

- The "defendant had not 'opened the door' to these questions. We find no support in the record for the proposition that defendant had previously volunteered any broad declarations of his respect for either the police or law and order generally so as to "open the door" to the prosecutor's questions. . . . the repeated broad questions about defendant's sentiments towards police officers in general elicited a response from defendant which then enabled the state to bring in defendant's prior convictions of assault against police officers. . . . these repeated questions constituted improper "manufacturing" of an issue to bring in evidence which the trial justice had previously ruled inadmissible." Id. at 822.

- Defendant must volunteer his respect for the police or authority in general in order to "open the door" to prosecutorial questions on that topic.

- New trial granted because improper admission of evidence was not harmless: "We cannot be satisfied beyond a reasonable doubt that the improper admission into evidence of the defendant's prior convictions was not overly prejudicial. Id at 823.

Violation of Sequestration Order

State v. Staffier, 21 A.3d 287 (R.I. 2011). Despite sequestration order, the Trial Court allowed the state to call rebuttal witnesses who were present during and observed the trial.

- State had not intended to call these witnesses and therefore did not undermine the purpose of the sequestration order.

State v. Almonte, 823 A.2d 1148 (R.I. 2003). Defendant testified that arresting police officer beat him and the state introduced the officer's testimony as rebuttal. Trial court precluded defendant's mother from testifying as surrebuttal witness. R.I.S.C. affirmed.

- Testimony by defendant's mother would have violated the court's sequestration order because she was in the courtroom throughout the trial. "The purpose of surrebuttal is to permit the defendant to introduce evidence in refutation or opposition to new matters interjected into the trial by the plaintiff on rebuttal. . . fairness requires that the defendant be permitted to oppose new matters presented by plaintiff for the first time which the defendant *could not have presented or opposed at the time of presentation of his main case.* Contrariwise, the purpose of surrebuttal is not the introduction of evidence merely cumulative to that presented by the defendant in its original presentation. . . *It follows that the defendant has no right to present surrebuttal evidence merely because the plaintiff has presented rebuttal evidence.*" Id. at 1151 (emphasis in original).

Surrebuttal

State v. Stewart, 663 A.2d 912 (R.I. 1995). In the prosecution of a second-degree murder trial, the state called an expert as a rebuttal witness to the defense experts. Defense counsel requested the opportunity to call a surrebuttal witness to respond to a rebuttal's witness' testimony claiming that new testimony was offered on rebuttal. The trial judge denied this request and the R.I.S.C. affirmed.

- "The purpose of surrebuttal is to permit the defendant to introduce evidence in refutation or opposition to new matters interjected into the trial by the plaintiff on rebuttal… In other words, fairness requires that the defendant be permitted to oppose new matters presented by plaintiff for the first time which the defendant *could not have presented or opposed at the time of presentation of his main case.* Contrariwise, the purpose of surrebuttal is not the introduction of evidence merely cumulative to that presented by the defendant in its original presentation… *It follows that the defendant has no right to present surrebuttal evidence merely because the plaintiff has presented rebuttal evidence.*" Quoting State v. Byrnes, 433 A.2d 658, 669–70 (R.I. 1981).

JUROR CONDUCT

Juror Statements

State v. Carmody, 471 A.2d 1363 (R.I. 1984). During *voir dire*, a prospective juror said he thought defendant was guilty. The trial judge failed to immediately give an adequate cautionary instruction. See R.I. R. EVID. 606(b).

- Trial justice must immediately caution the jury that they are to disregard the juror's comments.

State v. Pusyka, 592 A.2d 850 (R.I. 1991). During an arson trial, a newspaper article came to a juror's attention and he asked to be excused. Trial judge replaced the juror and immediately *voir dired* the panel. R.I.S.C. affirmed.

- The article was an objective account of the trial and unlikely to cause prejudice.
- Trial judge's timely action also prevented any prejudice to defendant.

State v. Browne, 602 A.2d 540 (R.I. 1992). A juror polled after verdict was equivocal as to defendant's guilt as to one count. Trial court *voir dired* the juror and accepted her guilty vote. R.I.S.C. affirmed.

- Rule 606(b) requires finality of judgment.
- When vote is equivocal, judge must determine whether juror's response is so far removed from the verdict as to make the verdict defective, or whether the defect could be cured by further interrogation or deliberations.
- Trial court may not inquire as to the juror's deliberative process except as to extraneous information. See Hartley, below.

State v. Martinez, 652 A.2d 958 (R.I. 1995). Juror's comments during *voir dire* about seeing defendant at the A.C.I. did not require a mistrial.

- The statement was made before selection was complete.
- Defense counsel did not request a cautionary instruction.
- Evidence of defendant's guilt was overwhelming.

State v. Nelson, 982 A.2d 602 (R.I. 2009). During *voir dire* at trial for DUI resulting in serious bodily injury, a prospective juror commented in open court that she could not be impartial because she "had three students killed by drunk drivers." The juror was immediately excused

and defense counsel moved for a mistrial. The trial justice denied the motion, largely because the comment did not specifically refer to the defendant, but cautioned the jurors to disregard the comments and continue to presume defendant's innocence. R.I.S.C. affirmed.

Juror Conduct

State v. Hartley, 656 A.2d 954 (R.I. 1995). During deliberations in a robbery case, several jurors had tainted deliberations with extraneous information learned outside the scope of the trial. R.I.S.C. ordered a hearing to determine what extraneous information reached the jury and whether defendant was prejudiced. A new trial was eventually ordered.

- Trial court may not inquire as to the effect the information had on the deliberative process.

- Trial judge must consider if the extraneous information would probably influence the decision of an average reasonable juror.

State v. Rodriguez, 694 A.2d 1202 (R.I. 1997). In a robbery case, a juror visited the store in question during the trial to see the position of the video cameras. The trial judge ordered a new trial but R.I.S.C. reversed.

- Extraneous information received probably would not have influenced the decision of an average reasonable juror because other jurors could determine the position of the cameras from evidence adduced at trial.

State v. DaSilva, 742 A.2d 721 (R.I. 1999). During deliberations in a child molestation trial, a juror learned that her own granddaughter had recently been molested and candidly disclosed this to the judge. The juror assured judge and counsel that she could remain fair and impartial, and she was permitted to continue deliberations. The judge denied defense counsel's subsequent requests for mistrial or to examine the juror further. R.I.S.C. vacated and remanded.

- "It is well settled that when questions concerning a juror's fitness are raised, the trial justice must conduct sufficient inquiry to make a reasoned determination whether the juror should be discharged or may continue to serve. The Sixth Amendment requires 'diligent scrutiny' to protect the defendant's right to a trial by a fair and impartial jury." Id. at 725.

- "The juror said enough to raise an immediate concern necessitating further inquiry, and the unfortunate failure to do so by the trial justice resulted in a violation of the defendant's right to an impartial jury determination of his guilt…. Without further inquiry, the trial justice was not sufficiently informed of the issue to adequately exercise his discretion." Moreover, a cautionary instruction to the jury cannot serve as a substitute to *voir dire* of the individual juror. Id. at 725-26.

State v. Briggs, 886 A.2d 735 (R.I. 2005). Over defendant's objection, the trial justice dismissed a juror mid-trial that had discussed the case with his wife, who herself had been attending the trial and spoken with one of the state's witnesses. R.I.S.C. affirmed, holding that the trial justice did not abuse her discretion or violate defendant's trial rights.

State v. Quinlan, 921 A.2d 96 (R.I. 2007). Trial judge did not abuse his discretion by refusing to grant a mistrial and failing to admonish the jury based on juror misconduct. During the trial, one juror spoke to others about the case, visited the crime scene, and read a news report about the murder case. While the juror did speak about the case in general terms, he did not discuss defendant's guilt or innocence, and the record disclosed that the other jurors ignored him. The juror was dismissed and the judge issued a cautionary instruction to the remaining jurors. R.I.S.C. affirmed.

- Defense counsel's acceptance of the judge's cautionary instruction also constituted waiver of the objection as an appealable issue.

State v. Delestre, 35 A.3d 886 (R.I. 2012). Trial court denied defendant's request to instruct the jury that in order to find the defendant guilty of murder each juror must unanimously agree to one of the three theories presented by the prosecution. R.I.S.C. affirmed.

- While each juror must agree that the state has proven every element of a crime beyond a reasonable doubt, they need not agree on the theory of how the crime occurred. No general requirement exists pursuant to which a "jury [must] reach agreement on the preliminary factual issues which underlie the verdict."

Juror Questions

State v. Sciarra, 448 A.2d 1215 (R.I. 1982). Trial judge committed reversible error when he (1) answered a jury question outside of the presence of the defendant and (2) failed to read back the witness testimony that would have answered the jury question on a critical issue at trial.

- The trial justice committed error when he failed to inquire of the jury whether they wanted [the witness'] testimony read back…The defendant shall be present … at every stage of the trial including the impaneling of the jury, and the return of the verdict ..." " [defendant's] counsel should [be] given an opportunity to be heard before the trial judge respond[s]" to a jury's request. Id. at 1220-21.

State v. Gomes, 590 A.2d 391 (R.I. 1991). Manslaughter case involving a couple that stabbed each other. Jury came back with a question asking if defendant was guilty of manslaughter if the killing was accidental. Judge merely repeated his definition of manslaughter, which never addressed the jury question as to accident. R.I.S.C. reversed.

- Repeating the original instruction is fine if it is apparent that the jury overlooked some portion of the instruction or if repeating the instruction could clear up the jurors' confusion.

- Here the jury did not overlook anything. The judge's original instruction did not clarify their question regarding an accidental killing. The judge should have explained this clearly.

State v. Dame, 488 A.2d 418 (R.I. 1985). Arson case where the jury had a question about the fire chief's answer as to when the fire started. The trial judge answered this question from her notes instead of reading back portions of the chief's testimony. R.I.S.C. reversed.

- A request from the jury to read back testimony should probably be honored.

- If the judge attempts to summarize evidence, the summary must be complete and impartial.

- Summary must be completely accurate and must not invade the fact-finding province of the jury.

- Judge may not summarize only direct examination testimony if cross-examination is also pertinent to the subject of the request.

State v. Adefusika, 989 A.2d 467 (R.I. 2010). While deliberating on a sexual assault case, jury asked for a read-back of the events involving the defendant and complainant while they were on a couch at defendant's house. Defense counsel objected when the judge read much more of complainant's testimony than what the jury had requested, but he was overruled. R.I.S.C. affirmed.

- The court reporter also read back portions of defense counsel's cross-examination. "Accordingly, the read-back was neither one-sided nor slanted in favor of either party. Id. at 478.

- "When a jury makes a request, the trial justice should, if the trial justice deems the request appropriate, conform his or her response to the request. The trial justice has considerable discretion as to how to respond to such a request." Id.

Juror Bias

State v. Valcourt, 792 A.2d 732 (R.I. 2002). Two jurors in a child molestation case overheard a conversation in which defendant was talking about DCYF and child support. The jurors informed the trial judge and one was dismissed while the other was retained, over defendant's objections, because she insisted that the conversation would not influence her ability to remain fair and impartial. R.I.S.C. affirmed.

- "It is well-settled in this jurisdiction that the issue of whether a juror is disqualified

due to bias, prejudice or interest is left to the discretion of the trial justice." Id. at 735 (quoting State v. Berberian, 374 A.2d 778, 781 (R.I. 1977)).

- The trial judge conducted an *in camera* hearing and extensive inquiry before determining that the comments were not so prejudicial as to arouse the passions of the jury.

State v. Oliveira, 774 A.2d 893, 915 (R.I. 2001). During trial and in the presence of the other jurors, a juror said "they should just hang them all." The trial judge dismissed the juror. Defendant argued that the comment was sufficiently prejudicial that the judge should have granted a mistrial, or alternatively *voir dired* the remaining jurors. R.I.S.C. affirmed but noted that defense counsel failed to request either of these remedies during trial.

State v. Lawless, 996 A.2d 166 (R.I. 2010). Defendant was not denied his Sixth Amendment right to a jury representing a fair cross-section of the community, even though only five males were represented in the pool of jurors, where he could not show that the exclusion of males was systematic in nature.

- "To demonstrate a *prima facie* violation of the fair-cross-section requirement, the defendant must establish: (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this under representation is due to systematic exclusion of the group in the jury-selection process." Id. at 168.

ALLEN CHARGES

State v. Patriarca, 308 A.2d 300 (R.I. 1973). R.I.S.C. established a recommended Allen Charge based upon the A.B.A. Model.

- "It is our opinion that this case demonstrates the need for a solution to forestall continued litigation over the validity of the Allen charge. Such a solution, in our opinion, is to be found in the A.B.A. Project on Minimum Standards for Criminal Justice, Trial by Jury, § 5.4 (a) and (b) (approved draft 1968). That section provides that before deliberation the court may instruct the jury: (1) that in order to return a verdict, each juror must agree thereto; (2) that jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment; (3) that each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors; (4) that in the course of deliberations, a juror should not hesitate to re-examine his own views and change his opinion if convinced it is erroneous; and (5) that no juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict." Id. at 322.

State v. Souza, 425 A.2d 893 (R.I. 1981). Trial judge's imposition of a deadline to reach a verdict, after two days of deliberations, was not coercive and did not violate the principles set forth in Patriarca.

- "We do not accept the proposition that a time deadline added to an Allen charge is in and of itself reversible error. Every Allen charge situation must be decided upon the particular facts and circumstances of the individual situation." Id. at 900.

- Thus, viewed as a whole, the judge's supplemental instruction did not contain the principal elements of the Allen charge most often criticized. It reasonably conformed to the admonitions in State v. Patriarca, and was not coercive in respect to a time limit or otherwise. Id. at 901.

State v. Oliveira, 882 A.2d 1097 (R.I. 2005). Defendants argued that the trial court committed reversible error when, in response to the tainting and subsequent removal of one juror, it gave an instruction tantamount to an Allen charge that described the possibility of retrial as "just terrible," thereby coercing the jury to reach a final verdict regardless of whether any juror harbored conscientious doubt. R.I.S.C. affirmed.

- Supplemental jury instructions were meant to caution jurors about the serious consequences that would result if the jury were tainted, not to coerce jurors to give up their convictions in order to reach a unanimous verdict.

State v. Luanglath**,** 863 A.2d 631 (R.I. 2005). Jurors deadlocked in a 10 to 1 vote (defendants agreed to proceed with 11 jurors) sent a note asking the trial justice how to proceed. The trial

judge refused to inform counsel of the split before issuing the Allen charge. Defendants' motion for a new trial was denied. R.I.S.C. reversed and remanded.

- It was reversible error for the trial judge to withhold the numerical split from counsel. "To ensure that defense counsel has sufficient opportunity to be heard before a response is given to the jury's note, it is imperative that the entire contents of the note be revealed." Id. at 643.

- Although the Allen charge included the suggestions outlined in Patriarca, the trial judge also informed the jurors that a retrial was imminent and would impose significant time and expense burdens on the state and the defendant. The instruction was coercive and "impermissibly exceeded the boundaries of Patriarca." Id. at 644.

State v. Rodriguez, 822 A.2d 894 (R.I. 2003). Defendant convicted of first-degree murder argued that the Allen charge was unduly coercive and that the trial judge should have asked the jury whether additional deliberations would be beneficial before issuing it. R.I.S.C. held that the trial justice properly charged the jury and affirmed.

- In assessing a challenge to an Allen charge on appeal, the court should apply a totality-of-the-circumstances test. Id. at 900 (citing Lowenfield v. Phelps, 484 U.S. 231 (1988)).

State v. Gordon, 30 A.3d 636 (R.I. 2011). After lengthy deliberations, jury remained deadlocked on a kidnapping charge but had reached a verdict on three other charges. The judge gave an Allen charge, designed to be a "supplemental jury instruction given by the court to encourage a deadlocked jury, after prolonged deliberations, to reach a verdict." When the impasse continued, the judge declared a mistrial on the kidnapping count, while the jury convicted the defendant of second-degree sexual assault and acquitted him on two counts of first-degree sexual assault.

- Double jeopardy did not bar defendant's retrial on the kidnapping charge following mistrial by deadlocked jury.

MOTION FOR NEW TRIAL

Practice Tip: There is a strategy decision to be made after a guilty verdict as to whether a Motion for New Trial should be filed. On the one hand, its an opportunity for the trial judge to vacate the judgment. However, it is also an opportunity for the trial judge to opine as to his or her view of the witnesses and evidence and give fodder to the Supreme Court on appeal.

SUPER. CT. R. CRIM. P. 33: New Trial

On motion of the defendant the court may grant a new trial to the defendant if required in the interest of justice. If trial was by the court without a jury, the court on motion of a defendant for a new trial may vacate the judgment, take additional testimony, and direct the entry of a new judgment. A motion for a new trial based on newly discovered evidence may be made only within three (3) years after the entry of judgment by the court, but if an appeal is pending, the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within ten (10) days after the verdict or finding of guilty or within such further time as the court may fix during the ten-day period. A copy of the motion for a new trial shall be filed with the trial justice contemporaneously with its filing with the clerk of the court.

State v. Dame, 560 A.2d 330 (R.I. 1989). "First the trial justice must consider all material evidence in light of the charge to the jury. Using independent judgment, the trial justice must pass upon the weight and credibility of the evidence and accept or reject conflicting testimony. At that point all proper and appropriate inferences may be drawn from the evidence adduced at trial. The trial justice must then determine whether the evidence presented a controversy upon which reasonable minds could differ or whether the evidence failed to prove guilt beyond a reasonable doubt. A new trial may be subsequently granted if the trial justice has reached a different conclusion from that of the jury and if it is specifically found that the verdict is against the fair preponderance of the evidence and fails to do substantial justice. The new trial motion must be denied, however, if the trial justice finds that the evidence is balanced or reasonable minds could differ."

- In ruling on a motion for new trial, the trial justice should "reflect a few sentences of trial justice's reasoning on each point." State v. Banach, 648 A.2d 1363 (R.I. 1994).

- The United States Supreme Court has emphasized that not only must a juror be convinced of the defendant's guilt beyond a reasonable doubt but the government also must prove its case by proof beyond a reasonable doubt. Victor v. Nebraska, 511 U.S. 1, 5 (1994).

- Moreover, "[i]t is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty." In re Winship, 397 U.S. 358, 364 (1970).

- In arguing that reasonable minds could not differ as to reasonable doubt, stress a very strong reasonable doubt standard as enunciated in State v. Mendoza, 709 A.2d 1030 (R.I. 1998):

"…the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged…the reasonable doubt standard is indispensable for it impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue…It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper fact-finder of his guilt with utmost certainty."

State v. Dunn, 726 A.2d 1142 (R.I. 1999). In a sexual assault case, defendant was convicted after a bench trial. While awaiting sentencing, the trial judge received numerous character letters in support of defendant. At the motion for new trial, the trial judge, *sua sponte*, ordered a new trial based upon ineffective assistance of counsel. R.I.S.C. reversed.

- Ineffective assistance of counsel is a post-conviction remedy.

- Trial judge cannot *sua sponte* order a new trial on grounds not specifically requested by trial counsel.

- There is no 'new trial' motion after a bench trial, only a request to vacate judgment, to hear additional testimony, or to order a new judgment.

State v. Salvatore, 763 A.2d 985, 990-91 (R.I. 2001). "In deciding a motion for a new trial, the trial justice acts as a thirteenth juror and exercises independent judgment on the credibility of witnesses and on the weight of the evidence." Quoting State v. Banach, 648 A.2d 1363, 1367 (R.I.1994).

- When ruling on a motion for a new trial, the trial justice must perform three analyses:

    1. The trial justice must consider the evidence in light of the charge to the jury, a charge that is presumably correct and fair to the defendant.
    2. The trial justice should form his or her own opinion of the evidence. In doing so, the trial justice must weigh the credibility of the witnesses and the other evidence and choose which conflicting testimony and evidence to accept and which to reject.
    3. The trial justice must determine by an individual assessment of the evidence and in light of the charge to the jury, whether the justice would have reached a different result from that of the jury. Id. at 991 (citing Banach, 648 A.2d at 1367).

State v. Adefusika, 989 A.2d 467 (R.I. 2010). If, following the trial justice's three-part analysis of defendant's motion for new trial, he "determines that he or she would have come to the same conclusion as that of the jury, 'the analysis is complete and the verdict should be affirmed.'" Id. at 480 (quoting State v. Rivera, 839 A.2d 497, 503 (R.I. 2003)).

- If the trial justice does not agree with the jury's verdict, he or she undertakes a fourth step:

  "[The trial justice] must determine whether the verdict is against the fair preponderance of the evidence and fails to do substantial justice. If the verdict meets this standard, then a new trial may be granted. However, the motion will be denied if the trial justice determines that the evidence and the reasonable inferences drawn therefrom are so nearly balanced that reasonable individuals could differ." Id. (quoting State v. Rivera, 839 A.2d 497, 503 (R.I. 2003)).

- R.I.S.C. will not reverse a trial justice's ruling on a motion for new trial absent a determination that "the trial justice committed clear error or that he overlooked or misconceived material evidence relating to a critical issue in [the] case." Id. at 481.

State v. Champion**,** 873 A.2d 92 (R.I. 2005). Defendant argued that the trial judge extended the 10-day period within which motions for a new trial must be filed when she specified the date of the first post-trial hearing. R.I.S.C. held that the comment was not a valid extension and as such, the motion was not properly before the court.

State v. Woods, 936 A.2d 195 (R.I. 2007). Defendant convicted of child molestation was not granted a new trial based on newly discovered evidence from a witness claiming that complainant admitted after trial that she lied about being molested. The trial justice found several inconsistencies in the new witness's testimony that made it not credible, and found the verdict supported by the testimony at trial. R.I.S.C. affirmed.

- When considering a motion for a new trial based on newly discovered evidence, the trial justice applies a two-prong test:

  - "The first prong encompasses a four-part inquiry, requiring that the evidence is (1) newly discovered since trial, (2) not discoverable prior to trial with the exercise of due diligence, (3) not merely cumulative or impeaching but rather material to the issue upon which it is admissible, (4) of the type which would probably change the verdict at trial."

  - "Once this first prong is satisfied, the second prong calls for the hearing justice to determine if the evidence presented is credible enough to warrant a new trial." Id. at 197 (quoting State v. Firth, 708 A.2d 526, 532 (R.I. 1998)).

State v. Richardson, 47 A.3d 305 (R.I. 2012). Prevailing on a motion for new trial carries a lesser burden than prevailing on a motion for judgment of acquittal, because a judge deciding an acquittal motion must view all evidence in favor of the state but a judge deciding a motion for new trial may weigh conflicting evidence.

- "[U]nless a defendant can show that the presented evidenced failed to support his or her conviction upon the motion-for-a-new-trial standard, a defendant necessarily will

be unable to establish [that] he or she was entitled to a judgment of acquittal." Id. at 317 (quoting State v. Pineda, 13 A.3d 623, 640 (R.I. 2011)).

State v. Karngar, 29 A.3d 1232 (R.I. 2011). In a breaking and entering case where the primary issue was whether or not defendant had consent to enter his ex-girlfriend's apartment, trial justice did not abuse his discretion by denying defendant's motion for new trial after finding the state's witnesses credible and the defendant not credible. R.I.S.C. affirmed.

- The Court articulated a very subtle but significant distinction in the wording of a motion for new trial, which is important to which standard is applied by the trial judge and which issues are preserved for appeal.
    - A defendant's motion for new trial that attacks "the sufficiency of the evidence supporting the guilty verdict" or "argues that the evidence against him was legally insufficient" will result in the judge examining all evidence in favor of the prosecution, without assessing weight or credibility. If any rational jury could find each element met beyond a reasonable doubt, the motion must be denied; "conversely, if the trial justice grants the motion, it is tantamount to a judgment of acquittal and retrial is barred by double jeopardy." Id. at 1235.
    - In contrast, a motion for new trial contending that "the verdict is against the weight of the evidence" will require the judge to exercise "independent judgment in weighing the evidence and passing on the witnesses' credibility" and grant a retrial if deemed appropriate. Id. (See Dame, above, for more detailed version of this standard.)
- In support of the trial court's credibility determination, the Court added that "when a defendant elects to testify, he runs the very real risk that if disbelieved, the trier of fact may conclude that the opposite of his testimony is the truth…. As long as there exists some other evidence of the defendant's guilt, disbelief of a defendant's sworn testimony is sufficient to sustain a finding of guilt." Id. at 1236 (quoting State v. Mattatall, 603 A.2d 1098, 1108 (R.I. 1992)).

SENTENCING

Sentencing Factors

State v. Coleman, 984 A.2d 650, 655 (R.I. 2009). "In formulating a fair sentence, a trial justice considers various factors including the severity of the crime, the defendant's personal, educational, and employment background, the potential for rehabilitation, societal deterrence, and the appropriateness of the punishment." Quoting State v. Bettencourt, 766 A.2d 391, 394 (R.I. 2001).

State v. Snell, 11 A.3d 97 (R.I. 2011). Sentencing benchmarks in Rhode Island "are not mandatory" and are only a "guide to proportionality." The factors stated in Coleman (see above) are used to "justify departure from the benchmarks."

- "In addition, the Superior Court sentencing benchmarks explicitly state that '[s]ubstantial and compelling circumstances for departure from the benchmarks may include': 'harm to the victim,' 'defendant's criminal record,' 'circumstances of the commission of the crime,' 'defendant's attitude and feeling about the crime (i.e., remorse, repentance, hostility),' and 'other substantial grounds which tend to mitigate or aggravate the offender's culpability.'" Id. at 102.

State v. Tiernan, 645 A.2d 482 (R.I. 1994). With respect to the potential for rehabilitation, "a trial justice may consider a defendant's attitude toward society, his sense of remorse, as well as his inclination and capacity to take his place as an honest and useful member of society."

- In addition to the five sentencing factors identified by the R.I.S.C. (see Coleman above), the trial justice may also justify reducing a sentence if a defendant "exhibited contrition and consideration for the victims of his or her criminal activity and pled guilty to the crime charged." A defendant pleading guilty "waives a broad array of rights," while also sparing public resources and saving the victim from publically recounting his victimization, such that defendant "may properly be extended a certain amount of leniency in sentencing." Id. at 485.

- R.I.S.C. has "specifically prohibited the lengthening of a sentence on the basis of a defendant's refusal to plead guilty or his or her insistence on holding the state to its burden of proving guilt beyond a reasonable doubt at trial." Constitutional rights are unconditionally extended to criminal defendants. "To exact a price or impose a penalty upon a defendant in the form of an enhanced sentence for invoking such rights would amount to a deprivation of due process of law, and that we shall not condone." Id. at 485-86.

State v. Marini, 638 A.2d 507, 518 (R.I. 1994). "In imposing sentences, trial justices are bound only by statutory limits…The sentencing justice may impose a more severe or a less severe

punishment than that recommended by the state. In formulating a fair sentence, the trial justice bears the affirmative duty to treat each defendant separately, focusing on the individual's unique background and character. He should consider the gravity of the crime, the possibilities for defendant's rehabilitation, deterrence to others, and the appropriateness of the punishment for the crime."

State v. Gonzalez, 84 A.3d 1164, 1166 (R.I. 2014) Defendant's age not a factor in sentencing consideration. "We see no reason to question the trial justice's well-reasoned decision. We have previously held that a defendant's age is not a determinative factor in a motion to reduce sentence. See State v. Lynch, 58 A.3d 146, 149 (R.I. 2013)."

Armenakes v. State**,** 821 A.2d 239 (R.I. 2003). Noting that a judge may properly consider an Alford plea as a relevant factor in sentencing.

Mattatall v. State, 947 A.2d 896, 899 n. 4 (R.I. 2008). An *Alford* plea qualifies as a conviction and may later be used "for any legitimate purpose, including sentencing factors and enhancement, impeachment, and in collateral proceedings, such as deportation."

Consecutive Sentences

State v. Ballard, 699 A.2d 14 (R.I. 1997). R.I.S.C. struck down the trial judge's imposition of consecutive life sentences followed by sixty-five years to serve.

- "Although a sentencing justice's decision concerning whether a defendant ought to be sentenced to serve concurrent or consecutive sentences is discretionary, contemporary thinking is that consecutive sentences are appropriate only in rare instances…Consecutive sentences for a single course of criminal activity presents special dangers in complying with the constitutional requirement that all punishment ought to be proportional to the offense." Id. at 18.

- While Ballard may remain an effective source of persuasive authority during sentencing hearings, it no longer holds any precedential value in Rhode Island. In State v. Snell, the R.I.S.C. rejected the defendant's reliance on Ballard, countering that "this Court has since all but overruled Ballard, recently holding that 'we have declined to treat… Ballard as a bright-line rule with respect to consecutive sentences'…. Further, we '[r]ecogniz[ed] that… Ballard was an aberration, [that] we now hold… is of little or no precedential value." Snell v. State, 11 A.3d 97, 103 (R.I. 2011) (quoting State v. Coleman, 984 A.2d 650, 656 (R.I. 2009)).

    - See also State v. Vieira, 883 A.2d 1146, 1150 n. 3 (R.I. 2005), reiterating that the holding in Ballard should be read narrowly as applying to the facts in that case.

State v. Guzman**,** 794 A.2d 474 (R.I. 2002). R.I.S.C. affirmed the trial judge's imposition of consecutive life sentences, noting that Ballard does not require that sentences be concurrent.

- When determining whether the sentences will run concurrently the trial judge may properly consider the aggravating circumstances of the crimes and the deterrent impact of the sentences.

State v. Rodriguez**,** 822 A.2d 894 (R.I. 2003). Because the Rhode Island General Assembly specifically authorized consecutive sentences for crimes of violence while using a gun, the imposition of cumulative punishment does not violate the double jeopardy clause of the Rhode Island Constitution.

State v. Monteiro, 924 A.2d 784 (R.I. 2007). Mandatory, consecutive life sentences for first-degree murder and using a firearm while committing a crime of violence resulting in death were appropriate sentences and did not constitute cruel and unusual punishment for seventeen-year-old offender who killed an innocent bystander during a gang-related gunfight.

State v. Coleman, 984 A.2d 650 (R.I. 2009). Trial court was justified in departing from sentencing benchmarks and sentencing defendant to consecutive sentences totaling twenty-five years for breaking and entering, simple assault, and driving a motor vehicle without consent of the owner. R.I.S.C. affirmed.

- The trial justice justified the imposition of consecutive sentences on several bases. First, the defendant did not commit a "run-of-the mill breaking and entering," but instead the crime was "one of violence, … a premeditated crime, a cold-hearted crime, a crime for profit, with no regard, whatsoever, to the rights of [his victims], and without regard to the law." The defendant also "lied on the stand during his trial," "lacked any remorse for his actions," and "refused to take personal responsibility." On top of that, the trial justice deemed the defendant a "danger to society" and a "poor candidate for rehabilitation," particularly considering his extensive criminal history. Id. at 656.

- While the R.I.S.C. had been gradually distancing itself from State v. Ballard for a number of years, Coleman was the first case in which the Court formally recognized the abrogation of Ballard. Nonetheless, the most recent cases on this issue (e.g., Coleman and Snell) do not suggest that the Court's intention is for consecutive sentences to trend toward a prevailing norm. The cases suggest only that the Court has become more open to consecutive sentences in the state's more serious cases and will be very hesitant to interfere with a judge's discretion in imposing them. In Coleman, the Court still favorably quoted certain parts of Ballard, including its standard for reviewing a motion to reduce sentence:

  > "A manifestly excessive sentence is a sentence disparate from sentences generally imposed for similar offenses when the heavy sentence imposed is without justification." Ballard, 699 A.2d at 16.

- In explaining their abrogation of Ballard, the Coleman court called Ballard a factual "aberration," implying that the facts mistakenly caused them to react too generously in crafting the rule of law in Ballard. It is noteworthy then that the difference in result between Ballard and Coleman stems largely from the factual circumstances in each case—Ballard had mitigating factors in his favor and Coleman had many aggravating factors against him. Despite the strong wording against Ballard in cases like Coleman and Snell, the reality is that they do not stray as far from the holding in Ballard as they claim. Both cases would easily fit into the exception already carved out in Ballard for allowing consecutive sentences when there exists "the presence of extraordinary aggravating circumstances."

- For that reason, even though Ballard is no longer binding on the courts, it remains valuable persuasive authority when advocating for concurrent sentences. Because of the many aggravating factors present in the Coleman and Snell cases, it is not difficult to factually distinguish cases as being less severe than those and argue that a more moderate approach in sentencing (akin to Ballard) would be more appropriate.

State v. Snell, 11 A.3d 97 (R.I. 2011). Declining to follow Ballard and instead relying on Coleman, R.I.S.C. found that the viciousness of the crimes, along with the many other aggravating factors cited by the trial justice, justified the imposition of consecutive sentences against defendant in this felony domestic assault case. The Court found the most significant factor to be that there were two, non-simultaneous assaults on two different victims.

State v. Chase, 9 A.3d 1248 (R.I. 2010). Consecutive sentences were not unduly harsh where defendant fatally stabbed two people and voluntarily agreed to the consecutive sentences as part of a plea agreement that reduced two counts of first-degree murder to manslaughter. In deciding this case, R.I.S.C. again cited favorable to Coleman and rejected defendant's reliance on Ballard.

Linde v. State, 78 A.3d 738 (R.I. 2013) the defendant received a mandatory life sentence for discharging a firearm during a crime of violence running consecutively with a 40-year sentence for murder. The R.I.S.C. ruled that this does not constitute cruel and unusual punishment. The mandatory consecutive sentences imposed in this case do not violate the prohibition against double jeopardy.

Habitual Offenders

R.I. GEN. LAWS § 12-19-18. Habitual criminals

(a) If any person who has been previously convicted in this or any other state of two (2) or more felony offenses arising from separate and distinct incidents and sentenced on two (2) or more occasions to serve a term in prison is, after the convictions and sentences, convicted in this state of any offense punished by imprisonment for more than one year, that person shall be deemed a

"habitual criminal." Upon conviction, the person deemed a habitual criminal shall be punished by imprisonment in the adult correctional institutions for a term not exceeding twenty-five (25) years, in addition to any sentence imposed for the offense of which he or she was last convicted....

State v. Chiellini, 762 A.2d 450 (R.I. 2000). Sentencing justice committed reversible error by refusing state's request that an additional "habitual criminal" sentence be imposed on defendant. R.I.S.C. vacated the sentence and remanded for resentencing.

- A person found by a preponderance of the evidence to be previously convicted in Rhode Island or any other state of two or more felony offenses arising from separate incidents and sentenced on two or more occasions to a term in prison, will be considered a "habitual criminal" following a conviction for a third felony. Id. at 455 n. 4 (citing R.I. Gen. Laws § 12-19-21)).

- A trial court upon finding a defendant to be a habitual criminal *must* impose an additional consecutive sentence, though the term is entirely within the discretion of the sentencing justice, whether months or years and whether suspended or to be served, up to the maximum of twenty-five years.

State v. Burke, 811 A.2d 1158 (R.I. 2002). Defendant qualified as a habitual offender based on two prior felonies, despite being imprisoned on only one of the convictions and receiving a suspended sentence for the other. A suspended sentence is the statutory equivalent of a "term in prison" because it is an imposed prison term which is then suspended. R.I.S.C. upheld defendant's sentence of five years for intimidating a witness and fifteen additional years as a habitual offender.

- Notice of the state's intent to pursue a habitual offender sentence must be such that "defendant is not misled, surprised or deceived in any way by the allegations of prior convictions." Id. at 1168.

- When the state gives defense counsel the "rap sheet" of defendant's prior convictions, the defendant has properly received notice, even if the state amends the notice at a later time to center on a different conviction on defendant's record.

State v. Kilburn, 809 A.2d 476 (R.I. 2002). Habitual offender statute does not violate double jeopardy, and thirty years for assault with a dangerous weapon and firearms convictions plus an additional twenty years as a habitual offender was not an excessive sentence.

State v. Smith, 766 A.2d 913 (R.I. 2001). Two prior sentences imposed on the same day and ordered to be served concurrently could not be considered separate sentences within the scope of the habitual offender statute. However, double jeopardy did not preclude the state from seeking the sentence again at a later time based on a different prior sentence.

- State also failed to establish prima facie proof of defendant's prior convictions because they offered docket face sheets as evidence not accompanied by the statutorily required "authenticated copies of former judgments and commitments."

Mattatall v. State, 947 A.2d 896 (R.I. 2008). *Alford* plea is a valid conviction that affords no protection from habitual offender statute.

State v. Werner, 851 A.2d 1093 (R.I. 2004). Defendant's twenty-five year sentence under the habitual offender statute was vacated on appeal because the state had failed to properly provide notice.

- If the state intends to seek habitual offender status for a defendant, the statute requires notice "within forty-five (45) days of the arraignment, but in no case later than the date of the pretrial conference." Here, the prosecutor never gave notice to the defendant and the mistake was not discovered until it was mentioned by the judge during sentencing.

State v. Marsich, 10 A.3d 435 (R.I. 2010). Notice filed by state was adequate under habitual offender statute, where notice sent to defense counsel stated that defendant was subject to the imposition of an additional sentence as a habitual offender upon conviction of the instant offense, and defendant's criminal record was attached with two felonies circled.

- "Although we deem this notice to be sufficient to meet the requirements of the statute, when an accused faces the possibility of serving an additional twenty-five years in prison because of two previous felony convictions, care should be taken to provide that defendant with appropriate notice that specifically identifies the convictions that serve as the basis for habitual-offender classification. This was not done in this case, as evidenced by the shoddy, yet adequate, notice provided to defendant." Id. at 441.

- The defendant also requested that R.I.S.C. adopt a rule limiting the number of years that the state may go back to find convictions to use for habitual-offender status. The Court denied the request, stating the clear language of the statute indicated that the time period for using convictions was limitless.

Motion to Reduce Sentence

Practice Tip: Rule 35 has a strict 120-day statutory filing deadline. That's 120 days from the date of sentencing or appellate decision, whichever is later. If the deadline has passed, post-conviction relief is an option to vacate the sentence and re-sentence. Rule 34(c) is a new vehicle to reduce a remaining period of probation so long as the requirements are met.

SUPER. CT. R. CRIM. P. 35: Correction, Decrease or Increase of Sentence

(a) Correction or reduction of sentence. The court may correct an illegal sentence at any time. The court may correct a sentence imposed in an illegal manner and it may reduce any sentence when a motion is filed within one hundred and twenty (120) days after the sentence is imposed,

or within one hundred and twenty (120) days after receipt by the court of a mandate of the Supreme Court of Rhode Island issued upon affirmance of the judgment or dismissal of the appeal, or within one hundred and twenty (120) days after receipt by the court of a mandate or order of the Supreme Court of the United States issued upon affirmance of the judgment, dismissal of the appeal, or denial of a writ of certiorari. The court shall act on the motion within a reasonable time, provided that any delay by the court in ruling on the motion shall not prejudice the movant. The court may reduce a sentence, the execution of which has been suspended, upon revocation of probation.

(b) Increase in sentence. Within twenty (20) days after the filing of a motion to reduce a sentence, the attorney general may file a motion for an increase in said sentence. The court on its own motion, after the filing of a motion to reduce a sentence, may increase said sentence. Whenever a judge increases a sentence, the reasons for so doing must be made part of the record and must be based on objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding.

(c) Motion for Termination of Probation. At any time after a defendant has served at least three (3) years of a term of probation in the community, the probation unit of the Department of Corrections, either at a defendant's request or administratively, may review the defendant's case history and recommend amending the defendant's sentence to terminate the defendant's probation. The probation unit's recommendation shall be based on the criteria contained in subdivision (1). In the event the probation unit recommends termination of the defendant's probation, the defendant may file in Superior Court a motion to amend the defendant's sentence to terminate the defendant's probation. This rule shall apply to all persons on probation and otherwise eligible, including persons sentenced to probation prior to the adoption of this rule.
(1) A motion seeking probation termination shall contain a signed certificate from the probation unit of the department of corrections stating that:
(i) A copy of the signed certificate has been provided to the State and the defendant's probation is not conditioned on an active no-contact order; and
(ii) The defendant has completed all of the terms and conditions of the defendant's probation, including, but not limited to, counseling requirements, community service orders, restitution orders, and fines; and
(iii) There are no pending probation or deferred sentence revocation proceedings filed against the defendant; and
(iv) During the three (3) years preceding the issuance of the certificate by the probation unit, the court has not declared defendant a violator of the defendant's probation or deferred sentence; and
(v) The defendant is not currently on parole in this or any other jurisdiction; and
(vi) The defendant is not currently on probation, suspended sentence, or deferred sentence in any other criminal case in this or any other jurisdiction, with the exception of another criminal case where the term of probation, suspended sentence or deferred sentence was imposed on the same date as the other sentence and the sentences were ordered to run concurrently; and
(vii) The defendant is not the subject of pending charge(s) in this or any other jurisdiction; and
(viii) The probation unit has made reasonable efforts to contact victims through its Office of Victims Services and/or the victim's last known address; and
(ix) After review of the defendant's case history and the criteria in subdivisions (1)(i) to (ix), the probation unit recommends that the defendant's probation be terminated.
(2) The motion shall be filed by the defendant at least ten (10) days before the time fixed for the hearing, with a copy provided to the State who shall be afforded an opportunity to object to the

motion. The court may grant the motion to discharge the defendant from probation, after hearing, if in the discretion of the judicial officer, the judicial officer finds that the defendant has demonstrated that the defendant no longer requires supervision.
(3) The defendant shall appear in open court, with or without an attorney and may be questioned, under oath by the attorney for the State or the judicial officer.
(4) In the event that the motion is granted, an order shall issue and thereafter a new judgment reflecting the change(s) in the sentence shall be entered by the court.

State v. Brown, 755 A.2d 124 (R.I. 2000). Trial justice increased defendant's sentence after Rule 35 hearing. R.I.S.C. reversed.

- "The record reveals that the trial justice did not cite any evidence to support his decision to increase the defendant's sentence. It appears form the trial justice's statement that defendant's sentence to serve was increased solely in retaliation for defendant's having filed a Rule 35 motion…the trial justice violated Pearce's clear instruction that vindictiveness must play no part in a decision to increase a sentence." Id. at 125 (citing North Carolina v. Pearce, 395 U.S. 711, 725 (1969)).

- "Rule 35 permits a defendant to file a motion to have a sentence reduced within 120 days after the sentence is imposed, or within 120 days after this Court or the United States Supreme Court has affirmed the sentence. Once a defendant files such a motion, the attorney general may file a motion seeking to have the sentence increased. If a motion to reduce sentence has been made, the trial justice also may increase the sentence upon his or her own motion. Decisions concerning Rule 35 motions are within the sound discretion of the trial justice." Id.

State v. Cote, 736 A.2d 93 (R.I. 1999). "A motion to reduce a sentence is essentially a plea for leniency, and this Court has stated that rulings on such motions lie within the discretion of the hearing justice. The court may grant the motion if it "decides on reflection or on the basis of changed circumstances that the sentence originally imposed was, for any reason, unduly severe." State v. Smith, 676 A.2d 765 (R.I. 1996). "In passing on a defendant's motion to reduce, the sentence is assumed valid. The court is simply asked to reconsider its prior determination. No new facts in mitigation need be presented to the court, although such information obviously will strengthen the motion…The rationale for such a motion we stated is the possibility that with the passage of time, the defendant may find the sentencing justice in a more sympathetic or receptive frame of mind."

State v. Pacheco, 763 A.2d 971, 983 (R.I. 2001). R.I.S.C. has held that "only when the record unswervingly points to the conclusion that there is no 'justification' for the imposition of a sentence that is 'grossly disparate from sentences generally imposed for similar offenses' shall we modify or revise a sentence imposed in the exercise of a trial justice's discretion." Quoting State v. Crescenzo, 332 A.2d 421, 433 (R.I. 1975).

State v. Guzman**,** 794 A.2d 474 (R.I. 2002). Good behavior in prison is expected and does not warrant a reduction in sentence.

State v. Brown, 865 A.2d 334 (R.I. 2005). Trial court erred by denying defendant's Rule 35 motion without a hearing. Although Rule 35 does not explicitly afford the movant a right to a hearing, "a hearing should be held with respect to such motions absent truly exceptional circumstances" because of the "crucial importance of the right to a hearing in most situations where significant liberty or property interests are involved." See also State v. Chase, 958 A.2d 147, 148-49 (R.I. 2008) (rejecting the state's contention that Brown was *dicta* rather than binding precedent, and reaffirming the defendant's right to a Rule 35 hearing).

State v. Goncalves, 941 A.2d 842, 848 (R.I. 2008). As an issue of first impression, R.I.S.C. held that "a hearing justice who corrects an illegal sentence pursuant to Rule 35(a) may correct the entire initial sentencing package to preserve the originally intended sentencing scheme, so long as the corrected sentence does *not* exceed the sentence originally imposed."

- This process, known as re-bundling, occurs "'when one or more components of a defendant's sentence are held to be illegal and the hearing justice thereafter corrects the *entire* sentencing package in order to 'effectuate the original sentencing intent.'" Id. at 847 (quoting United States v. Martenson, 178 F.3d 457, 462 (7th Cir. 1999)). By permitting re-bundling, the R.I.S.C. adopted the majority approach of the jurisdictions that have decided the issue.

State v. Bouffard, 35 A.3d 909 (R.I. 2012). Following on the heels of Goncalves (see above), the R.I.S.C. once again affirmed the trial court's re-bundling of a defendant's previously illegal sentence. Defendant had been sentenced to prison and probation on breaking and entering charges in 1991, 1996, and 2000, before being arrested again in 2006. For the 2006 offense, defendant was deemed to be a violator of his probation and he was sentenced to seven years in prison under his 1996 probation. At his subsequent Rule 35 hearing, the hearing justice determined that the sentence was illegal because the 1996 term of probation had actually expired. However, rather than release defendant, the hearing justice "re-bundled" his sentence by applying the seven year prison term to his 2000 probation.

- Defendant first argued that the hearing justice lacked the authority to re-bundle his sentence, because he was not the original sentencing justice (who had since retired). R.I.S.C. held that "it is the intent of the original sentencing court that lies at the heart of the re-bundling analysis, and that intent may be permissibly ascertained by another justice of that court should the need arise." Still, the hearing justice must preserve the sentence's original intent and cannot exceed the original sentence. Id. at 917.

- The Court also found that the re-bundled sentence met the intent of the original sentencing justice. Furthermore, the Court upheld the violation despite the state's eventual dismissal of the underlying criminal charge that formed the basis for the violation (due to the timing of the appeal, the 2010 amendments to § 12-19-18 were not applicable to the issue; see "Collateral Estoppel" section below).

State v. Mendoza, 958 A.2d 1159 (R.I. 2008). Life sentence for second degree murder was not without justification or grossly disparate from other sentences for similar offenses, considering that the victim was a young, defenseless boy and in view of the impact on the victim's family.

- "Any comparison of sentences can be misleading, especially if too much reliance is placed on this one factor in assessing whether a sentencing justice was justified." Even if disparate, what matters is that the sentence was not one beyond the judge's power to impose, nor was it patently unjustified. Id. at 1163 n. 4.

- "A motion to reduce sentence is not the correct forum for challenging the sufficiency or quality of the state's evidence." Id. at 1163.

State v. Coleman, 984 A.2d 650, 655 (R.I. 2009). Defendant was not entitled to a sentencing reduction when he received twelve-and-a-half years in prison for breaking and entering, but his accomplice received only ten years. "Confederates need not receive equal sentences for the same crime."

State v. Ruffner, 5 A.3d 864 (R.I. 2010). Defendant's good behavior and rehabilitative efforts in prison were matters to be considered by the parole board—not the trial court in ruling on a motion to reduce sentence. The trial judge reasoned that having "taken advantage of programs" in the early stages of a prison sentence was not a persuasive reason to assume that defendant could be rehabilitated. R.I.S.C. affirmed.

State v. Chase, 9 A.3d 1248 (R.I. 2010). "A plea agreement does not preclude [defendant] from later filing a motion to reduce pursuant to Rule 35." However, "this Court has recognized that it is certainly proper for motion justices to accord this factor considerable significance in deciding whether to exercise their discretion to grant the motion [to reduce]." Id. at 1255.

- In addition, defendant was not entitled to counsel at his Rule 35 hearing. Because a motion to reduce sentence is a posttrial proceeding after conviction, it "is not a criminal prosecution, and thus it is our opinion that it is not a 'stage of the proceeding' to which the procedural right to counsel attaches." (Defendant argued the issue only under Rule 44 and not due process or the Sixth Amendment). Id. at 1254.

- The Court hinted that if a motion to increase sentence was pending under Rule 35(b), then their result on the right to counsel issue may have been different because of "the prospect of…additional loss of liberty." Id.

- Trial court did not err by denying defendant's request for statistical information regarding the sentences imposed on other defendants convicted of manslaughter. The information would have had only a "minimal impact" on the motion and previous

cases have recognized that "a list of sentence comparisons is not adequate to meet the heavy burden that a defendant must satisfy on a motion to reduce." Id. at 1255.

State v. Chhoy Hak, 30 A.3d 626 (R.I. 2011). Trial justice was not required to consider immigration consequences when ruling on defendant's motion to reduce sentence. Defendant was to be subject to a federal immigration detainer after release from state custody. He argued that the trial justice abused his discretion by not considering this factor, where the detainer could subject him to indefinite detention if his home country was unwilling to accept him. R.I.S.C. affirmed the trial court, finding that the assertion of indefinite detention was "wholly speculative" and, regardless, an immigration detainer is "a collateral matter for a different authority." Id. at 629.

State v. Graff, 17 A.3d 1005 (R.I. 2011). Two years into a ten year prison sentence for driving under the influence, death resulting, defendant filed a motion to modify sentence to allow for work release. The original sentencing justice granted the motion, relying upon the DUI, death resulting, statute to conclude that he still had residual authority to modify the sentence at that point in time. The DOC appealed and R.I.S.C. vacated the modification.

- The DUI, death resulting, statute at issue vests the sentencing judge with the discretion to sentence first-time offender to any unit of the ACI. For general purposes, though, the key issue in this case was whether sentencing is a one-time event or an ongoing process where the sentencing judge retains his or her discretionary powers.

- "There is nothing in the statute that in any way suggests that sentencing is some sort of ongoing process. Rather, sentencing is, in our view, a discrete act. We view 'the discretion' that this statute accords to 'the sentencing judge' as unambiguously referring to a discretion that is exercisable when the judge pronounces *the sentence* and that, except as otherwise explicitly provided for in Rule 35… ceases to exist after that event takes place." Id. at 1011.

- "The hearing justice in the instant case had the authority to order the defendant to the work-release program at the time of her sentencing…, but he did not have the continuing authority to thereafter grant the defendant's 'Motion to Modify Sentence.'" Id. at 1012.

Proportionality

McKinney v. State**,** 843 A.2d 463, 470 (R.I. 2004). To determine whether the gravity of the offense is commensurate with the harshness of the sentence the court must consider the following, "the nature of the crime, the defendant's criminal history, the state legislature's intent when it classified the crime, and the state's public safety interest in incapacitating recidivists. While these factors guide our analysis, this list is not exhaustive. We also consider [whether the defendant] consented to the sentence in [the] plea agreement."

State v. Morris, 863 A.2d 1284 (R.I. 2004). Although defendant's sentence was notably higher than his co-defendants and notably higher than other defendants in the state convicted of the same offense, the trial justice did not abuse his discretion by denying defendant's motion to reduce sentence. The sentence was not "grossly disparate," aggravating factors justified the defendant's higher sentence, and "comparison of sentences can be misleading" and are of "limited value."

- While first codefendant received a 50-year sentence for his seven-count conviction (43-percent of the maximum possible prison term), defendant received 89-percent of the maximum. This increase was largely justified by the determination that defendant played a more active role in the home invasion. A second codefendant received only a 10-year sentence for pleading guilty to 12 counts, but the case against him was much weaker and he made an early acknowledgement of guilt and responsibility.

- Defendant also cited statistics that in the past ten years, only one other defendant received a sentence similar to his for the same crime, and most were significantly lower. All of these statistics were unavailing in defendant's case.

State v. Monteiro, 924 A.2d 784 (R.I. 2007). Statute requiring mandatory, consecutive life sentences for first-degree murder and using a firearm while committing a crime of violence resulting in death did not constitute cruel and unusual punishment under the United States Constitution or the state constitution.

- A constitutional violation under the Eighth Amendment's proportionality principle "will be found only in extreme circumstances in which the sentence is grossly disproportionate to the offenses for which defendant stands convicted." If that high threshold is met, only then will the court consider a "comparison of the defendant's sentence to similarly situated defendants." Id. at 795.

- The burden is on the defendant to show that the sentence is "manifestly excessive."

Sentencing and Appeal from District Court

State v. Avila, 415 A.2d 180 (R.I. 1980). Defendants appealed for a jury trial in Superior Court, under § 12-22-1, following their assault and battery convictions at a jury-waived trial in the District Court. The court granted the appeal but denied the request for a jury trial. R.I.S.C. reinstated the claim.

- Defendants' waiver of the right to jury trial at the District Court cannot affect the statutory rights of the defendant appealing to the Superior Court following conviction.

- Defendants have a constitutional right to a jury trial for any "non-petty" offense (an offense carrying a maximum penalty of more than six months) and it was unconstitutional to deny that right on appeal for trial in the Superior Court.

- The judge's erroneous denial of a jury trial stemmed from his belief that he could not impose a sentence higher than the $100 fine defendants received from the District Court. However, "the Superior Court possesses the power to impose a sentence after trial de novo more severe than that imposed by the District Court," and defendants offense had a maximum penalty of one year's imprisonment. Id. at 182-83.

State v. Brown, 899 A.2d 517 (R.I. 2006). Jury found defendant guilty of disorderly conduct and the trial judge ordered the case filed for a period of one year. Defendant appealed that order to the R.I.S.C., and R.I.S.C. dismissed the appeal for lack of a justiciable issue.

- Rhode Island law provides a right to appeal from a final judgment. Following a conviction in a criminal trial, the sentence is the final judgment. "Because the case was filed, pursuant to § 12-10-12, no sentence has been imposed and therefore no final judgment has entered." Id.

- Defendant may only appeal if she fails to maintain the conditions of her filing, is brought before the court, and receives a sentence under the original charge.

- Note – this holding does not apply to the appeal of a filing in District Court. Such appeals automatically transfer the case to Superior Court for pre-trial.

State v. McManus, 950 A.2d 1180 (R.I. 2008). Defendant appealed to the Superior Court from a District Court bench trial where he was convicted of disorderly conduct and acquitted of simple assault. The Superior Court judge dismissed the charges after determining that the District Court's findings at trial were erroneous. R.I.S.C. vacated and remanded for trial.

- "Because the Superior Court trial justice was without authority to undertake appellate review of the District Court trial judge's findings, her order must be vacated. When a District Court judgment is appealed under § 12-22-1, the state, as well as the accused, is entitled to a trial *de novo*." Id. at 1182.

State ex rel. City of Providence v. Auger, 44 A.3d 1218 (R.I. 2012). Defendant who was found guilty and assessed a $200 fine in Providence Municipal Court for violating city noise ordinance was entitled to a jury trial on appeal in Rhode Island Superior Court as a matter of law.

- Providence contended that the Superior Court lacked jurisdiction over defendant's appeal because defendant was convicted of a violation that was not criminal in nature.

- "It is well established that a jury trial is required for those defendants who have been convicted of a violation that is 'criminal in nature.' In determining whether a

particular charge triggers the right to [appeal to Superior Court for] a jury trial, we consider whether the offense at issue or an analogous offense was triable by jury at the time of the adoption of the Rhode Island Constitution or at common law." Id. at 1227; see also R.I. Gen. Laws § 12-22-9 (governing appeals from municipal courts).

- R.I.S.C. held that this case had the "indicia of criminality" necessary to confer the right of a jury trial. Police officer needed probable cause to stop defendant's car with loud music playing, defendant received a summons issued by the Providence police officer, and state and common law have a long history of criminalizing loud and unreasonable noise.

- To show the distinction between criminal and non-criminal violations, R.I.S.C. compared Aptt v. City of Warwick Building Dept., 463 A.2d 1377 (R.I. 1983) (defendant convicted of zoning violation had no right to Superior Court de novo trial by jury), with State v. Vinagro, 433 A.2d 945 (R.I. 1981) (defendant charged with animal cruelty was entitled to jury trial).

ETHICAL DILEMMAS AT TRIAL

Client Wants to Present False Evidence or Testimony at Trial

R.I. RULES OF PROF'L CONDUCT R. 3.3: Candor Toward the Tribunal

(a) A lawyer shall not *knowingly*:
  (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
  (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
  (3) offer evidence that the lawyer *knows* to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In the *ex parte* proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

- The operative language as contained in the code's *"TERMINOLOGY"* section is subjective and a lawyer must have *ACTUAL KNOWLEDGE OF FALSITY* before she/he is obliged to do anything pursuant to Rule 3.3.

- Solution: Although it is *dicta*, in Nix v. Whiteside, 106 S. Ct. 988 (1986), the United States Supreme Court discussed several approaches and solutions when counsel knows that a defendant/witness is about to present false evidence. These include:

  1. Refuse to call the witness and present the false evidence;
  2. Withdraw from representation;
  3. Let the defendant/witness take the stand but decline to affirmatively assist the presentation of perjury by traditional direct examination and instead stand mute while the defendant/witness presents the false version in narrative form on his or her own;
  4. Refrain from discussing the known false testimony in closing argument;
  5. Remonstrate with the client before doing any of the above.

State v. McDowell, 681 N.W.2d 500 (Wis. 2004). Defense counsel committed error by substituting narrative form questioning for traditional questions and answers because defendant never expressly admitted his intent to testify falsely and counsel failed to inform defendant, opposing counsel, and the court of the change in questioning style prior to using narrative. However, the error caused no prejudice to defendant.

Larngar v. Wall, 918 A.2d 850 (R.I. 2007). Defendant filed a motion for post-conviction relief based on ineffective assistance of trial counsel. At trial, counsel believed that defendant intended to present perjurious testimony and attempted to dissuade him from testifying. When the defendant insisted, trial counsel threatened to withdraw. Then, without defendant's knowledge, counsel brought the issue to the trial justice in an *ex parte* chambers conference. Under the trial justice's advice, counsel continued with the trial and the defendant eventually agreed not to testify.

- R.I.S.C. held that the attorney's actions did not fall outside the range of reasonable professional conduct and did not create a conflict of interest amounting to ineffective counsel.

- "Debate still continues about an attorney's obligation when put in this very position," where a defendant cannot be persuaded against presenting false testimony. Id. at 863-64.

- Although a defendant has a constitutional right to testify, "it is elementary that such a right does not extend to testifying *falsely*." Id. at 864 (quoting Nix v. Whiteside, 106 S. Ct. 988, 997 (1986)).

Threats, Sensitive Information & Rule of Confidentiality at Trial

R.I. RULES OF PROF'L CONDUCT R. 1.6: Confidentiality of Information

(a) A lawyer *shall not reveal* information relating to the representation of a client *unless* the client gives informed consent *except* for disclosures that are impliedly authorized in order to carry out the representation, and *except* as stated in paragraph (b).

(b) A lawyer *may* [*but is not obligated to*] reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm;
(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
(3) to secure legal advice about the lawyer's compliance with these Rules; or
(4) to comply with other law or a court order.

State v. Juarez, 570 A.2d 1118 (R.I. 1990). Defendant sought to obtain the results of a polygraph test that the co-defendant took at the direction of the co-defendant's attorney. R.I.S.C. held that the test results were not discoverable because they were protected by the attorney-client privilege and were not in possession of the State.

People v. Belge, 372 N.Y.S.2d 798 (N.Y. App. Div. 1975). In light of attorney/client relationship, failure of attorney to disclose, prior to trial, his discovery of body of one of murder victims made by virtue of client's disclosure to counsel, did not provide proper basis for charging attorney with criminal offenses related to disposal of bodies. Therefore, indictment against attorney should be dismissed.

Sanford v. State, 21 S.W.3d 337 (Tex. App. 2000). Trial court improperly allowed the State to disclose to the jury that it was defendant's attorney who told the State the location of an instrumentality of the crime (i.e. an automobile). Because this disclosure violated defendant's attorney client privilege, his convictions for the aggravated offenses of kidnapping and assault with a deadly weapon were reversed and the case remanded. But cf. Motilla v. State, 78 S.W.3d 352 (Tex. Crim. App. 2002) (holding that substantial evidence of guilt must be considered in a harm analysis for non-constitutional errors committed at trial).

Newman v. State, 863 A.2d 321 (Md. 2004). Defendant was convicted of conspiracy, attempted murder, assault, and burglary after the trial court compelled her divorce attorney to testify regarding a Rule 1.6 disclosure he made after defendant communicated her plan to kill one of her

children and frame her husband. Before making the Rule 1.6 disclosure, the attorney repeatedly asked his client to convince him that her plan was not real (and merely the result of frustration, anger, and fear), and warned her that he would inform the judge if she did not convince him. The court noted that the Rule 1.6 discretionary disclosure was reasonable, but more importantly held that it did not obviate defendant's attorney-client privilege. Consequently, counsel's testimony was inadmissible, defendant's conviction was reversed, and the case was remanded.

- *Practice Tip*: A lawyer is permitted but not required to reveal information to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm. When the lawyer makes a moral (as opposed to a legal) decision to reveal this information, this rule protects her/him from sanctions.

State v. von Bulow, 475 A.2d 995 (R.I. 1984). Documents in possession of attorney, who was hired by family members to investigate whether defendant attempted to poison his wife, were protected from disclosure to the defendant by the attorney-client privilege. However, once the attorney selectively disclosed some confidential documents to help the state build its case, the attorney-client privilege was waived and the disclosure of *all* related documents was required to the defendant.

- The rationale is that the attorney may not disclose communications it considers favorable to its position while insisting upon protection of the privilege for damaging communications.

- In addition, other communications were determined to be unprotected by the privilege because disinterested third persons were present during some of the meetings between attorney and clients. "[T]he presence of third persons who are not essential to the transmittal of information will belie the necessary element of confidentiality and vitiate the privilege." Id. at 1008 (quoting Hearn v. Rhay, 68 F.R.D. 574, 579 (E.D. Wash. 1975)).

Witnesses Who May Incriminate Themselves at Trial

R.I. RULES OF PROF'L CONDUCT R. 4.2: Communication with Person Represented by Counsel

In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

R.I. RULES OF PROF'L CONDUCT R. 4.3: Dealing with Unrepresented Person

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

> *Practice Tip*: Counsel may utilize an application of RULE 804 of the Rhode Island Rules of Evidence:
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> 1. Interview the witness at the pre-trial stage while complying with rules 4.2 & 4.3.
> 2. Memorialize the incriminatory information in the form of an oral statement of your investigator or another third party.
> 3. Present the witness at trial where he/she asserts his/her Fifth Amendment rights and therefore becomes "unavailable."
> 4. Thereafter, introduce the incriminatory statement of the witness through your investigator or third party as an "admission against penal or pecuniary interest" where it cannot be cross-examined.

JUDICIAL MISCONDUCT

Canons

> A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, and of staff, court officials and others subject to the judge's direction and control. During trials and hearings, a judge should act so that the judge's attitude, manner or tone toward counsel or witnesses will not prevent the proper presentation of the cause or the ascertainment of the truth. A judge may properly intervene if the judge considers it necessary to clarify a point or expedite the proceedings.
>
> R.I. CODE OF JUDICIAL CONDUCT Canon 3(B)(4).

> A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where: (a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding.
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> R.I. CODE OF JUDICIAL CONDUCT Canon 3(E)(1)(a).

State v. Washington, 189 A.3d 43 (R.I. 2018). Trial judge denied defense counsel's request to recuse himself based upon the appearance of impropriety. In this case, the trial judge's daughter worked as a special assistant attorney general and was being mentored by the prosecutor in this case. R.I.S.C. affirmed the denial of motion to recuse.

- "We have held that "[t]he party seeking recusal bears the burden of establishing that 'the judicial officer possesses a personal bias or prejudice by reason of a preconceived or settled opinion of a character calculated to impair his [or her] impartiality seriously and to sway his [or her] judgment.' " *Howard*, 23 A.3d at 1136 (quoting *Mattatall v. State*, 947 A.2d 896, 902 (R.I. 2008)). In addition, "justices have an equally great obligation not to disqualify themselves when there is no sound reason to do so." *McWilliams*, 47 A.3d at 260 (quoting *State v. Mlyniec*, 15 A.3d 983, 999 (R.I. 2011)). Id. at 64.

- "To prevail on a recusal motion based on bias, a party must show that there are facts present such that it would be 'reasonable for members of the public or a litigant or counsel to question the trial justice's impartiality.' " *In re Jermaine H.*, 9 A.3d 1227, 1230 (R.I. 2010) (quoting *In re Antonio*, 612 A.2d 650, 653 (R.I. 1992)).

State v. Howard, 23 A.3d 1133 (R.I. 2011). A judicial officer should recuse himself from a case if the moving party meets the burden of showing that the judge "possesses a personal bias or prejudice by reason of a preconceived or settled opinion of a character calculated to impair his [or her] impartiality seriously and to sway his [or her] judgment." Id. at 1136 (quoting Mattatall v. State, 947 A.2d 896, 902 (R.I. 2008)) (brackets in original).

In re Commission on Judicial Tenure and Discipline, 916 A.2d 746 (R.I. 2007). Judge violated Canons of the Code of Judicial Conduct by prejudging case, depriving criminal defendant of the opportunity to consult with counsel before accepting a guilty plea, and implying that defendant would be penalized if he elected to speak to an attorney.

- Legal error alone is not judicial misconduct, but it may amount to ethical misconduct if it is "repeated, motivated by bad faith, accompanied by intemperate or abusive conduct, or irremediable by appeal" or when the error clearly and convincingly reflects "bias, abuse of authority, disregard for fundamental rights, intentional disregard of the law, or any purpose other than the faithful discharge of judicial duty." Id. at 754-55.

Krivitsky v. Krivitsky, 43 A.3d 23 (R.I. 2012). "While a recused magistrate or justice should avoid any activity in a case from which he or she formerly is recused, we do not deem it *per se* error if one such magistrate or justice partakes in ministerial acts requiring no independent decision making."

- R.I.S.C. affirmed and held that, in this case, where the recused magistrate "merely signed an order that had already been effectuated by the oral order of the hearing justice, judicial partiality has not been established."

Prejudicial Statements by Trial Judge

State v. Nunes, 205 A.2d 24 (R.I. 1964), sets the standard: "Not only must the judges residing over the courts be honest, unbiased, impartial, disinterested in fact, but it is of the utmost importance that all suspicion to the contrary must be jealously guarded against and if possible be completely eliminated, if we are to give full effect and dignity of the bench and maintain public confidence in its integrity and usefulness."

- Trial justice granted state's motion to revoke bail and commit defendant pending sentence after his conviction for assault with intent to commit rape. Noting that defendant's previous acquittal of rape for related incidents in the same neighborhood on the same day was "a miscarriage of justice," he referred to defendant's conduct as threatening "wholesale rape in East Providence." Id. at 27.

- Even though there was no record of any court ruling that was inherently unfair or hostile to defendant and the comments were made *entirely post-conviction*, they negated the required impartiality, apparent as well as real.

State v. Nordstrom, 408 A.2d 601 (R.I. 1979). Trial judge should have recused himself after referring to defendants as "bad bastards" in a conversation with defense counsel. R.I.S.C. reversed and remanded.

- The Nunes burden was met. "Although the evidence submitted during the course of the state's presentation would warrant a person of ordinary sensibilities to be horrified

at the conduct ascribed to the various defendants by the prosecution witnesses, it is a familiar principle that judicial officers must keep their minds open until the entire case is concluded and arguments of counsel have been heard. This duty runs counter to human reaction. Nevertheless, it is required in order to vindicate our system of criminal adjudication." Id. at 602-3.

Taylor v. Wall, 821 A.2d 685 (R.I. 2003). Defendant convicted of burglary, kidnapping, and first-degree child molestation applied for post-conviction relief alleging in part that trial justice made prejudicial comments to jury regarding the use of videotaped testimony of complaining witness given outside the presence of defendant. Specifically, the judge warned that the jury was not to infer from the use of videotape either defendant's guilt or a need to protect the complaining witness from defendant. R.I.S.C. upheld trial court's denial of post-conviction relief.

- The court did not address whether the comments were improper because defendant failed to present the issue in a direct appeal taken years prior to the application for post-conviction relief and was therefore barred by the doctrine of *res judicata.*

State v. Brown, 798 A.2d 942 (R.I. 2002). Trial justice improperly engaged in colloquy with jury foreperson over the meaning of answers given during defense cross-examination of state's fingerprint expert. When defense counsel objected, the trial justice interrupted and prevented further comment. R.I.S.C. held that although the conduct was impermissible it was harmless, and denied defendant's appeal.

- Impermissible colloquy with jury:
    - "A trial justice should always avoid commenting on the evidence and should always limit his or her response to the actual written question posed by a jury. If jurors do have further questions, the trial justice should send them back to the jury room to put their questions in writing, and the trial justice can then respond accordingly and avoid the danger of responding verbally to jury questions in a manner that could serve to jeopardize the trial process." Although the judge committed error, it was harmless in this case. Id. at 948.
- Impermissible conduct toward counsel:
    - "The trial justice's rather premature and brisk, uncourtly cutting off of defense counsel's attempt to fully voice his objection . . . should be avoided by trial justices in future cases." Id. at 948 n.5.
    - "While such conduct by a trial justice is not to be condoned, defense counsel failed to move to strike the trial justice's earlier comment and failed to move for a mistrial. Defense counsel did not offer any objections until after the colloquy between the trial justice and the jury foreperson had ended, and even then he did not object to any one statement, but to 'anything more being said by the Court other than a reading of the testimony.'" Id. at 948.

State v. Oliveira, 774 A.2d 893 (R.I. 2001). After discovering that a witness's microphone was turned off, the trial judge in a first-degree murder case responded, "Sometimes you are just surrounded by assassins." Id. at 915. R.I.S.C. held that the trial judge was impartial and did not commit error. Id.

Mattatall v. State, 947 A.2d 896 (R.I. 2008). When sentencing defendant pursuant to habitual offender statute, trial judge articulated his reasons for enhancing sentence by stating that defendant had lied under oath and that record indicated defendant had an "attitude of hostility and a propensity for violent and volatile behavior." Id. at 902. R.I.S.C. held that the statements did not demonstrate prejudice or bias requiring the judge to recuse himself from defendant's subsequent application for post-conviction relief.

- "The burden is on the party seeking recusal to establish that the judicial officer possesses a 'personal bias or prejudice by reason of a preconceived or settled opinion of a character calculated to impair his [or her] impartiality seriously and to sway his [or her] judgment.'" Id. at 902 (quoting Cavanagh v. Cavanagh, 375 A.2d 911, 917 (R.I. 1977)). Mere criticism is insufficient to establish judicial bias.

- If that burden is not met, judges have an "equally great obligation not to disqualify themselves." Id.

State v. Howard, 23 A.3d 1133 (R.I. 2011). Prior to his probation violation hearing, defendant filed a disciplinary complaint against his attorney, which created a conflict of interest forcing the attorney to withdraw. The hearing justice stood by the attorney's performance, telling the defendant that the attorney was "not a miracle worker" and that the defendant "need[ed] to be warehoused" because he "violate[d] the law constantly" and was "beyond rehabilitation." Id. at 1134. Defendant later moved for the judge to recuse himself for the violation hearing, but the judge denied the request and proceeded. R.I.S.C. vacated the judgment against the defendant.

- Contrary to common belief, "alleged bias or prejudice need not arise from an extrajudicial source." Id. at 1136. Extrajudicial source is "the only *common* basis, but not the exclusive one, since it is not the *exclusive* reason a predisposition can be wrongful or inappropriate. A favorable or unfavorable predisposition can also deserve to be characterized as 'bias' or 'prejudice' because, even though it springs from the facts adduced or the events occurring at trial, it is *so extreme as to display clear inability to render fair judgment*." Id. at 1136-37 (quoting Liteky v. United States, 510 U.S. 540, 551 (1994)) (emphasis in original).

- While the source of prejudice can be the facts of the actual case before the judge, generally this is only found to be objectionable if the prejudicial statements are made *before* the conclusion of the trial or hearing. On the other hand, the judge's views, "even though harshly and caustically expressed, would likely not have warranted the hearing justice's recusal had he expressed them *after* he had fairly conducted the violation hearing." Id. at 1137 (emphasis in original).

State v. McWilliams, 47 A.3d 251 (R.I. 2012). Judge was not required to recuse himself from jury trial based on his statements at defendant's earlier joint parole-violation and bail hearing, which included the statement that "on the merits of the case, the evidence is very persuasive that he's guilty of the crime." The judge did not exhibit a preconceived opinion of the defendant's case, because he assumed the role of fact finder during the hearing and the statement was made after all evidence was presented, even though the judge would later have to rule on a motion for new trial after the subsequent trial.

- R.I.S.C. held that defendant failed to persuade them that the statements "demonstrated in any way a prejudice or a closed mind on the part of the trial justice." The Court distinguished this case from Nordstrom and Howard (see above) by noting that the statements here were made *after* a fair hearing and at the close of all the evidence. Additionally, the comments "were not personal with regard to the character of defendant and they were made in strict compliance with the justice's duties in conducting the hearing." Id. at 261-62.

State v. Ricci, 54 A.3d 965 (R.I. 2012). Due to the admitted drug use of two prosecution witnesses, defendant requested a jury instruction stating that the testimony of drug users must be examined by the jury "with greater care" than non-drug users. The judge denied the request and R.I.S.C. affirmed.

- "[W]e have repeatedly stressed that a trial justice is obligated to avoid expressing any opinion about the weight of the evidence or the credibility of witnesses as long as the case is before the jury." Id. at 973 (quoting State v. Farlett, 490 A.2d 52, 56 (R.I. 1985)).

- "[I]t is well settled that 'a trial justice should avoid reciting instructions that might be construed as commentary on the quality or credibility of particular evidence.'" Id. (quoting State v. Hadrick, 523 A.2d 441, 444 (R.I. 1987)).

Prejudicial Questioning by Trial Judge

R.I. R. EVID. 614: Calling and Interrogation of Witnesses by the Court

(C) Objections. Objections to the calling of witnesses by the court or to interrogation by it may be made at the time or at the next available opportunity when the jury is not present.

State v. Phommachak, 674 A.2d 382 (R.I. 1996). "The authority of the trial justice to interrogate a witness extends to any 'relevant matters proper to be presented to the jury' in furtherance of justice. However, the trial justice must proceed 'with caution' in such an examination. He or she must also 'guard against even the appearance of changing his [or her] position from that of a judicial officer impartially presiding at the trial to that of a partisan advocate interested in establishing the position of either party.' The trial justice 'should not be led to express by language, or the tones of his [or her] voice, or in any other manner his [or her] opinion as to the credibility of the witness or the weight which should be given to his testimony. His [or her] examination is to be governed by the same rules as those which govern counsel and his [or her] questions are equally open to exception.'" Id. at 388-89. [Citations Omitted.]

- Therefore, when objecting or making a motion to pass based upon questions posed by the judge to a witness before the jury, it is important to point out the following for the record:

    1. The judge's demeanor and tone of voice;
    2. Any inappropriate mannerisms or facial expressions made by the judge;
    3. How critical or prejudicial the testimony elicited by the judge is;
    4. How important the witness is to the State or defendant's case (e.g. does the judge question the complainant or other key prosecution witness in a way so as to buttress his/her testimony while impugning the veracity of the defendant's testimony?);
    5. At what point in the trial the judge engaged in questioning;
    6. The number of times that the judge engaged in questioning.

State v. Nelson, 982 A.2d 602 (R.I. 2009). Trial justice exceeded the scope of judicial interrogation when questioning two state witnesses at defendant's trial for DUI resulting in serious bodily injury. R.I.S.C. vacated and remanded for a new trial, holding that both interrogations were prejudicial and too inflammatory to be remedied with a curative instruction.

- Justice's questions improperly took on an air of direct and cross-examination, and elicited inflammatory testimony that reinforced defendant's intoxication to the jury. Most notably, the interrogations elicited testimony from a hospital laboratory technician about tests that could not be performed due to defendant's severe intoxication, and then solicited the opinion of a crime laboratory director with respect to defendant's relative blood alcohol level at various intervals following the collision.

- The justice's interrogation of the crime laboratory director involved a rephrased version of a question the prosecutor had previously asked and the witness had already

answered. The court determined that the purpose could not be clarification when the judge asked a question to which he and the jury already knew the answer. Id. at 617-18.

- "A trial justice's prerogative to question witnesses still is limited to inquiry that will clarify a matter which he justifiably feels is a cause for confusion in the minds of the jurors"; yet, even then, the trial justice should do so only in limited circumstances and "first allow counsel every opportunity to refine the witness's testimony" before "cautiously" interrogating the witness himself. Id. at 615.

PROSECUTORIAL MISCONDUCT

Prosecutor's Duty Under Rules of Professional Conduct

R.I. RULES OF PROF'L CONDUCT R. 3.8: Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;
(e) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule;
(f) not, without prior judicial approval, subpoena a lawyer for the purpose of compelling the lawyer to provide evidence concerning a person who is or was represented by the lawyer when such evidence was obtained as a result of the attorney-client relationship.

- We remind every prosecutor of the words of Justice Sutherland in Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 633, 79 L. Ed. 1314, 1321 (1935) (quoted in State v. Verlaque, 465 A.2d 207, 214 (RI 1983)):

> "The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor -- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

Opening Statements

Practice Tip: If a prosecutor states something in opening that is worthy of a mistrial, counsel must move for a sidebar, put the violation on the record and the grounds for a mistrial. If denied, counsel must request an immediate cautionary instruction and lodge an objection to the instruction if deemed inadequate in order to preserve appellate review.

State v. Colvin, 425 A.2d 508 (R.I. 1981). In a delivery of controlled substances trial, the prosecutor referred to prior uncharged drug sales by the defendant. Defendant moved to pass the case, was denied the motion, and then moved for a cautionary instruction. The trial judge cautioned the jurors that statements of counsel are not evidence. R.I.S.C. reversed defendant's conviction and remanded.

- The trial judge's instruction was insufficient to cure the prejudice: "…an admonition to the jury that opening or closing statements do not constitute evidence is insufficient to correct the prejudicial error committed in the opening statement." Id. at 512.

- Use this language to both move to pass the case and then to justify strong language in the cautionary instruction.

State v. Casas, 792 A.2d 737 (R.I. 2002). Prosecutor in a possession with intent to deliver case improperly told the jury that the state had been investigating the defendant's drug trafficking for years even though defendant had moved *in limine* to preclude the state from such references. The trial court granted a mistrial and denied defendant's double jeopardy motion to dismiss. R.I.S.C. affirmed.

- Although the trial judge had not ruled on the motion *in limine* prior to opening statements, R.I.S.C. noted that the state was on notice that the issue was "forbidden territory." Id. at 740.

- In order to prevail on a double jeopardy challenge following dismissal on grounds of prosecutorial misconduct, defendant must show that the misconduct was intended to goad defendant into moving to pass the case. Id. at 739 (citing State v. McIntyre, 671 A.2d 806, 807 (R.I. 1996)).

- Prosecutor's misconduct was unintentional because it happened early in the trial (rather than later in response to a rapidly deteriorating case), because defense counsel initially responded that he had no evidence that the misconduct was intentional, and because the prosecutor was young, inexperienced, and unfamiliar with the concept that character evidence is inadmissible to establish guilt. Id. at 740.

State v. Andujar, 899 A.2d 1209 (R.I. 2006). Defendant on trial for soliciting another to commit murder was entitled to introduce the fact of his prior acquittal for charges of sexual assault perpetrated against the same victim, following the prosecutor's reference to the prior charges during opening and closing arguments.

- Although juries are instructed that statements made in opening and closing arguments are not evidence, the prosecutor's statements created the unavoidable impression that defendant had sexually assaulted the intended victim and wanted her murdered to prevent her from testifying.

- Evidence of a defendant's prior acquittal is admissible when evidence about that conduct is introduced by the state. The acquittal may be presented to the jury either by stipulation, by the parties' testimony, or by an instruction from the trial justice. Id. at 1221-22.

State v. Chum, 54 A.3d 455 (R.I. 2012). During his opening statement, the prosecutor promised the jury that they would hear testimony about an incriminating statement the defendant gave to police admitting his involvement in a shooting. However, during the trial, the prosecutor never actually presented the promised testimony.

- Although the defendant did not properly preserve this issue for appeal, R.I.S.C. still noted the following:

  "When, as in this case, a prosecutor makes an unfulfilled promise in opening statement about the evidence that will be put before the jury, a criminal defendant has several avenues available to address the issue." For example:

  3) "Defense counsel can remind the jury during closing argument that the prosecutor promised that certain evidence would be admitted and that the evidence never materialized."
  4) Once it becomes clear that the evidence will not be presented "defense counsel can seek a mistrial or, in the alternative, a curative instruction." Id. at 461.

Prejudicial Questions

State v. Ordway, 619 A.2d 819 (R.I. 1992). In a murder trial, the prosecutor's question about the defendant stabbing another boyfriend was so inflammatory that no curative instruction could have neutralized the prejudice to defendant. The prosecutor had not disclosed this prior act in discovery and had no factual basis to ask the question. R.I.S.C. reversed.

- Prosecutor's question was so inflammatory as to render the cautionary instructions inadequate. "The naïve assumption that prejudicial effects can be overcome by instructions to the jury … all practicing lawyers know to be unmitigated fiction…The well was poisoned and the bell rung, and the resulting effects cannot be altered." Id. at 828.

State v. Barbosa, 908 A.2d 1000 (R.I. 2006). Prosecutor's question at a felony assault trial lacked a factual basis while implying that the defendant had intimidated the witness. The trial

judge denied defendant's mistrial request, but cautioned the jury to disregard the question and answer. R.I.S.C. affirmed.

- The state's witness testified that the defendant did not have a gun, inconsistent with his earlier statement to police. The prosecutor then asked the witness if he had since learned that defendant had received the police report and that witness's address was on it, to which witness answered in the affirmative before defense counsel could object.

- "Even if the words of a particular witness, if not further addressed, could have a prejudicial effect on defendant's right to a fair trial, a motion to pass a case and declare a mistrial will be properly denied if a cautionary instruction is given in a timely manner and is effective in curing the prejudice." Id. at 1004.

State v. McManus, 941 A.2d 222 (R.I. 2008). When arrested for the murder of his wife, defendant had a blood alcohol level of 0.131. At trial, the prosecutor asked the police officer present for the test: "Do you know of any law in the State of Rhode Island that says if you have a blood alcohol level above .10, you can't go out and kill somebody?" The trial judge denied defense counsel's request for a mistrial, but gave a curative instruction and ordered the jury to disregard the "inappropriate" question.

- R.I.S.C. concluded that the jury would not be so affected by the question "that they would not be able to decide the case based on a dispassionate evaluation of the evidence." Id. at 234.

State v. Jones, 416 A.2d 676 (R.I. 1980). At trial on drug offenses, defendant was prejudiced by prosecutor's line of hypothetical questions about his involvement with drugs and to whom he was willing to sell drugs. Even though defendant had presented an entrapment defense, the questions were not the proper method for the prosecutor to show defendant's predisposition.

- Hypothetical questions based on a "speculative factual basis" were "fraught with impermissible prejudice" and were "especially pernicious given the inability of defendant to defend against these vague unsupported accusations except by a bald denial." Id. at 683.

State v. Price, 68 A.3d 440 (R.I. 2013). In this case the defendant was charged with various counts for possession and the prosecutor asked various questions about previous charges filed against the defendant. The questions were improper for impeachment purposes, placed factually incorrect information in front of the jury, and impermissibly introduced false evidence of the defendant's previous criminal activities.

- "The implication that defendant was previously charged with a crime without an evidentiary basis for that suggestion is patently improper." Id. at 447.

Closing Arguments

Practice Tip: A prosecutor's closing argument is limited to evidence presented and the reasonable inferences from the record. Prosecutors cannot comment on a defendant's failure to call witnesses or make inflammatory statements. If such a comment is made, you must make a specific objection, move to pass the case and, if denied, move for a Taylor cautionary instruction noted below. If you anticipate such conduct, file a motion *in limine* to preclude the state from doing so.

State v. Taylor, 425 A.2d 1231 (R.I. 1981). Prosecutor's comment about defendant's failure to call witnesses at trial was reversible error.

- The state may never comment about the defendant's failure to call witnesses at trial because it suggests that he has a burden or that he knew their testimony would be unfavorable.

- Trial court's instruction that "a defendant never has to prove anything" and to keep the prosecutor's comments "in context" was inadequate. Trial court should have told the jury that the prosecutor's argument was improper and must be totally disregarded. Id. at 1235.

- Cautionary instruction must "(1) identify the prosecutor's conduct as improper, (2) unequivocally indicate that the jury must disregard it, and (3) unequivocally indicate that since the defendant has no duty to present witnesses or any other evidence, his failure to do so cannot be construed as an admission that the evidence…would have been adverse." Id. at 1235.

- The failure to request a Taylor instruction constitutes a waiver of your appellate rights. In Lapointe and White, the prosecutor's comments about the defendant's failure to call witnesses was improper but defense counsel waived any appellate rights when he failed to request a Taylor instruction. See State v. Lapointe, 525 A.2d 913 (R.I. 1987) and State v. White, 512 A.2d 1370 (R.I. 1986).

State v. Marizan, 185 A.3d 510 (R.I. 2018). During closing arguments in a sex assault trial, the prosecutor commented on the lack of consent evidence, including from the defendant. Defense counsel moved to pass the case based upon the prosecutor's comment amounting to a violation of the Fifth Amendment since the defendant did not testify but his statement to police was admitted. The trial judge denied the request for a mistrial and the R.I.S.C. affirmed.

- "A prosecutor is given considerable latitude in closing argument, as long as the statements pertain only to the evidence presented and represent reasonable inferences from the record." *State v. Cavanaugh*, 158 A.3d 268, 278 (R.I. 2017) (quoting *Boillard*, 789 A.2d at 885). Because we read that statement in context, we are satisfied that the prosecutor's comment indicates that she was referring to defendant's denial of any sexual relations with the complaining witness. Id. at 519.

- We caution that, in some cases, such comments by prosecutors "may approach the line of improper prosecutorial conduct." Id. at 520.

State v. DeCarlo, P1/2010-0644A February 24 (R.I. Super. 2012)(Darrigan, J. unpublished). Defense motioned for dismissal with prejudice based upon nine instances of prosecutorial misconduct. Trial Judge granted the motion noting that the "prosecutor went out her way, knowingly, purposefully, and intentionally on three separate occasions to introduce facts before this jury that she knew absolutely were forbidden by rule of this court." And "the prosecutor was over zealous and made improper comments bent more on conviction than justice." And "the egregiousness, the number and the cumulative effect of this act of transgression left this defendant absolutely no other alternative or conclusion other than to be provoked or goaded into making" the motion to dismiss.

State v. Horton, 871 A.2d 959 (R.I. 2005). Prosecutor improperly characterized defendant charged with first-degree child molestation as a monster and defense counsel objected. The trial justice never responded to counsel's objection and defendant was convicted. R.I.S.C. affirmed defendant's conviction because it found the error harmless.

- R.I.S.C. admonished the court for failing to address counsel's objection and noted that the characterization was improper. "We begin by stating firmly that we do not condone tactics that serve to demonize a particular defendant. As we previously have stated, '[a] criminal trial cannot be allowed to become like a day at a Roman Coliseum when an individual's fate was determined by the cheers or jeers of the crowd.'" Id. at 965 (quoting State v. Mead, 544 A.2d 1146, 1150 (R.I. 1988)).

- The issue was not adequately preserved for appeal because defense counsel failed to lodge a specific objection (but rather generally objected), never moved to strike, and did not motion for a new trial.

State v. Barkmeyer, 949 A.2d 984 (R.I. 2008). Defense counsel requested a mistrial after prosecutor characterized defendant in a child molestation case as a "predator" who "preys on weak people," and suggested that defense counsel was intentionally misleading the jury. The trial justice called the statements "unfortunate" and issued a cautionary instruction to the jury. R.I.S.C. held that the judge's curative instruction was an adequate remedy.

- "There is no fixed rule of law to determine whether a challenged remark is incurably prejudicial, but instead, the trial justice must assess the probable effect of the remark within the factual context of the evidence presented." Id. at 1007.

- The Court must assume the jury has complied with a cautionary instruction "unless some indication exists that the jury was unable to comply." Id.

State v. Vieira, 38 A.3d 18 (R.I. 2012). During closing argument in a child molestation case, prosecutor violated motion *in limine* that prohibited drawing any conclusions from physical changes that occurred to the complainant after the alleged molestation began, but the conduct was not to the extent requiring a mistrial. The prosecutor stated in her closing argument that the child had become "withdrawn, angry and started wetting her bed… all signs of a troubled child. We now know why… [because] the defendant was molesting her." The trial judge denied defendant's motion to pass, but issued a curative instruction to the jury. R.I.S.C. affirmed, agreeing that the comments were improper based on the motion *in limine* but finding the curative instruction sufficient.

PROBATION VIOLATION HEARINGS

Super. Ct. R. Crim. P. 32(f): Sentence and Judgment

(f) Revocation of Probation**.** The court shall not revoke probation or revoke a suspension of sentence or impose a sentence previously deferred except after a hearing at which the defendant shall be afforded the opportunity to be present and apprised of the grounds on which such action is proposed. The defendant may be admitted to bail pending such hearing. Prior to the hearing the State shall furnish the defendant and the court with a written statement specifying the grounds upon which action is sought under this subdivision. No revocation shall occur unless the State establishes by a fair preponderance of the evidence that the defendant breached a condition of the defendant's probation or deferred sentence or failed to keep the peace or remain on good behavior.

-As amended by the court on June 21, 2016; September 5, 2017

Notice

State v. Lanigan, 335 A.2d 917 (R.I. 1975). On the day of his violation hearing, defendant was informed by the prosecution that his probation was being revoked for various anti-social behaviors. However, the Attorney General failed to provide defendant with written notice specifying the exact grounds of revocation. R.I.S.C. reversed and remanded for a new hearing.

- "Rule 32(f) means what it says. It should be obeyed. Adherence to its provisions will facilitate the due process requirements of proper notice." Id. at 920.

State v. Desrosiers, 559 A.2d 641 (R.I. 1989). Defendant was convicted after trial of several felonies. On the day of sentencing, defendant was notified that prosecutors were seeking revocation of his suspended sentence. At sentencing, the trial judge revoked his suspended sentence and ordered it to run consecutive to his other sentences. R.I.S.C. affirmed.

- Although defendant did not receive written notice of the revocation of probation until the morning of the sentencing, he was not prejudiced since he was afforded a full trial on the same issue of violation. Technical non-compliance with Rule 32(f) notice requirements is not a bar to prosecution if actual notice exists.

- "We strongly urge prosecutors under Rhode Island law to give defendants timely written notice of probation-revocation hearings and the grounds for such hearings." Id. at 644.

State v. Martin, 358 A.2d 679 (R.I. 1976). Defendant's probation revocation hearing was combined with the bail hearing. While a separate 32(f) notice was not given, defendant was aware of the charges since they were listed on the complaint. R.I.S.C. refused to reverse, ruling

that a finding of violation will not be vacated because of technical noncompliance with Rule 32(f) when the defendant is in fact aware of the exact grounds of violation.

State v. Godette, 751 A.2d 742 (R.I. 2000). Probation violation judge prohibited the state from amending the ground for violation (from driving a vehicle without the consent of the owner to possession of a stolen vehicle) because it did not formally amend but rather wanted to amend at trial. R.I.S.C. reversed.

- The state reasonably complied with the Rule 32(f) notice requirement "because the amended notice contained a substantially related charge arising from the same occurrence, identical physical evidence, and identical witnesses to the original notice." Id. at 745.

State v. Barber, 767 A.2d 78, 80 (R.I. 2001). Procedural due process requirements are satisfied for purposes of Rule 32(f) provided that defendant is "afforded an opportunity to dispute the facts that are offered as proof" of the violation and "to present evidence of factors mitigating against the reimposition of the suspended sentence."

State v. Brown, 915 A.2d 1279 (R.I. 2007). The state's Rule 32(f) report contained a complaint specifying robbery and resisting arrest as the grounds for alleging a probation violation. However, at the hearing the state also presented evidence of an assault committed by defendant. R.I.S.C. determined that the state's paperwork attached to the complaint contained sufficient information about the assault, such that defendant should have been on notice that it could be a focal point at the hearing.

- "It is well settled that the reversal of a probation violation decision is proper if the state falls short of [its Rule 32(f)] requirement" to provide "a written statement specifying the grounds upon which action is sought." Id. at 1282.

- "The requirements of Rule 32(f) may be satisfied by reference to attached reports." Id.

- Defendant's appeal was also waived because of his failure to object to the non-disclosure during the hearing.

Time Limitations

Rose v. State, 92 A.3d 903 (R.I. 2014). Petitioner, having received a 20-year sentence at the A.CI., with 8 years to serve and the balance of 12 years suspended with probation, sought to end his probationary period earlier based upon good time credits received and his early release from the original 8 year prison sentence. The R.I.S.C. rejected this argument and held that the entire sentence of 20 years could not be reduced by the application of good time credits and early release from the A.C.I.

State v. Parrillo, 158 A.3d 283 (R.I. 2017). The Supreme Court reaffirmed its holding in Rose v. State and denied defendant's argument that his probation had already expired based upon his good time release from prison.

- "…because Parrillo was sentenced on January 21, 1986, to a thirty-year term, and because the effect of his good-time or time-served credits reduced his period of incarceration, but did not reduce the overall length of his sentence, his sentence officially ended on January 21, 2016—thirty years later. Consequently, the hearing justice committed an error of law in finding that Parrillo was not on probation at the time of the 2011 incident." Id. at 291.

State v. Taylor, 306 A.2d 173 (R.I. 1973) and State v. Santos, 498 A.2d 1024 (R.I. 1985). Probation revocation proceedings must commence during period of probationary term unless period is tolled by issuance of a *capias* or warrant and a good faith effort is made to serve process.

- "…the issuance of an unexecuted *capias* before a defendant has completed a deferred sentence tolls the running of the limitations period provided the state has met its obligation to make a bona fide effort to serve the accused. If no action is taken or a diligent effort to serve the defendant is not made, the state is barred from bringing violation charges after the limitations period has run." Santos, 498 A.2d at 1026.

State v. Dantzler, 690 A.2d 338 (R.I. 1997). Defendant escaped from prison and was charged with committing sexual assault. His probation was revoked even though those periods did not commence until his release from the A.C.I. R.I.S.C. affirmed.

- While defendant's suspended sentence had not commenced, an "implied condition of good behavior comes into existence at the very moment the sentence is imposed and which remains until expiration of the total term of the sentence." Id. at 340. See also, State v. Jacques, 554 A.2d 193 (R.I. 1989), wherein a probation revocation was upheld while defendant was on parole but before the commencement of his probation.

State v. Barber, 767 A.2d 78 (R.I. 2001). While incarcerated on a 20-year prison sentence, defendant assaulted two correctional officers and was found in violation of his probation. Defendant appealed, arguing that the probation terms ("probation for 5 years, said probation to commence upon defendant's release from the ACI") prevented a violation while in the A.C.I.

- R.I.S.C. denied the appeal, stating that good behavior is always an implied condition while probation hangs over a defendant's head, and "it would violate public policy and the underlying reasons for probation" if defendant could violate that implied condition in prison without probationary consequences. Id. at 79.

- Defendant's contention that the violation hearing was barred by the doctrine of laches because his violation notices were filed as late as fourteen months after the assaults, was inapposite because there was no evidence that defendant suffered any prejudice from the delay.

Practice Tip: Counsel should advise their clients just entering pleas resulting in incarceration that while probation does not commence until their release from the A.C.I., the probation may be violated before it starts based upon misconduct at the A.C.I.

State v. Lawrence, 658 A.2d 890 (R.I. 1995). A two-month delay prior to the violation hearing was not ruled a due process violation since many of the continuances were attributable to defendant. R.I.S.C. affirmed.

- In determining whether delays in probation violation hearing violate rule 32(f)'s time constraints, the court must consider the nature and circumstances of delay as well as defendant's contribution towards any delay.

- "…we are of the opinion that §12-19-9 is quite clear in mandating that a defendant may be held without bail pending a probation-revocation hearing for a period not exceeding ten (10) days excluding Saturdays, Sundays and holidays….Thus our interpretation of §12-19-9 must ultimately turn on the nature and extent of a criminal defendant's conduct in contributing to the delay and conversely, those continuances attributable to the state." Id. at 893.

State v. Tavares, 837 A.2d 730 (R.I. 2003). Trial court revoked defendant's probation although his probationary period had expired. R.I.S.C. reversed.

- Defendant's probation was tolled by an outstanding warrant; however, once the warrant cancelled, "it was incumbent upon the Superior Court and the state to move on the violation hearing within a reasonable amount of time. Instead, the warrant was cancelled and Tavares was released on bail *without a finding*. By failing to proceed with a hearing during the tolling period, the state was barred from seeking to have defendant declared a violator or ordered to serve a term of incarceration." Id. at 734.

State v. Cosores, 891 A.2d 893 (R.I. 2006). Defendant was originally sentenced to a year of probation and violated his conditions with three months remaining. However, a series of continuances, primarily of the Court's own doing, resulted in defendant's violation hearing taking place almost fourteen months after his probation expired. Defendant was declared a violator at the hearing and served several months in prison. R.I.S.C. vacated the judgment.

- The state argued that the appeal was moot, by way of defendant's completed prison sentence. R.I.S.C. declined to declare the appeal moot and responded, "Although the completion of a prisoner's sentence renders his or her appeal from the revocation of a

term of supervised release moot, we deem the issue…to be of extreme public importance and capable of repetition, yet evading review." Id. at 894.

- "If no action is taken or a diligent effort to serve the defendant is not made, the state is barred from bringing violation charges after the limitations period has run." Id. (quoting State v. Santos, 498 A.2d 1024, 1026 (R.I. 1985)).

- "The law is clear: a defendant must be declared a violator during the probationary period. A defendant should not have the threat of incarceration hanging over his head for an indeterminate time…Thus, the court did not have the authority to declare the defendant a violator." Id. at 894-95.

Assistance of Counsel

O'Neill v. Sharkey, 268 A.2d 720 (R.I. 1970). Defendant was not able to confer with court-appointed counsel until minutes before his violation hearing was set to begin. After violation, R.I.S.C. remanded the matter for a new hearing, finding defendant was denied the assistance of meaningful representation.

- "We hold, therefore, that … O'Neill shall have the benefit of representation by counsel appointed sufficiently in advance of said hearing to make that representation meaningful; to be heard in his own defense, and to cross-examine such witnesses as may be produced against him." Id. at 723.

State v. Dias, 374 A.2d 1028 (R.I. 1977). The trial judge abused his discretion when he refused to grant a continuance to allow defendant to retain counsel of his choice and prepare a defense. Private counsel was prepared to enter but could not attend on that date. The public defender was forced to enter on the day of violation hearing. Defendant's request was not an attempt to delay proceedings and there was no prejudice to the state.

- "The defendant contends that he must be afforded a reasonable opportunity to secure counsel of his own. This principle of law is not disputed. The right to the opportunity to obtain counsel of one's choice is as much a part of due process requirements as the right to be represented by counsel at every critical stage of the proceedings." Id. at 1029.

- "Violation hearings are held without a jury; thus the factors of additional expense and scheduling difficulties which could mitigate against the interruption of a trial in progress to change counsel midstream were not present. The state's case involved only four witnesses, of which two were police officers and one was a state employee." Id. at 1030.

State v. Caprio, 819 A.2d 1265 (R.I. 2003). Defendant in a probation violation hearing requested a continuance to obtain new counsel because his attorney unintentionally misrepresented the state's offer in a plea agreement. (Counsel said the offer was six years with fifteen months to

serve when in actuality the offer was fifteen years with six years to serve.) R.I.S.C. upheld the trial court's denial of defendant's motion.

- "Exceptional circumstances" are necessary to justify a delay due to an eleventh-hour discharge of counsel. Id. at 1270 (quoting State v. Monteiro, 277 A.2d 739, 742 (R.I. 1971)).

Lyons v. State**,** 880 A.2d 839 (R.I. 2005). Defense counsel chose not to subpoena medical records at defendant's probation violation hearing. R.I.S.C. held the decision was tactical and did not prejudice defendant or violate his rights to counsel.

State v. Gilbert, 984 A.2d 26 (R.I. 2009). The hearing justice at defendant's probation violation hearing denied defendant's request for a continuance to obtain alternate counsel due to a lack of confidence in his appointed attorney. The attorney's request to withdraw was denied as well. R.I.S.C. affirmed.

- The hearing justice considered several factors, including that the defendant waited until the second day of the hearing to make the request, the defendant's doubts lacked adequate grounds, defendant could not represent himself, and no other counsel was immediately available to represent defendant.

- Upon a request for a continuance to secure new counsel, the hearing justice's decision "requires the careful balancing of the presumption in favor of the defendant's right to trial counsel of choice and the public's interest in the prompt, effective, and efficient administration of justice." This balancing requires a fact-specific analysis of each case. Id. at 30.

State v. Powell, 6 A.3d 1083 (R.I. 2010). Defendant's motion for new counsel, which was filed the morning of his probation violation hearing, was denied. Defendant had not demonstrated that he could afford private counsel or that he had alternate counsel available, his appointed counsel appeared prepared to proceed, state and its witnesses were prepared to proceed, and defendant had weeks leading up to his hearing to secure attorney of his choice.

- A motion for new counsel is treated as a continuance because, if granted, the court would be required to continue the matter and delay proceedings. "[A]lthough a defendant has a right to counsel at a probation violation hearing, such a hearing is summary in nature and the defendant is not entitled to the panoply of rights available at a criminal trial. Therefore a motion to continue a probation-violation hearing so that alternative counsel might be retained is more narrowly reviewed." Id. at 1087.

State v. Lancellotta, 35 A.3d 863 (R.I. 2012). At a probation-violation hearing, "a hearing justice's decision to grant or deny a request for alternate counsel requires a balancing of the presumption in favor of the defendant's right to the trial counsel of choice and the public's interest in the prompt, effective, and efficient administration of justice." Id. at 867.

- A hearing justice should consider the following factors when determining whether to grant a continuance to secure new counsel:

> (1) the promptness of the continuance motion and the length of time requested; (2) the age and intricacy of the case; (3) the inconvenience to the parties, witnesses, counsel, and the court; (4) whether the request appears to be legitimate or merely contrived foot-dragging; (5) whether the defendant contributed to the circumstances giving rise to the request; (6) whether the defendant in fact has other competent and prepared trial counsel ready to pinch-hit; and (7) any other relevant factor made manifest by the record. Id.

Practice Tip: Counsel should never be rushed into a probation violation hearing unless adequately prepared to render effective assistance of counsel. In the event that counsel is not prepared to proceed, he/she must make an adequate record to preserve this issue on appeal.

Presence of Defendant

State v. Arroyo, 403 A.2d 1086 (R.I. 1979). Defendant's probation violation hearing was commenced and concluded while he had fled the state. Sentencing was held until his extradition to Rhode Island. R.I.S.C. remanded the matter for a new hearing ruling that a probation violation hearing may not commence without defendant's presence, regardless of whether defendant's absence is voluntary or involuntary.

Discovery

The rules of discovery in violation hearings are governed by a combination of due process case law, procedural rules and administrative orders.

In Superior Court, use Superior Court Rule of Criminal Procedure 26.1:

As amended, this rule now applies to all pre-trial hearings in addition to trials. A motion for the production of a witness's statement may be made by any party who did not call the witness. Statements include grand jury testimony of a witness. This rule now applies to defense witnesses, allowing the state access to statements of a witness, other than the defendant, after the witness's testimony. Sanctions for the state's non-compliance include striking a witness's testimony or ordering a new hearing. If the defendant refuses to comply with the court's order, the court's only sanction is striking or precluding the testimony.

In District Court, use *Administrative Order 93-12*:

"The Attorney General shall furnish copies of the witness statements of any witnesses the State intends to call in support of the prosecution's case-in-chief to defense counsel by 9:00 a.m. on the day *before* the bail or violation hearing is scheduled." *September 30, 1993*

State v. Delarosa, 39 A.3d 1043 (R.I. 2012). No discovery violation occurred when, prior to probation-violation hearing, the state failed to inform defendant of testimony by a cooperating witness regarding a second encounter with defendant shortly after dropping him and two other men at the site of a planned home invasion. Defense counsel did not learn of the information until the witness testified at his hearing.

- "Since the witness revealed the information concerning her second encounter with Delarosa for the first time at the violation hearing, and no written or recorded statement existed on this particular issue, the hearing justice did not err in finding no discovery violation on the part of the state and overruling Delarosa's objection." Id. at 1052.

- Rule 16 does not apply to probation-violation proceedings, including the requirement related to written or recorded statements by persons whom the state expects to call as witnesses. Also, since no written statements existed, the prosecutor here did not violate Rule 26.1 by not providing a statement after the witness testified.

- Defendant argued that, even without Rule 16, he was entitled to receive the information before trial based on due process and fundamental fairness. R.I.S.C. responded:

    - "In regard to discovery in the context of probation-violation hearings, this Court has held that such a hearing is not part of the criminal-prosecution process; therefore, it does not call for the 'full panoply of rights' normally guaranteed to defendants in criminal proceedings. The minimum due process requirements of a violation hearing call for the notice of the hearing, notice of the claimed violation, the opportunity to be heard and present evidence in [the] defendant's behalf, and the right to confront and cross-examine the witnesses against [the] defendant. This Court has also recognized that probation-violation hearings are frequently held without the benefit of preparation that precedes a criminal trial." Id. at 1051 (citations omitted).

Exculpatory Evidence Doctrine

In Superior and District Court, the state is required to disclose exculpatory evidence when the basis of the violation hearing is a new criminal charge. Since the prosecution has an immediate and ongoing responsibility to turn over evidence favorable to the accused, including evidence that may be used to impeach the credibility of prosecution witnesses, such evidence must be made available to the defendant prior to and during a violation hearing. Also, the disclosure of exculpatory evidence is arguably a minimum due process requirement. See State v. Chabot, 682 A.2d 1377 (R.I. 1996) ("…a violation proceeding presents the possibility of the loss of liberty prompting the requirement of 'certain constitutional safeguards.'").

Brady v. Maryland, 373 U.S. 83 (1963). Due process requires the prosecution to disclose evidence favorable to an accused when such evidence is material to the issues of guilt or punishment.

U.S. v. Agurs, 427 U.S. 107 (1976). Although a specific request for exculpatory material is helpful, it is not required in order to "trigger" the prosecutions obligation to disclose.

Giglio v. U.S., 405 U.S. 150 (1972) and State v. Wyche, 518 A.2d 907 (R.I. 1986). The obligation to disclose exculpatory material also includes evidence that may be used to impeach the testimony of the prosecution's witnesses.

Mooney v. Holohan, 294 U.S. 103, 108 (1935). The prosecution's duty to disclose exculpatory material is ongoing and continues throughout the proceedings.

Standard of Proof

NOTE: The standard of proof has been amended to a preponderance of the evidence. No reported cases address this change yet, but the committee notes to the amendment read: "Prior to amending subsection 32(f), the state only was required to prove to the reasonable satisfaction of the hearing justice or magistrate that the defendant had violated his or her previously imposed probation. State v. Ferrara, 883 A.2d 1140, 1144 (R.I. 2005); Walker v. Langlois, 243 A.2d 733, 737 (R.I. 1968). The 2016 amendment, by adding the last sentence to the subsection, increases that burden by requiring the state to prove the revocation allegation by a fair preponderance of the evidence. In addition, the amendment reflects and recites the Rhode Island Supreme Court's settled rule that revocation should not be determined by whether the defendant violated any offense which may form the basis of the violation allegation; rather, the ""sole purpose of a probation violation hearing is for the trial justice to determine whether the conditions of probation'--"[k]eeping the peace and remaining on good behavior--have been violated.'" State v. Hazard, 68 A.3d 479, 499 (R.I. 2013), citing State v. Gromkiewicz, 43 A.3d 45, 48 (R.I. 2012))(quoting State v. Waite, 813 A.2d 982, 985 (R.I. 2003)). State v. Znosko, 755 A.2d 832, 835 (R.I. 2000) (holding that "the appropriate role of the hearing justice was to determine 'only whether in [the hearing justice's] discretion [the defendant's] conduct on the day in question had

been lacking in the required good behavior expected and required by his probationary status'") (quoting State v. Godette, 741 A.2d 742, 745 (R.I. 2000)). It is the consensus of the committee that the amendment should operate prospectively from the time of its adoption, not retroactively."

In re Lamarine, 527 A.2d 1133 (R.I. 1987). A probation-revocation hearing is not part of the criminal prosecution process and defendant is not entitled to the full panoply of due process rights. The prosecution is not required to prove an accused's violation of probation beyond a reasonable doubt; rather, the prosecution need only establish the violation by reasonably satisfactory evidence.
State v. Hazard, 671 A.2d 1225 (R.I. 1996). In a drive-by shooting, defendant's probation was revoked although the victim of the shooting identified another individual as the shooter. R.I.S.C. affirmed.

- "…the defendant's mere presence in the car during the drive-by shooting would be sufficient to revoke his probation." Id. at 1227.

State v. Godette, 751 A.2d 742, 745 (R.I. 2000). Hearing justice found that the state had not met its burden of proving defendant was in violation for driving a vehicle without the owner's permission. The state subsequently charged defendant with possession of a stolen vehicle. The motion justice found no "identity of issues" necessary to collaterally estop the state's prosecution. R.I.S.C. affirmed.

- The hearing justice critically misconceived her role during the probation revocation hearing by rendering a specific finding regarding the defendant's ultimate culpability for the misconduct.

- It was not the role of the hearing justice to determine the validity of the specific charges against defendant. Rather, the hearing justice's proper function is to assess "only whether in her discretion [the defendant's] conduct on the day in question had been lacking in the required good behavior expected and required by his probationary status." Id. at 745.

State v. Znosko, 755 A.2d 832 (R.I. 2000). An affirmative defense that absolves a defendant of criminal culpability is not necessarily dispositive at a probation hearing. Defendant got into a physical altercation at a party and stabbed the other individual, who later died. Defendant admitted to the stabbing but claimed it was in self-defense. The hearing justice gave strong consideration to defendant's claim but, ultimately, did not find it credible. He further noted that, even if defendant was protecting himself from an unprovoked attack, the judge would still find him to be a violator because probationers "are not to be in these circumstances in the first place."

- R.I.S.C. affirmed and stated, "Although we note that these are issues that may militate in his favor at trial on the underlying charge, they are not issues that are dispositive at this time." Id. at 835.

Practice Tip: Counsel must advise clients that the rules of a probation violation hearing are completely different than a trial and any finding of not 'keeping the peace and being of good behavior' by a preponderance of evidence is enough to revoke it.

State v. Santiago, 799 A.2d 285, 288 (R.I. 2002) (Santiago I). R.I.S.C. held that the only relevant issue before the hearing justice was whether defendant "had been lacking in the required good behavior expected and required by his probationary status" and not whether the state had satisfactorily proven defendant's criminal guilt for the charges forming the basis of alleged violation. Quoting State v. Gautier, 774 A.2d 882, 887 (R.I. 2001) (Gautier I).

State v. Piette, 833 A.2d 1233, 1236 (R.I. 2003). "The court's role [in a probation-revocation proceeding] is not to determine the defendant's criminal guilt or innocence with respect to the underlying conduct that triggered the violation hearing."

State v. Crudup, 842 A.2d 1069, 1072 (R.I. 2004). The court's role is to determine "whether a defendant has breached a condition of his probation by failing to keep the peace or remain on good behavior."

State v. Sylvia, 871 A.2d 954 (R.I. 2005). The burden of proof in a probation revocation hearing is considerably lower than in a criminal case.

- Instead of establishing proof beyond a reasonable doubt, "the state is only required to prove to the reasonable satisfaction of the hearing justice that the defendant has violated the terms and conditions of the previously imposed probation." Id. at 957 (quoting State v. Anderson, 705 A.2d 996, 997 (R.I.1997)).

State v. Vieira, 883 A.2d 1146 (R.I. 2005). Defendant's six years of good behavior did not prevent the imposition of the full nine years and six months of defendant's unexecuted suspended sentence following an arrest for robbery and possession of a stolen vehicle.

- The state has to prove only within a "reasonable degree of probability" that defendant breached the peace. Id. at 1149.
- "The attack here need not be vicious to amount to a violation of probation…Evidence demonstrating within a reasonable degree of probability that defendant was involved in a scheme to rob [victim] is more than sufficient to meet the applicable standard." Id.

State v. Forbes, 925 A.2d 929 (R.I. 2007). R.I.S.C. vacated and remanded violation judgment after determining that it was arbitrarily decided, because the hearing justice's findings of fact were insufficient to constitute a violation. Although the hearing justice correctly perceived that his role was not to determine defendant's guilt on his first-degree sexual assault charge, his failure to make any factual findings on the record about that conduct was improper and left insufficient findings to support the adjudication.

- In believing that he could not make any factual finding on the sexual assault, the hearing justice instead predicated his violation adjudication on "five significantly more benign instances of the defendant's conduct that night," including carrying a pocket knife, taking an acquaintance's cell phone and refusing to give it back, and not immediately getting out of a car when asked to by a police officer. Id. at 935-36.

State v. McLaughlin, 935 A.2d 938 (R.I. 2007). The hearing justice can limit defendant's introduction of evidence and cross-examination of witnesses to issues relevant strictly to whether defendant failed to keep the peace and remain on good behavior. In this case, hearing justice's decision to prohibit defendant from questioning the complaining witness about her motivations to "control" him was appropriate, because witness's alleged control over defendant's conduct was irrelevant to whether he personally maintained good behavior.

- "Although it is true that a defendant at a violation hearing is entitled to confront and cross-examine the witnesses against him, it is also true that a hearing justice may, in the exercise of his or her discretion, reasonably limit the scope of cross-examination." Id. at 942-43.

- The admissibility of evidence lies within the sound discretion of the hearing justice. "Strict application of the rules of evidence is not required at a probation violation hearing." Id. at 942 (quoting State v. Rioux, 708 A.2d 895, 898 (R.I. 1998)).

- The hearing justice can draw reasonable inferences from the evidence presented and assess the credibility of witnesses to determine whether defendant violated the terms of his probation.

State v. Jensen, 40 A.3d 771 (R.I. 2012). Defendant questioned the reliability of using his fingerprint found on a package of gum in the bedroom of sexual assault victim as a basis for finding that he violated his probation, due in part to the movable nature of the gum and the inability to prove that it was left during commission of the crime.

- "When a hearing justice is called upon to determine whether or not a defendant has committed a probation violation, the hearing justice is charged with weighing the evidence and assessing the credibility of the witnesses." Id. at 778 (quoting State v. Horton, 971 A.2d 606, 610 (R.I. 2009)).

- "[A] probation violation adjudication may be predicated upon fingerprint evidence as long as the weight of the circumstantial evidence constitutes reasonably satisfactory evidence that the defendant has violated his or her probation." This applies to other circumstantial evidence as well. Id. at 782.

State v. Gromkiewicz, 43 A.3d 45, 48 (R.I. 2012). "The 'reasonable satisfaction' standard should not be employed to determine the question of defendant's guilt in regard to any offense

which may form the basis of the violation allegation, but should instead be applied to determine whether defendant maintained or violated the conditions of his probation."

Immunity

State v. DeLomba, 370 A.2d 1273 (R.I. 1977). Defendant may testify at his violation hearing without fear that his testimony will be used at trial. If the state chooses to pursue a violation hearing prior to the trial on the violating offense, defendant will be given use and derivative use immunity for any testimony he may give.

- "…we hold henceforth the state must either hold the violation hearing first and give the alleged violator use and derivative use immunity for any testimony he may give, or postpone the violation hearing until after the criminal trial." Id. at 1276.

- While his testimony may not be used at trial, "such testimony and its fruits will be available to impeach or rebut clearly inconsistent testimony … [or be the basis of] perjury…" Id. at 1276.

State v. LeBlanc, 687 A.2d 456 (R.I. 1997). The trial justice has no obligation to inform the defendant of his immunity rights. This duty falls within the responsibilities of defense counsel.

Exclusionary Rule

State v. Spratt, 386 A.2d 1094 (R.I. 1978). The state exclusionary rule does not apply to probation revocation proceedings. R.I.S.C. leaves open the question of searches designed to harass probationers or that shock the conscience of the court.

- "These decisions, however, do not go so far as to say that an extension of the exclusionary rule would not deter police from searches which are consciously directed toward or intended to harass probationers … or which shock the conscience of the court. But since the search in this case was not so directed or intended, we leave to a future day consideration of the effect of that kind of conduct on the applicability of the exclusionary rule." Id. at 1095.

State v. Mello, 558 A.2d 638 (R.I. 1989). Evidence seized in violation of the Fourteenth Amendment's due process clause is excludable from a probation revocation proceeding. Note that federal case law does not allow coerced confessions for any purpose. See New Jersey v. Portash, 440 U.S. 450 (1979).

- "In the absence of a denial of due process, our holding in State v. Spratt, 386 A.2d 1094 (R.I. 1978), would clearly make the admission of the evidence obtained from the defendant proper." Id. at 638.

State v. Campbell**,** 833 A.2d 1228 (R.I. 2003). Magistrate denied defendant's motion to suppress a custodial statement given as a result of coercion. R.I.S.C. affirmed and noted that the magistrate was not required to conduct a separate hearing to determine the admissibility of the evidence under the exclusionary rule.

State v. White, 37 A.3d 120 (R.I. 2012). Defendant arrested for child pornography offenses had the criminal charges dismissed after successfully moving to suppress the evidence against him based on an illegal search. However, the evidence was still used afterward to violate defendant on his probation from a prior offense. RISC affirmed probation revocation.

Hearsay Evidence

State v. DeRoche, 389 A.2d 1229 (R.I. 1978). Defendant's probation was violated based upon the hearsay statements of an alleged accomplice. Defendant is entitled to confront state witnesses unless the judge finds good cause. If a witness is unavailable, the court may consider other elements such as reliability and evidentiary exceptions to the hearsay rule.

- "… we are bound by the minimum requirements set forth in Morrissey v Brewer. One of those requirements is 'the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation).' If the witness is unavailable, then the tribunal may consider other elements such as reliability and evidentiary exceptions to the hearsay rule." Id. at 1234.

- "… before admitting hearsay, particularly on issues that are central to the determination of the commission of the violation, the trial justice must determine whether there is good cause for denying confrontation and/or cross-examination." Id. at 1234.

State v. Vashey, 823 A.2d 1151 (R.I.2003). "The minimum due process requirements of a violation hearing call [only] for notice of the hearing, notice of the claimed violation, the opportunity to be heard and present evidence in defendant's behalf, and the right to confront and cross-examine the witnesses against defendant." Id. at 1155 (quoting State v. Casiano, 667 A.2d 1233, 1237 (R.I.1995)).

- The right to confront and cross-examine adverse witnesses during probation-revocation hearing is merely a "conditional right," and "need not be afforded to the defendant in those cases in which the hearing officer has found good cause for not allowing confrontation." Id. (quoting Casiano, 667 A.2d at 1239).

- Additionally, the rules of evidence are applied less stringently in a probation-revocation hearing than during a trial proceeding.

State v. Casiano, 667 A.2d 1233 (R.I. 1995). Trial court's denial of confrontation of the complaining witness child upheld by R.I.S.C. Hearsay testimony presented at defendant's hearing was sufficiently reliable to establish good cause for denying confrontation.

- "Before hearsay is admitted, however, particularly on issues that are central to determining whether the violation has been committed, the trial justice must decide whether there is good cause for denying confrontation and/or cross-examination. Hence, the opportunity to confront and cross-examine adverse witnesses at a violation hearing is a conditional right and need not be afforded to the defendant in those cases in which the hearing officer has found good cause for not allowing confrontation." Id. at 1239 (citations omitted).

State v. Greene 660 A.2d 261 (R.I. 1995). In a stolen license plate case, the police officer was allowed to testify as to the hearsay statements of the plate's owner. Defendant was adjudicated a violator of his probation based upon this testimony. R.I.S.C. remanded for a new hearing ruling that the hearsay testimony should not have been admitted without a showing of good cause denying confrontation or indicia of reliability.

- "In the case at bar no determination of good cause was made for the denial of the right of confrontation of either of these highly significant witnesses. In the case of D'Ambra, her written statement given in the Cranston police station had virtually no indicia of reliability. It was in contradiction of other documentary evidence of title to the automobile and her own initial statement given to the police when she sought release of the automobile. Certainly confrontation and cross-examination of this witness were essential to defendant." Id. at 263.

State v. Bernard, 925 A.2d 936 (R.I. 2007). Admission of hearsay testimony at defendant's probation revocation hearing violated his due process right to confront witnesses. The state presented one witness, who lacked personal knowledge of defendant's probationary record, and trial court failed to conduct any inquiry into whether there was "good cause" to deny confrontation of further witnesses. R.I.S.C. vacated judgment and remanded for a new hearing.

- The "good cause" determination for denying confrontation at a probation proceeding is generally based on both "the reliability of proffered substitute evidence and the state's explanation of why confrontation was undesirable or impractical." Id. at 939 (quoting State v. Casiano, 667 A.2d 1233, 1239 (R.I. 1995)).

- "Failure to make such a determination constitutes reversible error." Id.

- Rather than conducting the threshold "good cause" inquiry, the hearing justice simply stated that "hearsay is admissible in a violation hearing." This was an "oversimplification of the law" that resulted in reversible error once testimony was admitted.

State v. Pompey, 934 A.2d 210 (R.I. 2007). Police responded to a domestic assault call and were greeted at the door by the visibly upset and shaking victim, who stated "[Defendant] beat me up." The victim did not testify at defendant's probation revocation hearing and the state sought to admit her statement through the responding officer. Defendant argued that, under Crawford v. Washington, 541 U.S. 36 (2004), admitting the statement would violate his constitutional right to confront the witness.

- Applying the interrogation test from Davis v. Washington, 547 U.S. 813 (2006), R.I.S.C. affirmed the trial court's finding that the statement was "nontestimonial" because it was "made voluntarily during the initial response of the police officer to an emergency call for assistance," and that it was then admissible hearsay as an excited utterance.

- Regardless, Crawford does not apply to probation revocation hearings "because a probation violation proceeding is not a criminal prosecution." Therefore, even testimonial hearsay, unequivocally prohibited at trial, can be permissible in a probation revocation hearing. Id. at 214.

Sentencing

State v. Heath, 659 A.2d 116 (R.I. 1995). After sentencing the defendant to a jail term for violating his probation, the judge failed to mention the remaining portion of the suspended sentence. Defendant was later violated on this suspended sentence and he moved to dismiss arguing he was no longer on a suspended sentence. R.I.S.C. was not persuaded.

- The court's failure to mention the remaining portion of the suspended sentence does not eliminate it. "… the intention of the justice who originally imposed the suspended sentences is controlling and that the justice who finds a violation of probationary status and executes the sentence is bound by the initial determination…the trial justice at the violation hearing did not possess the statutory power to amend or decrease the sentence as originally imposed and was bound by the terms of that sentence." Id.

State v. Traudt, 679 A.2d 330 (R.I. 1996). Facing a violation of probation for failure to pay restitution, defendant agreed to extend his probation an additional two years to avoid incarceration. During that extension, defendant was violated and incarcerated for failure to pay. R.I.S.C. reversed and dismissed the violation on the grounds that a probationary period cannot be extended beyond the original sentence, even with the consent of defendant. Defendant remains civilly liable to pay the restitution.

- "We are of the opinion that the parties in this action cannot enter into an agreement to extend defendant's probation period beyond that which was originally imposed by the sentencing justice." Id. at 332.

But see: R.I.G.L. §12-19-8(c). At any time during the term of a sentence imposed, the probation and parole unit of the department of corrections may seek permission of the superior or district court to modify a defendant's conditions of probation set at the time of sentence by either

imposing additional conditions of probation or removing previously imposed conditions of probation to provide for more effective supervision of the defendant. Failure of the defendant to comply with modified conditions of probation may result in a violation of probation being filed pursuant to §12-19-9.

State v. Studman, 468 A.2d 918 (R.I. 1983). Defendant received separate suspended sentences for charges with no mention as to whether they were to run consecutive or concurrent. These sentences were later violated and ordered to run consecutive to each other. R.I.S.C. reversed. See also State v. Taylor, 473 A.2d 290 (R.I. 1984) (where sentencing justice did not state that defendant's terms were to be served consecutively, justice revoking probation could not make the sentences consecutive).

- "… when two or more sentences to be served in the same institution are imposed at the same time, such sentences run concurrently unless expressly ordered otherwise." Id. at 919 (quoting Pelliccia v. Sharkey, 292 A.2d 862, 864 (R.I. 1972)).

- "…when two or more sentences are not expressly stated as being consecutive, the presumption is that they were imposed to be served concurrently." Id. (quoting Pelliccia, 292 A.2d at 865).

- The original sentence is controlling and binding upon a justice that later revokes the sentence. "[T]he intention of the justice who originally imposed the suspended sentences is controlling and … the justice who finds a violation of probationary status and executes the sentence is bound by the initial determination." Id. at 920.

State v. Fortes, 330 A.2d 404 (R.I. 1975). Defendant's deferred sentence for possession of marijuana was later revoked based upon new charges of assault with intent to murder. The trial judge sentenced defendant to 15 years to serve based upon the serious nature of the assault charge. R.I.S.C. reversed and remanded for a new sentencing hearing.

- A violation hearing is "not held for the purpose of punishing defendant for the new offense. Although the latter is the precipitating cause for the revocation hearing, *it should play no part* in determining the extent of the penalty to be imposed on the charge on which sentence had formerly been deferred. Punishment for the new offense must await the disposition of the case in which the new offense is charged." Id. at 411-12.

State v. Pires, 525 A.2d 1313 (R.I. 1987). In a case with facts similar to Fortes, R.I.S.C. slightly modified Fortes. A judge sentencing a defendant for violating his probation must be "guided principally" by the first offense and use the sentencing benchmarks range when imposing sentence.

- "We have never held that the trial justice must completely ignore the nature of the second offense when imposing a sentence for a probation violation. However, we have held that the trial justice should be guided principally by consideration of the

nature of the first offense. We believe that the benchmarks promulgated as policy for sentencing by the Superior Court provide acceptable guidance and a reasonable range for the imposition of a sentence at a violation hearing." Id. at 1314.

- But see State v. Wisehart, 569 A.2d 434, 436-37 (R.I. 1990), which further limited the holdings of Fortes and Pires. R.I.S.C. found those cases inapplicable in Wisehart because the Fortes and Pires defendants had very limited criminal histories, while the defendant in Wisehart had extensive contacts with law enforcement. Although electing not to overrule Fortes and Pires, the Court found their reasoning to be "limited to situations involving first offenders when the sentence imposed is clearly excessive. A more realistic approach in situations such as the one before us is to allow the trial justice to consider the totality of the circumstances before the court, including the existing record of the defendant as it relates to his/her amenability to rehabilitation."

State v. Koliscz, 636 A.2d 1329 (R.I. 1994). Defendant's Alford plea to a burglary charge in Connecticut could be used as grounds to violate his Rhode Island probation. An Alford plea constitutes an adjudication that may later be revoked, regardless of whether defendant maintains his innocence.

In re Lamarine, 527 A.2d 1133 (R.I. 1987). Rule 37 of the District Court Rules of Criminal Procedure, which allows for a de novo appeal of a sentence, does not apply to a probation violation hearing. Once the court finds defendant to be a violator, he is not sentencing defendant, he is merely executing a previously imposed sentence.

State v. Deluca, 692 A.2d 689 (R.I. 1997). A trial judge may order defendant to serve a suspended sentence consecutive to an intervening federal sentence. Defendant was on state suspended sentences when he was charged and convicted on federal offenses. The state court adjudicated him a violator based upon the new crimes and ordered defendant to serve five years consecutive to the federal sentence. R.I.S.C. affirmed.

State v. Parson, 844 A.2d 178 (R.I. 2004). Based on offenses in 1992, defendant was sentenced to a ten-year suspended sentence with a probationary period of ten years. In 2000, defendant violated his probation and was sentenced to serve his full ten-year suspended sentence in prison. Defendant appealed, calling the sentence illegal because he had only two years remaining on his probation. R.I.S.C. affirmed the trial court, because a suspended sentence does not begin to run until it is executed.

- "No part of the suspended sentence runs until either the end of the probationary period or until the execution of all or some portion of it upon a determination that defendant violated probation." Id. at 180. Therefore, violation at any point of the probationary period subjects the defendant to the possibility of being sentenced to serve the full suspended sentence.

State v. LaRoche, 883 A.2d 1151, 1154 (R.I. 2005). "When the state seeks to revoke probation based upon a failure to pay restitution, the sentencing court must inquire into the reasons for the noncompliance. If the probationer has made sincere efforts to legally acquire the necessary money, but remains unable to comply with a restitution obligation, then the court must consider alternate measures of punishment other than incarceration. On the other hand, if the probationer has either refused to pay or has not made 'sufficient bona fide efforts' to acquire the resources to pay, then the sentencing court may revoke probation and impose a prison sentence." Citing Bearden v. Georgia, 461 U.S. 660, 672 (1983).

- The burden of proof is on the defendant to satisfy the trial court that he made "sufficient bona fide efforts" to comply with court-ordered restitution obligation, particularly if it is undisputed that the defendant has not fulfilled that condition of probation.

State v. Jones, 969 A.2d 676, 681 (R.I. 2009). Allocution is a constitutional right for defendants in Rhode Island, but the right is not afforded to defendants before sentencing at a probation revocation hearing. "This is because a probation-revocation hearing is not part of the criminal prosecution process, but is instead a civil proceeding."

- However, for situations in which the hearing justice intends to impose consecutive sentences or to impose a sentence on more than one case, "the better practice is to permit counsel to address the court concerning any factors which may assist the court in fashioning a sentence that as to the court may seem just and proper." Id. (quoting State v. Ratchford, 732 A.2d 120, 123 (R.I. 1999)); accord State v. Nania, 786 A.2d 1066, 1069 (R.I. 2001).

State v. Bouffard, 35 A.3d 909 (R.I. 2012). This case involved the re-bundling of a defendant's previously illegal probation sentence. Defendant had been sentenced to prison and probation on breaking and entering charges in 1991, 1996, and 2000, before being arrested again in 2006. For the 2006 offense, defendant was deemed to be a violator of his probation and he was sentenced to seven years in prison under his 1996 probation. At his subsequent Rule 35 hearing, the hearing justice determined that the sentence was illegal because the 1996 term of probation had actually expired. However, rather than release defendant, the hearing justice "re-bundled" his sentence by applying the seven year prison term to his 2000 probation.

- Defendant first argued that the hearing justice lacked the authority to re-bundle his sentence, because he was not the original sentencing justice (who had since retired). R.I.S.C. held that "it is the intent of the original sentencing court that lies at the heart of the re-bundling analysis, and that intent may be permissibly ascertained by another justice of that court should the need arise." Still, the hearing justice must preserve the sentence's original intent and cannot exceed the original sentence. Here, the Court found that the re-bundled sentence met the intent of the original sentencing justice. Id. at 917.

- Furthermore, the Court upheld the violation despite the state's eventual dismissal of the underlying criminal charge that formed the basis for the violation (due to the timing of the appeal, the 2010 amendments to § 12-19-18 were not applicable to the issue; see "Collateral Estoppel" section below).

State v. Lancellotta, 35 A.3d 863 (R.I. 2012). "The magistrate has wide discretion when determining the proper sentence to exact upon a probation violator, especially because 'the unexecuted portion of a probationer's suspended sentence hangs over his or her head by the single horsehair of good behavior, until such time as the term of probation expires.'" Id. at 869 (quoting State v. Vieira, 883 A.2d 1146, 1149 (R.I. 2005)).

- Hearing justice did not abuse his discretion by sentencing defendant to a seven year sentence following an assault that violated his probation stemming from a robbery. The judge's sentence is guided principally by consideration of the nature of the original offense, which was robbery, and not the violating offense of assault.

Appellate Review

State v. Gautier, 774 A.2d 882 (R.I. 2001). A trial court's finding of no violation may be reviewed by R.I.S.C. for abuse of discretion. In Gauthier, defendant was charged with violating a ten year suspended sentence based upon a new charge of murder. The trial justice did not believe the state's eyewitness and ruled that Mr. Gauthier did not violate his probation. R.I.S.C. found that the trial judge misconceived his role at the probation violation hearing.

- "…the state [can] seek and obtain appellate review in a criminal matter by petitioning this Court for a writ of certiorari where it appeared that an inferior court had improperly taken jurisdiction or had clearly abused its proper jurisdiction… This Court limits its review on certiorari to examining the record to determine if an error of law has been committed…We do not weigh the evidence presented below, but rather inspect the record to determine if any legally competent evidence exists therein to support the findings made by the trial justice." Id. at 886.

- It is the trial court's duty to determine "only whether in [the hearing justice's] discretion [the defendant's] conduct on the day in question had been lacking in the required good behavior expected and required by his probationary status…It is not the role of the hearing justice to determine the validity of the specific charge that formed the basis of the violation…" Rather, "pursuant to Rule 32(f), a showing that the defendant has failed to keep the peace and to remain on good behavior is sufficient to establish a probation violation." Id. at 886-87.

State v. Crudup, 842 A.2d 1069, 1072 (R.I. 2004). When reviewing an appeal from a revocation hearing, the court considers only "whether the hearing justice acted arbitrarily or capriciously in finding a violation."

State v. Jackson, 966 A.2d 1225 (R.I. 2009). At the probation violation hearing, it is the hearing justice's duty to weigh the relevant, material evidence and assess the credibility of the witnesses. R.I.S.C. affords deference and will not "second-guess" the hearing justice's findings of fact.

Hampton v. State, 786 A.2d 375 (R.I. 2001). Hearing justice did not violate due process by failing to advise defendant of the right to appeal his revocation adjudication. Although notice to defendant of his right to appeal is a right required in criminal proceedings, notification is not mandatory in civil proceedings such as a probation violation hearing. Private defense counsel also was not ineffective by failing to advise defendant of the right to appeal, when defendant could not show how he was prejudiced by the failure of his counsel to inform him.

State v. Seamans, 935 A.2d 618 (R.I. 2007). "Where, subsequent to a conviction of violation of probation, a defendant is criminally convicted for the same conduct underlying the violation of probation, his appeal from that judgment of violation of probation is rendered moot because there is no longer any live controversy about whether he engaged in the conduct for which his probation was violated." Quoting State v. Singleton, 876 A.2d 1, 8 (Conn. 2005).

- The term "criminally convicted" in this rule, adopted by R.I.S.C. in Seamans, applies equally to trial convictions and pleas, and does not distinguish between pleas of guilty or *nolo contendere*.

- In this case, defendant was arrested for third-degree sexual assault and deemed to have violated his probation as a result. Defendant filed a timely appeal, and later pleaded *nolo contendere* to the charge of third-degree sexual assault. Then, when defendant's appeal from the probation violation came before the R.I.S.C., the court declared the appeal moot because defendant's *nolo* plea to third-degree sexual assault was "tantamount to an admission of fault with respect to the probation violation." Based on the guilt implied by the plea, the court found no live controversy to review.

State v. Jones, 942 A.2d 982 (R.I. 2008). In 1997, defendant was sentenced to fifteen years suspended, with fifteen years probation. A probation violation in 2005 resulted in an order for defendant to serve three years of his suspended sentence. Defendant filed a motion to reduce that sentence under Rule 35. The trial court denied the motion and R.I.S.C. affirmed.

- Defendant's motion was time-barred. A motion to reduce sentence must be brought within 120-days of the original judgment. Once that window closes, the courts do not have jurisdiction to reduce the sentence and will not consider the motion on the basis of fairness. Only illegal sentences continuously remain open to correction.

- Here, defendant's original sentence was imposed in 1997. His violation of the sentence eight-years later did not create a new judgment. Therefore, eight-years removed from his "final judgment," defendant was time-barred from moving for a sentence reduction in seeking relief from his new violation sentence.

State v. Pona, 13 A.3d 642 (R.I. 2011). A motion for a new probation-violation hearing due to newly discovered evidence will not be considered on appeal to R.I.S.C. unless it has first been raised in the trial court.

State v. Shepard, 33 A.3d 158 (R.I. 2011). "When…an inquiry as to whether defendant violated his probation 'turns on a determination of credibility,' and after considering all the evidence, the hearing justice 'accepts one version of events for plausible reasons stated and rationally rejects another version,' this Court 'can safely conclude that the hearing justice did not act unreasonably or arbitrarily in finding that a probation violation has occurred.'" Id. at 164 (quoting State v. Ferrara, 883 A.2d 1140, 1144 (R.I. 2005)).

Collateral Estoppel

R.I. GEN. LAWS § 12-19-18. Termination of imprisonment on deferred sentence on failure of grand jury to indict--Determinations of insufficient evidence lack of probable cause or exercise of prosecutional discretion

(a) Whenever any person has been sentenced to imprisonment for violation of a deferred sentence by reason of the alleged commission of a felony and the grand jury has failed to return any indictment or an information has not been filed on the charge which was specifically alleged to have constituted the violation of the deferred sentence, the sentence to imprisonment for the alleged violation of the deferred sentence shall, on motion made to the court on behalf of the person so sentenced, be quashed, and imprisonment shall be immediately terminated, and the deferred sentence shall have same force and effect as if no sentence to imprisonment had been imposed.

(b) Whenever any person, after an evidentiary hearing, has been sentenced to imprisonment for violation of a suspended sentence or probationary period by reason of the alleged commission of a felony or misdemeanor said sentence of imprisonment shall, on a motion made to the court on behalf of the person so sentenced, be quashed, and imprisonment shall be terminated when any of the following occur on the charge which was specifically alleged to have constituted the violation:

(1) After trial person is found "not guilty" or a motion for judgment of acquittal or to dismiss is made and granted pursuant to Superior or District Court Rule of Criminal Procedure 29;

(2) After hearing evidence, a "no true bill" is returned by the grand jury;

(3) After consideration by an assistant or special assistant designated by the attorney general, a "no information" based upon a lack of probable cause is returned;

(4) A motion to dismiss is made and granted pursuant to the Rhode Island general laws § 12-12-1.7 and/or Superior Court Rule of Criminal Procedure 9.1; or

(5) The charge fails to proceed in District or Superior Court under circumstances where the state is indicating a lack of probable cause, or circumstances where the state or its agents believe there is doubt about the culpability of the accused.

(c) This section shall apply to all individuals sentenced to imprisonment for violation of a suspended sentence or probationary period by reason of the alleged commission of a felony or misdemeanor and shall not alter the ability of the court to revoke a suspended sentence or probationary period for an allegation of conduct that does not rise to the level of criminal conduct.

eff. June 12, 2010.

Prospective Application Only

State v. Beaudoin, 137 A.3d 717 (R.I. 2016). Statutory amendment providing that "Whenever any person, after an evidentiary hearing, has been sentenced to imprisonment for violation of a suspended sentence or probationary period by reason of the alleged commission of a felony or misdemeanor said sentence of imprisonment shall, on a motion made to the court on behalf of the person so sentenced, be quashed, and imprisonment shall be terminated," when "after trial person is found not guilty," applied prospectively, not retroactively to defendant; all three triggering events, evidentiary hearing, defendant's acquittal on charges underlying probation violation, and sentence of imprisonment resulting from the violation, occurred after the amendment.

Collateral Estoppel Issues

State v. Gautier, 871 A.2d 347 (R.I. 2005). R.I.S.C. held that the trial justice's factual finding at a probation-revocation hearing, effectively absolving defendant of criminal responsibility for the murder alleged by the state as the basis for its probation-revocation notice, did not collaterally estop defendant's prosecution for murder. This case overrules State v. Chase, 588 A.2d 120 (R.I. 1991), and abrogates State v. Wiggs, 635 A.2d 272 (R.I. 1993).

- "[W]e believe that further application of the doctrine of collateral estoppel to bar re-litigation of a criminal charge, following a determination during a probation-revocation hearing that is adverse to the state, inequitably overlooks and misconceives the inherent and important differences between those proceedings and criminal trials." Id. at 358.

- "Mindful of the critical differences in both the purposes of and procedures employed during probation-revocation hearings and criminal trials, we are of the opinion that further application of the Chase doctrine would strongly counteract the significant public interest in the preservation of the criminal trial process 'as the intended forum for ultimate determinations as to guilt or innocence of newly alleged crimes.'" Id. at 359 (quoting Lucido v. Superior Court, 795 P.2d 1223, 1230-31 (Cal. 1990)).

State v. Smith, 721 A.2d 847 (R.I. 1998). A verdict of not guilty does not prevent the trial court from finding the defendant to be a violator of probation based upon the same conduct. In Smith, the parties agreed to convene a violation hearing after the jury trial. The jury found the defendant not guilty and the state proceeded on the violation hearing one week later. Based upon the testimony at trial, the trial judge found defendant to be a violator of probation and ordered her to serve a portion of her suspended sentence. R.I.S.C. affirmed. Note: The interplay between this holding and newly enacted R.I.G.L. §12-19-8 has not been decided.

State v. Hie, 688 A.2d 283 (R.I. 1997). A court may take judicial notice of another court's finding of violation in revoking defendant's probation. In Hie, defendant was found to be a violator of probation after a full hearing in district court. In the 32(f) proceeding in Superior Court for the same charges, the judge took judicial notice of the District Court violation and revoked defendant's probation. R.I.S.C. affirmed.

State v. Tetreault, 973 A.2d 489 (R.I. 2009). Defendant was arrested for breaking and entering into a store. Subsequent probation violation conviction resulted in defendant being sentenced to serve four years of his suspended sentence. When defendant was later acquitted of the breaking and entering charge at trial, defendant appealed to have the violation reexamined. On remand, trial court denied relief and R.I.S.C. affirmed. Note: This case should no longer be good law in light of R.I.G.L. §12-19-8.

- "…since only reasonably satisfactory evidence is required for a probation violation, a defendant's probation may be revoked based on an offense of which the defendant has been acquitted after a criminal trial." Id. at 492 n. 4 (quoting State v. DiChristofaro, 842 A.2d 1075, 1078 (R.I. 2004)).

IMMIGRATION CONSEQUENCES

Counsel's Duty to Advise

"The weight of prevailing professional norms supports the view that counsel must advise her client regarding the deportation risk … The consequences of Padilla's plea could easily be determined from reading the removal statute, his deportation was presumptively mandatory, and his counsel's advice was incorrect. There will, however, undoubtedly be numerous situations in which the deportation consequences of a plea are unclear. In those cases, a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry adverse immigration consequences. But when the deportation consequence is truly clear, as it was here, *the duty to give correct advice is equally clear*." Padilla v. Kentucky, 130 S. Ct. 1473, 1476-77 (2010).

- If the deportation consequence is clear, counsel must advise the client the exact nature of the consequence prior to entering a plea. If the consequence is unclear, counsel has a duty to advise as to the risk of immigration consequences.

- Failure to advise a client as to deportation consequences satisfies prong 1 under Strickland for ineffective assistance of counsel.

Recommended Actions

1. Ask the client where they were born, when they came to the United States, current immigration status and for how long (permanent resident, non-immigrant visa, visa overstay, illegal entry etc.)

2. Research the exact consequences of any course of action, including plea v. trial. Use the following appendix as a starting point. Excellent research reference guides include Kurzban's Immigration Law Sourcebook and Norton Tooby's Immigration Consequences Manual.

3. Consult with an immigration attorney to confirm your research and advice. A national database for this information can be found at www.immigrantjustice.org. A free service is also available through the Defenders Initiative by phone at (312) 660-1610, by email at defend@heartlandalliance.org, or through the online inquiry submission form.

4. Advise your client as to the immigration consequences of any course of action. Memorialize your advice in writing with a copy for your client and your file. I cannot emphasize enough how critical this last step is so that the client has it in writing and you have it memorialized for future reference.

Selected RI Statutes and Immigration Consequences

This is a list of selected Rhode Island criminal statutes and their *probable* immigration consequences. I use the term probable because there is very little BIA or 1st Circuit case law concerning these statutes, only the practical experiences from experienced immigration attorneys at the Boston Immigration Court. Please note that immigration consequences are complex and ever changing. Use this chart as a starting point but not a substitute for your own research. If you disagree with the analysis or become aware of a relevant new case, please contact me with this information. Aggravated felonies should be avoided as they require automatic removal from the United States. A defendant may or may not be cancellation eligible for all other removable offenses – each case requires a fact-specific analysis and a consult with an immigration lawyer.

AF – Aggravated felony
CIMT – Crime involving moral turpitude
Removable – Convictions that are specifically designated as removable for other reasons

Assault	§11-5-3	Not a CIMT but will constitute an AF if sentence of 1 year suspended or to serve. If complainant qualifies as domestic household member, it will be considered domestic even if amended to non-domestic. If forced to plead, better to plead to simple battery in light of Johnson v. U.S., 135 S.Ct. 2551 (2015).
Assault – Domestic	§11-5-3/ 12-29-5	Crime of Domestic Violence. Attempt to amend to non-assault charge, even if remains domestic, such as domestic disorderly (loud & unreasonable, §11-45-1(a)(2)) or domestic trespass §11-44-26. If amendment not possible, client is better off with a domestic battery for less than 1 year to serve or suspended. If amendment unavailable, specify that plea is to domestic simple battery. Pursuant to Johnson v. U.S., 135 S.Ct. 2551 (2015), RI's battery definition is arguably not a crime of violence.
Assault with a Dangerous Weapon	§11-5-2	CIMT regardless of sentence. AF if sentence of 1 year or more suspended or to serve.
Assault with Intent to Commit Specified Felonies	§11-5-1	CIMT regardless of sentence. AF if sentence of 1 year or more suspended or to serve. Possible AF regardless of sentence.

Attempt	Multiple	AF or CIMT if underlying offense qualifies as such.
Breaking & Entering w/o consent	§11-8-2	AF if sentence of 1 year or more suspended or to serve. BIA has ruled similar statutes does not constitute CIMT (so long as sentence is less than 1 year to serve or suspended).
Breaking & Entering w/ felonious Intent	§11-8-4	CIMT regardless of sentence. AF if sentence of 1 year or more suspended or to serve. Probable AF regardless of sentence.
Burglary	§11-8-1	CIMT regardless of sentence. AF if sentence of 1 year or more suspended or to serve.
Child Abuse	§11-9-5.3	CIMT regardless of sentence. AF if sentence of 1 year or more suspended or to serve.
Child Molestation – 1st or 2nd	§11-37-8.2 §11-37-8.3	AF and CIMT regardless of sentence (sexual abuse of a minor).
Contributing to Delinquency of a Minor	§11-9-4	CIMT regardless of sentence.
Conspiracy	§11-1-6	AF or CIMT if underlying offense qualifies as such.
Discharge of a Firearm	§11-47-3.2	AF if sentence of 1 year or more suspended or to serve.
Disorderly Conduct	§11-45-1	Only indecent exposure constitutes a CIMT regardless of sentence (§11-45-1).
Disorderly Conduct – Domestic	§11-45-1/12-29-5	Subsection (1) violent, tumultuous behavior is arguable a crime of domestic violence. Amend to subsection (2), loud and unreasonable noise. Safe haven for domestic offenses.
DUI or Chemical Test Refusal	§31-27-1 et. al.	Neither a CIMT or AF.
DUI-Death or Serious Injury	§31-27-2.2 §31-27-2.6	Neither a CIMT or AF.
Embezzlement	S11-41-3	CIMT regardless of sentence. AF if sentence of 1 year or more suspended or to serve.
Failure to Register as Sex Offender	§11-37.1-10	Neither a CIMT or AF regardless of sentence.

Frequenting a Drug Nuisance	§21-28-4.06(b)(3)	Removable as a Controlled Substance offense. Amend to willful trespass §11-44-26.
Forgery & Counterfeiting Offenses	§11-17-1 et. al.	CIMT regardless of sentence. AF if total loss is over $10,000, regardless of restitution ordered. Possible AF if sentence of 1 year or more imposed. If restitution is over $10,000, attempt to amend to larceny over $1500 for straight probation or deferred thereby avoiding AF implications. Note, larceny is still a CIMT but client may be able to plead to one.
Fraud Offenses	§11-18-1 et. al.	CIMT regardless of sentence. AF if total loss is over $10,000, regardless of restitution ordered.
Harassing Phone Calls	§11-35-17	The first part of statute describing harassment constitutes a CIMT. The second part of the statute describing vulgar language is arguably not a CIMT.
Identity Fraud	§11-49-1.1	CIMT regardless of sentence. AF if total loss is over $10,000.
Kidnapping	§11-26-1	CIMT regardless of sentence. AF if sentence of 1 year or more suspended or to serve. Possible AF regardless of sentence.
Larceny	§11-41-5	CIMT regardless of sentence. AF if sentence of 1 year or more suspended or to serve. Note – same rule applies to all larceny type offenses, such as shoplifting.
Larceny – Domestic	§11-41-5/12-29-5	Not a crime of domestic violence regardless of sentence but CIMT regardless of sentence and AF if sentence of 1 year or more suspended or to serve.
Leaving the Scene of an Accident – Property Damage Resulting	§31-26-2	Neither a CIMT or AF regardless of sentence.
Leaving the Scene of an Accident – Injury/Death	§31-26-1	Neither a CIMT or AF regardless of sentence.

Maintaining a Common Nuisance	§11-30-1	Neither a CIMT or AF if specific to "disorderly persons" portion of the statute. Possible CIMT if not specific. Safe haven for drug offenses.
Maintaining a Drug Nuisance	§21-28-4.06(b)(1)	AF regardless of sentence. Amend to R.I.G.L. §11-30-1, Maintaining a Common nuisance for disorderly persons.
Murder	§11-23-1	AF regardless of sentence.
Manslaughter	§11-23-3	AF if sentence of one year or more imposed.
Obstruction	§11-32-1	Neither a CIMT or AF regardless of sentence.
Obtaining Money under False Pretenses	§11-41-4	CIMT regardless of sentence. AF if total loss is over $10,000, regardless of restitution ordered.
Operating on a Suspended/Expired or Without a License	§31-11-18	Neither a CIMT or AF regardless of sentence (strictly regulatory offenses are not CIMTs).
Possession of Child Pornography	§11-9-1.3	AF and CIMT regardless of sentence.
Possession of Controlled Substance	§21-28-4.01 et. seq.	All possession cases are removable as a controlled substance offenses except a first offense possession of marijuana under 30 grams. All second offense possessions are considered aggravated felonies if charged and convicted as a subsequent offense.
Possession with intent to Distribute; Possession of Oz - Kilo/multi-kilo; Delivery of a Controlled Substance	21-28-4.01 et. seq.	AF regardless of sentence since it constitutes trafficking offense. Exception - possession with intent to deliver marijuana is not an aggravated felony but removable as controlled substance offense.
Possession of a Firearm without a License	§11-47-8	Removable as a Firearm Offense but not AF.
Possession of a Firearm by illegal alien	§11-47-7	AF regardless of sentence.
Possession of Prohibited Weapons	§11-47-42	Subsection a(2) is a possible CIMT because of the language "intent to use." Pleas to subsection a(3)

		avoid this language and do not constitute a removable offense.
Prostitution	§11-34-8.1	CIMT regardless of sentence.
Receiving Stolen Goods	§11-41-2	CIMT regardless of sentence. AF if sentence of 1 year or more suspended or to serve.
Reckless Driving	§31-27-4	Possible CIMT. Note, DUI and refusal are not removable offenses.
Reckless Driving/Death Resulting	§31-27-1	CIMT regardless of sentence.
Reckless Driving/Serious Injury	§31-27-1.1	CIMT regardless of sentence.
Robbery	§11-39-1	AF and CIMT regardless of sentence.
Shoplifting	§11-41-20	CIMT regardless of sentence. AF if sentence of 1 year or more suspended or to serve. Note – same rule applies to all larceny offenses.
Sexual Assault – 1st & 2nd	§11-37-2 §11-37-4	CIMT regardless of sentence. AF if sentence of 1 year or more suspended or to serve.
Sexual Assault – 3rd	§11-37-6	CIMT and AF regardless of sentence (because it will be considered sexual abuse of a minor)
Stalking	§11-59-2	CIMT regardless of sentence but note the harassing section of stalking is arguably not a CIMT so try to amend to this part if a plea is necessary.
Trespass	§11-44-26	Neither a CIMT or AF regardless of sentence. Safe haven for domestic and non-domestic crimes of violence.
Trespass – Domestic	§11-44-26	Neither a CIMT, AF or crime of domestic violence regardless of sentence. Safe haven for domestic crimes of violence. Note, ICE has placed defendants in proceedings with this conviction but Boston Immigration Court has terminated case.
Vandalism	§11-44-1	CIMT regardless of sentence. AF if sentence of 1 year or more suspended or to serve.

Vandalism – Domestic	§11-44-1 §12-29-5	CIMT regardless of sentence and AF if sentence of 1 year or more suspended or to serve.
Violation of No-Contact Order (Restrictions Upon and Duties of Court)	§12-29-4	Crime of Domestic Violence regardless of sentence.
Violation of Restraining Order	§8-8-1/1515-1	Crime of Domestic Violence regardless of sentence.

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TRIAL PREPARATION CHECKLIST

Investigations

____Visit Scene
____Create Demonstrative Evidence
Photographs/Diagrams/Props
____Listen to Bail Hearing Tapes
____View State's Tangible Evidence
____Witness BCIs
____Interview Witnesses
_____
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_____
_____
_____

Discovery Motions

____Request Discovery
____Answer Discovery
____Compel Answer
____Bill of Particulars
____Disclose Confidential Informant
____Disclose Promises, Inducements, Rewards
____Disclose Exculpatory Evidence
____Disclose 404(b) Evidence
____Produce 17(C)
_____
_____

Pre-Trial Motions

____Change Venue
____Dismiss: Double Jeopardy (Duplicity/Merger/Sufficiency of Charge)
____Dismiss: Lack of Jurisdiction
____Dismiss: Lack of Probable Cause 9.1
____Dismiss: Speedy Trial
____Dismiss: Statute Unconstitutional
____Notice of Insanity
____Sever: Co-Defs/Counts
____Speedy Trial
____Other_____

Trial Motions

____Limine: Convictions
____Limine: 'Victim' Reference

____Limine: Prejudicial Evidence

_____

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____Notice of Insanity
____Suppression: Evidence
____Suppression: Identification
____Suppression: Statements
____Sever: Co-Defendants/Counts
____Speedy Trial
____Juror View of Scene

Miscellaneous Preparation

____Legal Research

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____17(c) Subpoenas

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____Witness Subpoenas

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____Motions in Limine

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____Jury Instructions

APPENDIX OF SAMPLE PRE-TRIAL MOTIONS

Below is a sample of pre-trial motions that may be filed in any District or Superior Court case. In some cases, to save space, certifications of service have been removed or truncated.

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DEFENDANT'S REQUEST FOR DISCOVERY (SUPERIOR COURT).....….....…….…….- 6 -

DEFENDANT'S ANSWER TO STATE'S REQUST FOR DISCOVERY……..…….- 8 -

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DEFENDANT'S MOTION TO DISCLOSE 404(B) EVIDENCE……..……..…….- 10 -

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MOTION TO RESTORE PROPERTY…….....……- 31 -

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

SIXTH DIVISION **DISTRICT COURT**

STATE OF RHODE ISLAND

v. **61-2018-03451**

JOHN SMITH

DEFENDANT'S REQUEST FOR DISCOVERY (DISTRICT COURT)

Now comes the above-captioned defendant, by and through counsel, and pursuant to Rule 16 of the District Court Rules of Criminal Procedure, hereby moves to inspect, listen to, copy or photograph the following items:

(1) written or recorded statements or confessions made by the defendant, or copies thereof, within the possession, custody or control of the State, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the State;

(2) written or recorded statements or confessions, or written summaries of oral statements or confessions, or copies thereof, which the State intends to introduce at trial and which were made by a co-defendant who is to be tried together with the moving defendant;

(3) results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession, custody or control of the State, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the State;

(4) recorded testimony, if any, before a grand jury of the defendant, or in the case of a corporate defendant, of any present or former officer or employee of the defendant corporation concerning activities carried on, or knowledge acquired, within the scope of or reasonably relating to his or her employment.

Respectfully submitted,
John Smith
By his attorney,

_____

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, S.C. **SUPERIOR COURT**

STATE OF RHODE ISLAND

V. **P2-2003-0239A**

JOHN SMITH

DEFENDANT'S REQUEST FOR DISCOVERY (SUPERIOR COURT)

Now comes the defendant, John Smith, by and through counsel, and pursuant to Rule 16 of the Rhode Island Superior Court Rules of Criminal Procedure hereby moves to inspect, listen to, copy or photograph the following items within the possession, custody or control of the State; the existence of which is known or by the exercise of due diligence may become known to the State:

(1) all relevant written or recorded statements or confessions, signed or unsigned, or written summaries of oral statements or confessions made by the defendant, or copies thereof;

(2) all relevant recorded testimony before a grand jury of the defendant, or in the case of a corporate defendant, of any present or former officer or employee of the defendant corporation concerning activities carried on, or knowledge acquired, within the scope of or reasonably relating to his or her employment;

(3) all written or recorded statements or confessions which were made by a co-defendant who is to be tried together with the moving defendant and which the State intends to offer in evidence at the trial, and written summaries of oral statements or confessions of such a co-defendant in the event the State intends at the trial to offer evidence of such oral statements or confessions;

(4) all books, papers, documents, photographs, sound recordings, or copies thereof, or tangible objects, buildings, or places which are intended for use by the State as evidence at the trial or were obtained from or belong to the defendant;

(5) all results or reports in writing, or copies thereof, of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case and, subject to an appropriate protective order under paragraph (f), any tangible objects still in existence that were the subject of such tests or experiments;

(6) a written summary of testimony that the State intends to use under Rules 702, 703, or 705 of the Rhode Island Rules of Evidence during its case-in-chief at trial, which describes the witness' opinions, the bases and reasons for those opinions, and the witness' qualifications;

(7) a written list of the names and addresses of all persons whom the attorney for the State expects to

call as witnesses at the trial in support of the State's direct case;

(8) as to those persons whom the State expects to call as witnesses at the trial, all relevant recorded testimony before a grand jury of such persons and all written or recorded verbatim statements, signed or unsigned, of such persons and, if no such testimony or statement of a witness is in the possession of the State, a summary of the testimony such person is expected to give at the trial;

(9) all reports or records of prior convictions of the defendant, or of persons whom the attorney for the State expects to call as witnesses at the trial, and within fifteen (15) days after receipt from the defendant of a list produced pursuant to paragraph (b)(3) of persons whom the defendant expects to call as witnesses all reports or records of prior convictions of such persons;

(10) all warrants which have been executed in connection with the particular case and the papers accompanying them, including affidavits, transcripts of oral testimony, returns and inventories.

Respectfully submitted,
John Smith
By his attorney

_____

CERTIFICATION

I hereby certify that on _____I sent a copy of this Request for Discovery to the Rhode Island Department of the Attorney General, 150 South Main Street, Providence, Rhode Island 02903.

_____

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, S.C. **SUPERIOR COURT**

STATE OF RHODE ISLAND

V. **P2-2003-0239A**

JOHN SMITH

DEFENDANT'S ANSWER TO STATE'S REQUST FOR DISCOVERY

Now comes the defendant, John Smith, by and through counsel, and hereby answers the state's request for discovery as follows:

1. None known at this time.

2. See attached medical reports from Miriam Hospital detailing the medical treatment received by Mr. Smith on December 18, 2002 as a result of the injuries sustained in this matter.

3/4 Frank Smith, 16 Smith Drive, Smithfield, RI. Mr. Smith will testify consistent with her December 18, 2002 statement to the Smithfield Police.
David Cicerchia, M.D., Orthopedic Group, Inc. 588 Pawtucket Avenue, Pawtucket, RI 02860. Dr. Cicerchia will testify consistently with the attached medical reports and December 31, 2002 letter to Robert Levine.

5. Defendant does not intend to rely on the defense of alibi.

Respectfully submitted,
John Smith
By his attorney

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, S.C. **SUPERIOR COURT**

STATE OF RHODE ISLAND

v. **P1-2012-4569A**

JOHN SMITH

MOTION TO DISCLOSE WITNESS INTERVIEW STATEMENTS

Now comes the defendant, John Smith, by and through counsel, and hereby moves for the disclosure of all notes, reports or memorandum, either hand-written or type written, by members of the Cumberland Police Department and/or Department of Attorney General, concerning all interviews of witnesses in this matter. As grounds, counsel avers that such writings constitute 'statements' under Rules 16(2) and (16(7) of the Superior Court Rules of Criminal Procedure and should be provided to counsel for Mr. Smith.

Respectfully submitted,
John Smith
By his attorney,

_____

CERTIFICATION

I hereby certify that on _____I sent a copy of this Request for Discovery to the Rhode Island Department of the Attorney General, 150 South Main Street, Providence, Rhode Island 02903.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, S.C. **SUPERIOR COURT**

STATE OF RHODE ISLAND

v. **P1-2014-4276A**

JOHN SMITH

DEFENDANT'S MOTION TO DISCLOSE 404(B) EVIDENCE

Now comes the defendant, John Smith, by and through counsel, and hereby moves for the disclosure of all 404(b) evidence, that is evidence of prior crimes, wrongs or bad acts, which the state intends to introduce at trial. As grounds, counsel for Mr. Smith respectfully requests notice of this evidence and a hearing to determine the admissibility of this evidence prior to trial.

Respectfully submitted,
John Smith
By his attorney,

_____

CERTIFICATION

I hereby certify that on _____I sent a copy of this Request for Discovery to the Rhode Island Department of the Attorney General, 150 South Main Street, Providence, Rhode Island 02903.

_____

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC **SUPERIOR COURT**

STATE OF RHODE ISLAND

v. **P1-2014-8877A**

JOHN SMITH

DEFENDANT'S MOTION TO COMPEL SUMMARY OF EXPERT WITNESS TESTIMONY

Now comes the defendant, John Smith, by and through counsel, and hereby moves this Court for an order compelling the state provide a summary of all expert witness testimony it plans to elicit during its case in chief as required by Rule 16(a)(6) of the Superior Court Rule of Criminal Procedure. As grounds, defendant avers that he is on notice as to multiple expert witnesses that will testify as to their observations and findings consistent with Rules 702, 703 and 705 of the Rhode Island Rules of Evidence. Counsel for Mr. Smith requests a written summary of all expert testimony pursuant to Rule 16(6) of the Superior Court Rule of Criminal Procedure.

Respectfully submitted,
John Smith
By his attorney,

_____

CERTIFICATION

I hereby certify that on _____I sent a copy of this Request for Discovery to the Rhode Island Department of the Attorney General, 150 South Main Street, Providence, Rhode Island 02903.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC **SUPERIOR COURT**

STATE OF RHODE ISLAND

v. **P2-2018-0881A**

JOHN SMITH

DEFENDANT'S MOTION FOR ISSUANCE OF RULE 17(C) SUBPOENA (JUSTICE RESOURCE INSTITUTE)

Now comes Defendant, John Smith, by and through counsel, and hereby moves, pursuant to Rhode Island Superior Court Rule of Criminal Procedure 17(c), for an Order authorizing the issuance of a subpoena duces tecum to be served upon the Justice Resource Institute, Southern New England Behavioral Health and Trauma Center, (hereinafter "JRI") located at 140 Park Street, Attleboro, Massachusetts 02703, for any and all records relating to Sally Smith (DOB: 5-14-2009).

Based on the foregoing, Mr. Smith respectfully requests that this motion is granted.

Respectfully submitted,
John Smith
By his attorney,

_____

CERTIFICATION

I hereby certify that on _____I sent a copy of this Request for Discovery to the Rhode Island Department of the Attorney General, 150 South Main Street, Providence, Rhode Island 02903.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC **SUPERIOR COURT**

STATE OF RHODE ISLAND

VS. **P1-2018-2055A**

JOHN SMITH

ORDER GRANTING DEFENDANT'S MOTION FOR ISSUANCE OF RULE 17(C) SUBPOENA

Defendant's Motion for Issuance of a Rule 17(c) Subpoena came before the Superior Court on the 10TH day of December, 2018. After hearing and/or consideration, it is hereby ORDERED, by agreement of the parties, that Defendant's motion is granted and a Rule 17(c) subpoena *duces tecum* may issue to **University of Rhode Island, Counseling Center** relating to any and all records, in the custody and/or control of the University of Rhode Island Counseling Center that relate to or otherwise reference to John Smith.

These records shall be produced and delivered to Providence Superior Court Clerk's Office on or before _____ for an in camera review.

ENTERED: **ORDERED:**

_____ _____

Clerk

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

SUBPOENA DUCES TECUM

PROVIDENCE, SC. **SUPERIOR COURT**

STATE OF RHODE ISLAND

V. **P2-2017-2457A**

JOHN SMITH

To: East Providence Police Department
750 Waterman Avenue
East Providence RI 02914

You are hereby commanded, in the name of the STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS, to deliver to Providence County Superior Court, Courtroom 9, 250 Benefit Street, Providence, Rhode Island 02903 any and all incident reports relating to Sally Smith (DOB: 10/16/2010) on or before November 5, 2018, for an in-camera review.

HEREOF FAIL NOT, as you will answer your default under the penalty of the law in that behalf made and provided.

Upon receipt of this subpoena, please contact John E. MacDonald, 401-421-1440.

Dated at Providence, Rhode Island on the 11th day of October, 2018.

_____
Notary Public
Clerk

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

RETURN OF SERVICE

I served this Subpoena on the within named _____

By delivering a copy to him/her and tendering to him/her $ _____ _

As fees for one day's attendance and mileage.

Check to be mailed.

Subscribed and sworn to before me this ___ day of _____ , 2018

NOTARY PUBLIC

NOTE: Affidavit required only if service made by a person other than a sheriff or their deputy.

ACKNOWLEDGMENT

Due and legal service of this Subpoena is hereby acknowledged and the receipt of legal fees for travel and one day's attendance.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

NEWPORT, S.C. **SUPERIOR COURT**

STATE OF RHODE ISLAND

v. **N2-2015-0045A**

JOHN SMITH

DEFENDANT'S MOTION FOR A BILL OF PARTICULARS

Now comes the defendant, John Smith, by and through counsel, and hereby moves this Honorable Court for an order requiring the state to describe with specificity the manner of offense pursuant to Rule 7(f) of the Superior Court Rules of Criminal Procedure. As grounds, counsel for Mr. Smith avers that neither the state's description of the offense contained within its Request for Discovery nor the charges or contents of the criminal information provide adequate notice as to what actions constitute the charged offenses.

Respectfully submitted,
John Smith
By his attorney,

_____

CERTIFICATION

I hereby certify that on _____I sent a copy of this Request for Discovery to the Rhode Island Department of the Attorney General, 150 South Main Street, Providence, Rhode Island 02903.

_____

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, S.C. **DISTRICT COURT**

STATE OF RHODE ISLAND

V. **62-2016-03151**

JOHN SMITH

MOTION TO DISMISS DISTRICT COURT COMPLAINT

Now comes the defendant, by and through counsel, and hereby moves to dismiss the above-referenced complaint. As grounds, defendant avers that over six months have elapsed since defendant's arraignment on March 23, 2016 and no action has been taken by the grand jury. *See* R.I.G.L. 12-13-6.

Respectfully submitted,
John Smith
By his attorney,

_____

CERTIFICATION

I hereby certify that on _____I sent a copy of this Request for Discovery to the Rhode Island Department of the Attorney General, 150 South Main Street, Providence, Rhode Island 02903.

_____

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, S.C. **SUPERIOR COURT**

STATE OF RHODE ISLAND

v. **P2-2018-0814A**

JOHN SMITH

MOTION TO DISMISS CRIMINAL INFORMATION

Now comes the defendant, John Smith, by and through counsel, and hereby moves to dismiss all counts of the above-referenced criminal information pursuant to Rules 9.1 and 12(b)(1)(2) of the Superior Court Rules of Criminal Procedure.

Respectfully submitted,
John Smith
By his attorney,

_____

CERTIFICATION

I hereby certify that on _____I sent a copy of this Request for Discovery to the Rhode Island Department of the Attorney General, 150 South Main Street, Providence, Rhode Island 02903.

_____

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, S.C. **SUPERIOR COURT**

STATE OF RHODE ISLAND

v. **P2-2017-3366A**

JOHN SMITH

DEFENDANT'S MOTION TO SUPPRESS TANGIBLE EVIDENCE

Now comes the defendant, John Smith, by and through counsel, and hereby moves to suppress all tangible evidence seized by members of law enforcement on or around June 6, 2016 in the above-captioned matter. As grounds, defendant avers that the search warrant and affidavit obtained and executed in this matter were in violation of the Fourth Amendment to the United States Constitution and Article I, §6 of the Rhode Island Constitution. Specifically and without limitation, the four corners of the affidavit do not support probable cause to believe that a crime has been committed.

Respectfully submitted,
John Smith
By his attorney,

_____

CERTIFICATION

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_____

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, S.C. **SUPERIOR COURT**

STATE OF RHODE ISLAND

v. **P1-2017-1384A**

JOHN SMITH

DEFENDANT'S MOTION TO SUPPRESS STATEMENTS

Now comes the defendant, John Smith, by and through counsel, and hereby moves to suppress any oral and/or written statements made to members of law enforcement concerning the subject matter of the above-captioned matter. As grounds, counsel for Mr. Smith avers that said statements were made in violation of his right against self-incrimination and his right to counsel as guaranteed by the Fifth and Sixth Amendments of the United States Constitution as well as Article I, Sections 13 and 10 of the Rhode Island Constitution.

Respectfully submitted,
John Smith
By his attorney,

_____

CERTIFICATION

I hereby certify that on _____I sent a copy of this Request for Discovery to the Rhode Island Department of the Attorney General, 150 South Main Street, Providence, Rhode Island 02903.

_____

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, S.C. **SUPERIOR COURT**

STATE OF RHODE ISLAND

v. **P1-2014-3171A**

JOHN SMITH

DEFENDANT'S MOTION TO SUPPRESS IDENTIFICATION

Now comes the defendant, John Smith, by and through counsel, and hereby moves to suppress the in-court and out of court identifications made by the complainants in this matter. As grounds, defendant avers that these identifications were procured in violation of his rights as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

Respectfully submitted,
John Smith
By his attorney,

_____

CERTIFICATION

I hereby certify that on _____I sent a copy of this Request for Discovery to the Rhode Island Department of the Attorney General, 150 South Main Street, Providence, Rhode Island 02903.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

KENT, S.C. **SUPERIOR COURT**

STATE OF RHODE ISLAND

v. **K1-2011-0431A**

JOHN SMITH

MOTION TO SEVER COUNTS

Now comes, the defendant, John Smith, by and through counsel, and hereby moves to sever count two from the above indictment pursuant to Rules 8 and 14 of the Superior Court Rules of Criminal Procedure. As grounds, counsel for defendant avers that the two counts are not of the same or similar character, transaction or scheme as count one as required by Rule 8. Count two, charging possession of cocaine, allegedly took place over two months after count one. This count did not involve the complainant alleged in count one but instead allegedly took place while Mr. Smith was being arrested by police as a result of an arrest warrant for the allegations concerning count one. A trial concerning count one will involve testimony of extensive drug use by the complainant, Mr. Smith and others at a party on January 30, 2011 and there would certainly be a prejudicial spillover effect of evidence as it relates to count two.

For the foregoing reasons, the defendant, John Smith, requests that this Honorable Court grant his Motion to Sever Counts.

Respectfully submitted,
John Smith
By his attorney,

_____

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, S.C. **SUPERIOR COURT**

STATE OF RHODE ISLAND

v. **P1-2015-3172A**

JOHN SMITH

DEFENDANT'S MOTION FOR EXCULPATORY EVIDENCE

Now comes the defendant, by and through counsel, and hereby requests that this Honorable Court order the State of Rhode Island to produce to the defendant for inspection any and all exculpatory evidence in its possession pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963). This order shall include, but is not limited to, the following:

1. All information known to the state of allegations of criminal behavior made by the complaining witness against any other person, regardless of whether such allegations resulted in criminal charges.
2. Any and all records concerning the allegations of paragraph one above.
3. Any and all records of a diary kept by the complaining witness at or around the time of the allegations in the above-referenced information.
4. Any and all evidence which may be used to impeach or discredit any prospective state witness, including, but not limited to:
    - any oral or written inconsistent statements by a witness,
    - any evidence concerning the truthfulness of any state witness;

- any evidence concerning bias or prejudice against the defendant by any state witness;
- any evidence concerning bias or prejudice in favor of the complainant by any state witness.

5. Any evidence which tends to show that the defendant was not involved in the alleged criminal activity charged in this information.

Respectfully submitted,
John Smith
By his attorney,

_____

CERTIFICATION

I hereby certify that on _____I sent a copy of this Request for Discovery to the Rhode Island Department of the Attorney General, 150 South Main Street, Providence, Rhode Island 02903.

_____

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

KENT, S.C. **SUPERIOR COURT**

STATE OF RHODE ISLAND

v. **K1-2011-0431A**

JOHN SMITH

DEFENDANT'S REQUEST FOR PROMISES, INDUCEMENTS AND REWARDS

Now comes the defendant, John Smith, by and through counsel, and hereby moves for an order compelling the state to produce the following information pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963).

1. All promises, inducements and rewards offered in exchange for any state witness' cooperation and testimony at trial;
2. A copy of any and all documentation, including hand-written notes, regarding all interviews any potential witness by members of the District Attorney's Office, and all participating police departments;
3. A copy of any cooperation agreement entered into between the District Attorney's Office and any state witness.

Wherefore, the defendant respectfully requests that this Honorable Court grant his Request for Promises, Inducements and Rewards.

Respectfully submitted,
John Smith
By his attorney,

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, S.C. **SUPERIOR COURT**

STATE OF RHODE ISLAND

v. **P1-2015-3172A**

JOHN SMITH

DEFENDANT'S REQUEST FOR TANGIBLE EVIDENCE VIEWING

Now comes the defendant, John Smith, by and through counsel, and hereby moves for a view of all tangible evidence seized by members of the Glocester Police Department in this matter. Counsel requests that Mr. Smith along with an expert witness be allowed to attend the tangible evidence viewing. Counsel also requests permission to independently weigh all marijuana constituting count one of the criminal information.

Respectfully submitted,
John Smith
By his attorney,

_____

CERTIFICATION

I hereby certify that on _____I sent a copy of this Request for Discovery to the Rhode Island Department of the Attorney General, 150 South Main Street, Providence, Rhode Island 02903.

_____

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, S.C. **SUPERIOR COURT**

STATE OF RHODE ISLAND

v. **P1-2015-3172A**

JOHN SMITH

DEFENDANT'S MOTION IN LIMINE TO EXCLUDE EVIDENCE OR REFERENCE TO ALCOHOL CONSUMPTION

Now comes the Defendant, John Smith, by and through counsel, and hereby moves this Court to exclude any evidence or reference regarding Mr. Smith's consumption of alcohol. As grounds for this motion, Mr. Smith avers the following:

1. Mr. Smith is charged by way of Indictment with First Degree Child Molestation and Second Degree Sexual Assault in violation of R.I. Gen Law §§ 11-37-8.1 and 11-37-4, respectively.

2. At 4:45 pm on June 19, 2015, the State notified Mr. Smith's counsel via email of its intention to introduce evidence that Mr. Smith is 'touchy-feely' with young girls in his family, especially when he consumes alcohol.

3. Counsel for Mr. Smith avers that testimony concerning his alcohol consumption is precluded pursuant to Handy v. Geary, 252 A.2d 435 (RI 1969) and State v. Amaral, 285 A.2d 783 (RI 1972). These cases hold that neither party may question a witness about alcohol consumption merely to show that he or she may have consumed some potentially intoxicating substance before an event at issue in the case has occurred. Id.

Since this evidence may cause confusion to the jury and be unfairly prejudicial to Mr. Smith, evidence of the drinking of alcoholic beverages should not be admitted to affect credibility. Amaral, 285 A.2d at at 788. Indeed, only when it is offered for the purpose of proving "intoxication," as that term is defined in Handy, is such evidence admissible. Id.

4. For these reasons, Mr. Smith asks that this evidence be excluded.

Respectfully submitted,
John Smith
By his attorney,

_____

CERTIFICATION

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_____

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, S.C. **SUPERIOR COURT**

STATE OF RHODE ISLAND

v. **P1-2015-3172A**

JOHN SMITH

DEFENDANT'S MOTION IN LIMINE

Now comes the defendant, John Smith, by and through counsel, and hereby moves in limine for an order precluding the state from referring to the complainants as 'victims' during any proceedings which include the jury. As grounds, defendant avers that the determination as to whether the complainants are in fact the victim of a crime lies within the sole province of the jury.

Respectfully submitted,
John Smith
By his attorney,

_____

CERTIFICATION

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_____

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, S.C. **SUPERIOR COURT**

STATE OF RHODE ISLAND

v. **P1-1995-3172A**

JOHN SMITH

DEFENDANT'S MOTION IN LIMINE

Now comes the defendant, John Smith, by and through counsel, and hereby moves for an order prohibiting the state from introducing into evidence a Providence Police Department photograph of the defendant. As grounds, counsel for Mr. Smith avers that the prejudicial effect of this 'booking' photograph substantially outweighs any probative effect. Arguably, the only probative value of this photograph is the question of identity and that is not in dispute. See Rule 403 of the Rhode Island Rules of Evidence.

Respectfully submitted,
John Smith
By his attorney,

_____

CERTIFICATION

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_____

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, S.C. **SUPERIOR COURT**

STATE OF RHODE ISLAND

v. **P1-2015-3172A**

JOHN SMITH

MOTION TO RESTORE PROPERTY

Now comes the defendant, John Smith, by and through counsel, and hereby moves for an order restoring all property seized by members of the Providence Police Department on April 8, 2010. As grounds, this matter was resolved by way of plea agreement on June 14, 2010 and no forfeiture proceedings have commenced.

WHEREFORE, the defendant respectfully requests that this Honorable Court grant his motion to restore property.

Respectfully submitted,
John Smith
By his attorney,

_____

CERTIFICATION

I hereby certify that on _____I sent a copy of this Request for Discovery to the Rhode Island Department of the Attorney General, 150 South Main Street, Providence, Rhode Island 02903.