STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC

DISTRICT COURT

SIXTH DIVISION

STATE OF RHODE ISLAND
TRAFFIC TRIBUNAL
FILED
10 JUN -9 AM 11:43

CITY OF WARWICK :
:
VS. : A.A. NO. 09-202
:
NICOLE CIANCI :

## JUDGMENT

This cause came on before McLoughlin, J. on Administrative Appeal, and upon review of the record and memoranda of counsel, and a decision having been rendered, it is

ORDERED AND ADJUDGED

The decision of the Appellate Panel of the Rhode Island Traffic Tribunal is Reversed.

Dated at Providence, Rhode Island, this 9 day of June, 2010.

ENTER:

BY ORDER:

June 9, 2010

**PROVIDENCE, S.C.**
**DISTRICT COURT**

**SIXTH DIVISION**

STATE OF RHODE ISLAND
TRAFFIC TRIBUNAL
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10 JUN -9 AM 11:43

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| **CITY OF WARWICK** | : | |
| **v.** | : | **A.A. No.: 09-202** |
| **NICOLE CIANCI** | : | |

# DECISION

**McLoughlin, J.** This matter is before the Court on the complaint of Nicole Cianci, Appellant, filed pursuant to Rhode Island General Laws § 31-41.1-9, seeking judicial review of a final decision rendered by the respondent, Appellate Panel of the Rhode Island Traffic Tribunal, which upheld the Decision of Magistrate Goulart and D. Disandro.

The Magistrate found the appellant guilty of § 31-27-2.1 "Refusal to submit to chemical test," an appeal was filed by Cianci to a three Judge Panel. The decision was upheld by the appeal panel by a vote of two to one. This court finds the reasoning of both sides interesting and a penalty was imposed on the majority ruling.

On appeal, the Traffic Tribunal Appeals Panel determined that the decision of the Magistrate was a proper determination of the facts and a proper application of the law.

Thereafter, Cianci filed a complaint for judicial review in the Rhode Island District Court.

The standard of review is provided by Rhode Island General Laws 31-41.1-9(d):

> (d) **Standard of review.** The judge of the district court shall not substitute his or her judgment for that of the appeals panel as to the weight of the evidence on questions of fact. The district court judge may affirm the decision of the appeals panel, or may remand the case for further proceeding or reverse or modify the decision if the substantial rights of the appellant have been prejudiced because the appeals panel's findings, inferences, conclusions or decisions are:
>
> (1) In violation of constitutional or statutory provisions;
> (2) In excess of the statutory authority of the appeals panel;
> (3) Made upon unlawful procedure;
> (4) Affected by other error of law;
> (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

On questions of fact, the District Court "...may not substitute its judgment for that of the agency and must affirm the decision of the agency unless its findings are clearly erroneous. Guarino v. Department of Social Welfare, 122 R.I. 583, 584, 410 A.2d 425 (1980) citing Rhode Island General Laws Section 42-35-15(g)(5). The Court will not substitute its judgment for that of the Board as to the weight of the evidence on questions of fact. Cahoone v. Board of Review of the Department of Employment Security, 104 R.I. 503, 246 A.2d 213 (1968). See also D'Ambra v. Board of Review, Department of Employment Security, 517 A.2d 1039, 1041 (R.I. 1986).

A review of the entire record demonstrates the following:

On May 17, 2007 Warwick Police Officer James Wenneman charged appellant "with Refusal to take a chemical test." The motorist contested the charge and it was set for a hearing before Magistrate Goulart

The central issue became in this case and before the appeal panel was whether the trial of appellant was fair and legal and most important timely. Was it conducted pursuant to the Rules of the Traffic Tribunal?

The gravamen of the case is whether the Prosecution, (Police department and Attorney Generals department) acted in bad faith by not affording appellant her basic rights as a citizen. Also did this 19 month delay in discovery cause substantial and prejudice prior to and during her trial.

A brief history of these facts follows:

On May 18, 2007, the day after Appellant's arrest, Counsel for Appellant forwarded a written discovery request to the Warwick Police Department that closely tracked the language of Rule 11 of the Traffic Tribunal Rules of Procedure (Rule 11). After a month had elapsed and without a response, counsel forwarded a second, more explicit discovery request to the headquarters of the Warwick Police on June 12, 2007. Counsel specifically instructed the Warwick Police Department to "hold, secure protect and maintain [a videotape depicting Appellant on the night of her arrest] until resolution of this matter." As an added precaution, counsel traveled to the headquarters of the Warwick Police Department and was allowed to view the video tape. At this time, counsel determined that the videotape was relevant and material to the preparation of his defense and made both verbal and written requests for the Warwick Police

Department to produce this exculpatory evidence. The Warwick Police Department ignored these requests and did not produce the tape.

When it became clear that the Warwick Police Department was not going to produce the requested videotape, counsel for Appellant took the additional step of filing a motion to compel. Although counsel's motion to compel should have been made pursuant to Rule 11 and not Rule 26, said motion was heard and granted on June 19, 2007. In its order, the Court directed the Warwick Police Department to produce the videotape by 4:00 p.m. on June 21, 2007. The Warwick Police Department completely ignored the deadline set forth in the June 19th order.

Although the charged violation of § 31-27-2.1 was dismissed on June 25, 2007 based on the failure of the Warwick Police Department to advise Appellant of the correct penalties associated with refusal to submit to a chemical test —an issue ultimately resolved by our Supreme Court in Such v. State —the video tape was not made available to counsel until Appellants second trial date on January 22, 2009. The minority finds it interesting, to say the very least, that the Warwick Police Department's approximately nineteen month period of non-compliance came to an end only after the State had presented its case-in-chief. The Majority suggests that the fact that the counsel for the defendant viewed the video some two years earlier is a substitute for compliance with the court order to produce the videotape. I can not agree with the Majority. Rules must be followed.

It is abundantly clear from the record before this Panel that counsel for Appellant did everything that he was required to do pursuant to Rule 11 of the

Traffic Tribunal Rules of Procedure to obtain the videotape evidence in possession, custody, and control of the Warwick Police Department. As such, the trial magistrate erred in denying Appellant's dismissal motion on the grounds that counsel should have taken the additional—and completely unwarranted—step of subpoenaing the Warwick Police Department to produce the videotape pursuant to Rule 12. (Tr. at 6-7.) In finding Rule 12 applicable, the trial magistrate seemingly overlooked the fact that Rule 11 has a built-in enforcement mechanism that does not contemplate the issuance of subpoenas. Where, as here, "a party discovers additional material previously requested or ordered which is subject to discovery or inspection..., the party shall promptly notify the other party's attorney or the court of the existence of the additional material." When these materials are not forthcoming, the judges and magistrates of this Court may order the non-compliant party "to permit the discovery or inspection of [the] materials not previously disclosed..."

Thus, when it became clear that the Warwick Police Department had no intention of complying fully with his specific and detailed discovery requests, counsel for Appellant did all that he was required to do under the provisions of Rule 11: he notified the Warwick Police Department that material and highly probative evidence had been withheld and, when that evidence was not made available to him for the preparation of his defense, obtained an explicit order from this Court directing the custodian of the videotape to allow Appellant to inspect it by a date certain. Once counsel for Appellant had obtained an order of this Court compelling the production of the videotape, his obligation under our Rules had

been completely discharged. The burden was now squarely on the Warwick Police Department to produce the videotape and emphatically not on counsel for Appellant to seek a subpoena pursuant to Rule 12. Accordingly as Magistrate Noonan believes that the trial magistrate's reliance on Rule 12 is misplaced, Noonan cannot subscribe to the Majority Decision. It is interesting that the majority opinion is silent on this point. On the other hand, Magistrate Noonan believes that this misapplication of Rule 12 alone would be sufficient grounds to dismiss the case based on the misapplication of law and procedure.

While this Court is mindful that a dismissal of a case based on non-compliance with a discovery is an "extreme" and "drastic" remedy for the court to employ, I am also mindful that dismissal has been found appropriate on facts far less egregious than those before this Panel. In support of its conclusion that the trial magistrate did not abuse his discretion when he refused to dismiss the charged violation of § 31-27-2.1 based on the Warwick Police Department's conduct, the majority relied on our Supreme Court's decisions in the civil cases of Mumford v. Lewiss, 681 A.2d 914 (R.I. 1996), Woloohojian v. Bogosian, 828 A.2d 522 (R.I. 2003), and Goulet v. OfficeMax, Inc., 843 A.2d 494 (R.I. 2004). However, a review of these cases reveals that the majority's reliance was misplaced.

For example, In Woloohojian v. Bogosian, 828 A.2d 522 (R.I. 2003), our Supreme Court held that dismissal pursuant to Rule 37 of the Superior Court Rules of Civil Procedure was an appropriate sanction for the trial justice to impose because "[t]he defendant repeatedly refused to avail herself of various

opportunities to comply with discovery requests. The defendant failed to respond to three sets of interrogatories, did not produce documents requested, and "ignored a court order entered upon plaintiff's motion to compel." Emphasis added. Id. In concluding that "the defendant's persistent refusal to provide the requested information despite numerous opportunities to do so warranted a default," the Woloohojian Court emphasized that "there is often a point in litigation when a party is entitled to a dismissal of an action in which the opposing party's failure to comply with discovery requests and related court orders causes inordinate delay, expense, and frustration for all concerned." Id. at 524.

Like in Woloohojian—and all of the civil cases cited by the majority—there came a point in the tortured travel of this case when the Warwick Police Department's failure to comply with Appellant's numerous discovery requests and an order of this Court had risen to the level of "persistent refusal, defiance [and] bad faith." Id. at 523. Over the course of nineteen months, the Warwick Police Department had had numerous opportunities to produce the videotape depicting Appellant on the night of her arrest. That the videotape was produced on the date of Appellant's trial and only after the State had presented its case-in-chief caused counsel for Appellant much more then "inordinate delay, expense, and frustration..." Id. at 524. It effectively precluded counsel from incorporating this material and exculpatory videotape into his defense as he prepared for trial.

To conclude the review of the civil cases cited by majority, it is interesting to note that in those cases the remedy of dismissal was upheld under less egregious circumstances than those present in this case. The majority's decision

opportunities to comply with discovery requests. The defendant failed to respond to three sets of interrogatories, did not produce documents requested, and "ignored a court order entered upon plaintiff's motion to compel." Emphasis added. Id. In concluding that "the defendant's persistent refusal to provide the requested information despite numerous opportunities to do so warranted a default," the Woloohojian Court emphasized that "there is often a point in litigation when a party is entitled to a dismissal of an action in which the opposing party's failure to comply with discovery requests and related court orders causes inordinate delay, expense, and frustration for all concerned." Id. at 524.

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to cite the criminal cases of State v. Quintal, 479 A.2d 117 (R.I. 1984) and State v. Musumeci, 717 A.2d 56 (R.I. 1998) for the "dismissal is a drastic remedy" proposition is perhaps misplaced, but welcome. It is axiomatic that dismissal of a criminal charge based on non-compliance with a discovery order is an even more "drastic" remedy for the court to impose than dismissal of a civil case.

Upon careful review of the evidence, this Court finds that the decision of the Traffic Tribunal was "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record," and that said decision was not "arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."

Accordingly, the decision of the Traffic Tribunal is hereby Reversed.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, S.C. RHODE ISLAND TRAFFIC TRIBUNAL

CITY OF WARWICK :
:
v. : C.A. No. T09-0015
:
NICOLE CIANCI :

## DECISION

**GUGLIETTA, C.M., DISANDRO, M.:** Before this Panel on May 20, 2009—Chief Magistrate Guglietta (Chair, presiding) and Magistrate DiSandro and Magistrate Noonan sitting—is Nicole Cianci's (Appellant) appeal from a decision of Magistrate Goulart, sustaining the charged violation of G.L. 1956 § 31-27-2.1, "Refusal to submit to chemical test." The Appellant was represented by counsel before this Panel. Jurisdiction is pursuant to G.L. 1956 § 31-41.1-8. Magistrate Noonan dissents from this Decision and has filed a separate opinion.

## Facts and Travel

On May 17, 2007, Officer James Wenneman (Officer Wenneman) of the Warwick Police Department charged Appellant with the aforementioned violation of the motor vehicle code. The Appellant contested the charge, and the matter was set down for trial.

On May 18, 2007, counsel for Appellant, acting pursuant to Rule 11 of the Rules of Procedure for the Traffic Tribunal (Rule 11),[1] forwarded a "Motion for Discovery and

STATE OF RHODE ISLAND
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[1] Rule 11 of the Rules of Procedure for the Traffic Tribunal reads, in pertinent part:

> "Upon motion of a defendant the court may order the attorney for the State to permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places,

Inspection" to the Office of the Attorney General and the Prosecution Division of the Warwick Police Department. The Rule 11 discovery motion requested, inter alia, "[a]ll 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." Neither the Office of the Attorney General nor the Prosecution Division complied with this discovery request.

On June 12, 2007, counsel for Appellant forwarded to the Office of the Attorney General a second, more specific Rule 11 discovery request entitled "Defendant's Motion for Discovery and Inspection and to Preserve Evidence in the Custody and Control of the Warwick Police Department." This motion requested, inter alia,

> "[a]ny evidence exculpatory in nature or tending to be exculpatory in nature including, but not limited to, any video, closed-circuit television, digital imaging or any other videography in the control of the Warwick Police Department depicting the arrest, detention, booking, incarceration and release of [Appellant]; the City of Warwick is requested to hold, secure, protect and maintain said videography until resolution of this matter." (Emphasis in original.)

On the same day that the above motion was forwarded, counsel for Appellant traveled to the Warwick Police Department to view a videotape. The videotape consisted of a video recording without any audio recording, for the time specific period relevant to Appellants arrest. The videotape was recorded by the Warwick Police Department's security cameras which are positioned at various locations both inside and outside the police headquarters. The cameras recording automatically cycles every few seconds from

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or copies or portions thereof which are within the possession, custody or control of the State, upon a showing of materiality to the preparation of the defendant's defense and that the request is reasonable."

camera to camera. The Appellants image was momentarily captured by the security camera as it cycled through the recording system. No audio recording of Appellant was recorded by the system. Upon viewing the videotape and determining that it possessed, in counsel's opinion, exculpatory value, counsel for Appellant made a verbal request to obtain a copy of the tape. The Prosecution Division failed to comply with Appellant's written and oral requests for the production of the videotape.

On June 12, 2007, counsel for Appellant—acting pursuant to Rule 26 of the Rules of Procedure for the Traffic Tribunal[2]—forwarded a "Motion to Compel Response to Discovery Requests" to the Office of the Attorney General and the Prosecution Division. A hearing was held before Judge Almeida on June 19, 2007, whereupon the Office of the Attorney General and/or the Prosecution Division was ordered to comply with Appellant's "Motion to Compel" no later than 4:00 p.m. on June 21, 2007. Despite the hearing judge's order, a copy of the videotape was not produced.

At trial before Judge Almeida on June 25, 2007, counsel for Appellant moved to dismiss the charged violation of § 31-27-2.1 on the grounds that the Warwick Police Department had advised Appellant of the incorrect penalties for refusing to submit to a chemical test. The trial judge granted Appellant's dismissal motion.[3] At the time of trial,

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[2] Rule 26 of the Rules of Procedure for the Traffic Tribunal reads:

> "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."

[3] The trial judge dismissed the charged violation based on the failure of the Warwick Police Department to advise Appellant of the correct penalties associated with refusal to submit to a chemical test. The trial judge did not dismiss the refusal charge based on the failure of the Warwick Police Department to comply with Appellant's discovery requests and the Court's order of June 19, 2007.

the videotape had not been produced and neither the Office of the Attorney General nor the Prosecution Division of the Warwick Police Department had accounted for its non-production. State appealed the dismissal. The appeal was heard on October 16, 2008 before a Traffic Tribunal Appellate Panel which granted the appeal, and reversed Judge Almeida's decision and remanded the case back for trial. The trial schedule was stayed pending the decision by our Supreme Court relative to numerous associated cases on the issue of penalties of refusal to submit to a chemical test.

When the legal issues surrounding the penalties associated with refusing to submit to a chemical test were resolved by our Supreme Court in Such v. State, 950 A.2d 1150 (R.I. 2008)[4], Appellant's case was remanded to this Tribunal for a new trial. On January 22, 2009—nineteen months after the case had been dismissed by Judge Almeida on the penalty issue—the matter was tried before Magistrate Goulart.

At trial but prior to any testimony, the trial magistrate asked counsel for Appellant whether the Warwick Police Department had located the videotape that was the subject of Appellant's Rule 11 discovery motions. (Tr. at 3-4.) Counsel was told that the Warwick Police were in the process of "burning a copy" for Appellant's use at trial. Id. Counsel then asked the trial magistrate to dismiss the charged violation based on the failure of the Office of the Attorney General and the Prosecution Division to comply with Judge Almeida's order of June 19, 2007. (Tr. at 5.) As counsel explained, dismissal was the appropriate sanction because

> "in preparation for the defense of this matter, having seen the tape,[5] . . . [he] [could] certainly make the representation . . . that the tape contained exculpatory material that . . .

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[4] Such v. State, 950 A.2d 1150 (R.I. 2008) was decided on June 26, 2008.

[5] It is noteworthy that counsel for Appellant had previously reviewed the videotape at the headquarters of the Warwick Police Department in June of 2007.

> [his] client [had] not been able to see . . . . The State and the City [of Warwick] never complied with an explicit court order" to produce said videotape. Id.

In ruling on Appellant's dismissal motion, the trial magistrate explained that discovery in the Traffic Tribunal is governed by the provisions of Rule 11, and Rule 11 "does not allow for, at least at the initial stage, the defendant in any matter to obtain the actual videotape or any kind of actual documentary evidence, other than those allowed in [the Rule]." (Tr. at 6.) The trial magistrate further explained:

> "Rule 12 [of the Rules of Procedure for the Traffic Tribunal] . . . allow[ed] [counsel] to issue a subpoena to . . . the Warwick Police Department . . . for the videotape. Should [counsel] have sought the videotape, the proper procedure . . . would have been . . . to . . . issue[] the Warwick Police Department a subpoena" pursuant to Rule 12. . . . "Rule 11 discovery wasn't the proper procedure to utilize in order to have obtained that videotape." (Tr. at 6-7.)

## I
## The Trial Magistrate's Proposed Remedial Measures: Continuance or Recall of Witnesses

While the trial magistrate acknowledged that counsel for Appellant had not had an opportunity to view the videotape in preparation for trial since he viewed the tape in 2007, he made clear that he readily would exercise his discretion to grant Appellant a continuance or, in the alternative, allow Appellant to recall Officer Wenneman in the event that the videotape arrived at the Traffic Tribunal after the State had presented its case-in-chief. (Tr. at 7.) The trial magistrate explained to defense counsel:

> "Certainly, once you obtain the videotape today ... and view the videotape, should you need a continuance, should you need an opportunity to recall the police officer ... [if] he had already completed his testimony by the time you obtain the videotape or have reviewed this videotape, or having reviewed the videotape believe you need to have

> him recalled to answer certain questions, I'll certainly give you that opportunity, but your motion to dismiss for discovery violation is denied." Id.

These options were offered to counsel for the Appellant with the knowledge that counsel had reviewed the tape at the Warwick Police Department in 2007 and the trial court subsequently denied the motion to dismiss making a specific finding that the Appellant suffered no prejudice in failing to review the video tape. Id. As these remedial measures would minimize or eliminate any prejudice to Appellant that resulted from the failure of the State and the Warwick Police Department to provide the videotape prior to trial, the trial magistrate denied Appellant's motion to dismiss. Id.

## II
## The Trial Testimony

Upon denying Appellant's Motion to Dismiss, the Court heard testimony from Officer Wenneman. Officer Wenneman began by describing his professional training and experience with respect to DUI-related traffic stops and the administration of standardized field sobriety tests. (Tr. at 11-14.) Officer Wenneman then testified that at approximately 12:45 a.m. on the date in question, he was traveling southbound on Warwick Avenue when he observed a vehicle at the intersection of West Shore Road and Warwick Avenue "execute a left-hand turn when [he] could see that [the operator] did not have a green arrow permitting [him or her] to do so." (Tr. at 15.)

Officer Wenneman began to follow the suspect vehicle, whereupon he observed it travel "from the left lane of travel to the right lane without signaling, and then back again." Id. During this time, the vehicle was traveling at approximately 50 m.p.h. in a posted 35 m.p.h. zone. (Tr. at 16.) Officer Wenneman ultimately initiated a traffic stop of the vehicle and made contact with the operator, identified at trial as Appellant. Id.

When asked to describe Appellant's physical appearance and demeanor, Officer Wenneman testified that her eyes were "bloodshot, watery, [and] glassy" and that there was a "strong odor of an intoxicating beverage emanating from her breath." (Tr. at 17.) When Officer Wenneman inquired as to whether Appellant had consumed alcohol earlier in the evening, Appellant responded that she had had two glasses of wine. Id. Upon making these observations, Officer Wenneman asked Appellant whether she would consent to a battery of standardized field sobriety tests; Appellant consented and exited the vehicle. (Tr. at 18.) At this time, Officer Wenneman noted that Appellant "had to utilize the door frame . . . window area of her vehicle . . . to steady herself as she exited the motor vehicle." Id.

Officer Wenneman administered the field sobriety tests in accordance with his professional training and experience, ultimately concluding that Appellant had failed the tests. (Tr. at 19-24.) He then placed Appellant under arrest and read her the "Rights for Use at Scene" card in its entirety. (Tr. at 25.) Once Appellant had been secured in the rear of his cruiser, Officer Wenneman transported her to the headquarters of the Warwick Police Department for processing. (Tr. at 27.) At the station, Officer Wenneman apprised Appellant of her "Rights for Use at Station," including Appellant's right to use a telephone within one hour of arrest. (Tr. at 27-28.)

Accordingly to Officer Wenneman, Appellant indicated her understanding of the rights listed on the "Rights" form, as she availed herself of her right to use a telephone. (Tr. at 28.) During the time that Appellant was utilizing the telephone, Officer Wenneman continued to observe her through a Plexiglass window in the booking room's door. (Tr. at 28-29.) Once Appellant had completed her confidential phone call, Officer

Wenneman requested that she submit to a chemical test of her breath. (Tr. at 29.) The Appellant refused to submit to a chemical test and refused to sign the "Rights" form. Id.

On cross-examination by counsel for Appellant, Officer Wenneman testified that he was unsure of the color of the traffic control device at the intersection of West Shore Road and Warwick Avenue. (Tr. at 36.) Officer Wenneman testified that he "assumed" that the traffic control device applicable to Appellant's vehicle was a "red arrow" at the time she turned left onto Warwick Avenue, and that this assumption was based on his "prior experience in that intersection . . . ." (Tr. at 35-36.) Officer Wenneman also clarified his earlier testimony regarding Appellant's lane changes, stating that Appellant's vehicle "drifted" from lane to lane and did not "swerve." (Tr. at 42.) He added that while Appellant was speeding and did not utilize a turn signal as she moved between the travel lanes, she did not cross the center dividing line in the roadway and did not enter the breakdown lane. (Tr. at 43-44.)

Officer Wenneman further testified on cross-examination that Appellant's vehicle did not strike the curb when she pulled to the side of the roadway. (Tr. at 45.) In addition, Officer Wenneman did not observe any "erratic" movements of Appellant's vehicle as he initiated a traffic stop of her vehicle. (Tr. at 46.) However, Officer Wenneman expanded on his earlier description of Appellant's physical appearance and demeanor by testifying that Appellant "fumbled" with her purse as she attempted to locate her driver's license, and that Appellant evidenced a "staggered gait" as she exited her vehicle. (Tr. at 52-53, 59.)

At the conclusion of Officer Wenneman's trial testimony, counsel for Appellant renewed his motion to dismiss the refusal charge based on the failure of the Office of the

Attorney General and the Prosecution Division to comply with the hearing judge's order. (Tr. at 88.) Once again, the trial magistrate denied the dismissal motion, reasoning that counsel "[had] the opportunity now to review the videotape, which [had] been provided to [him], and . . . also an opportunity, after having reviewed the videotape, to seek a continuance or even have [Officer Wenneman] recalled to the witness stand." Id. The trial magistrate added that he "[didn't] see any prejudice to [counsel] . . . or to [his] client." Id.

The Court next heard testimony from Trisha Murphy (Ms. Murphy), a friend of Appellant. Ms. Murphy testified that on the date in question, at approximately 9:30 p.m., Appellant visited her at her new apartment. (Tr. at 89-90.) Shortly after Appellant arrived at the apartment, Ms. Murphy and Appellant each consumed a glass of red wine. (Tr. at 90.) After Ms. Murphy and Appellant "chit-chatted for about two hours [and] caught up," Ms. Murphy poured a second glass of wine for Appellant. Id. Ms. Murphy testified that she observed Appellant consume "a glass and a half" of wine during the approximately two hours that Appellant was at her apartment, and that she did not observe Appellant consume any other alcoholic beverages during this time. (Tr. at 91.)

When asked to describe Appellant's physical appearance and demeanor, Ms. Murphy indicated that Appellant was not slurring her words and was not experiencing difficulty walking or maintaining her balance. (Tr. at 91-92.) Although Ms. Murphy did not testify that Appellant had been crying, she testified that Appellant "was having a misunderstanding with her husband" and appeared "very" upset. (Tr. at 92.)

At the conclusion of Ms. Murphy's testimony, Appellant testified that she did not consume alcohol prior to arriving at Ms. Murphy's apartment at approximately 9:30 p.m.

on the date in question. (Tr. at 98.) During the approximately two hours that she was visiting with Ms. Murphy, Appellant consumed "a glass and a half" of red wine. (Tr. at 99.) The Appellant further testified that she was not slurring her speech at the time she left Ms. Murphy's apartment and did not experience any difficulty driving away from Ms. Murphy's apartment, despite the fact that Ms. Murphy's driveway "is very difficult to get out of . . . ." (Tr. at 101.)

The Appellant testified that upon leaving Ms. Murphy's residence, she drove to a Wendy's restaurant in Warwick. (Tr. at 101-102.) While consuming her meal in the Wendy's parking lot, Appellant received a phone call from her husband that she described as "very upsetting." (Tr. at 102.) According to Appellant, the phone call from her husband reduced her to tears. (Tr. at 103.)

Upon leaving the parking lot of Wendy's, Appellant testified that she was traveling in the direction of the intersection of West Shore Road and Warwick Avenue. (Tr. at 104.) As she approached the intersection, Appellant received another call from her husband. Id. While Appellant indicated that she was not completely focused on her driving, she recalled that the traffic control device was "yellow turning [red]" at the time she approached the intersection. (Tr. at 105.) According to Appellant, she sped up in an attempt to "beat the light." Id.

As she was driving on Warwick Avenue, Appellant noticed Officer Wenneman's cruiser in her rearview mirror. (Tr. at 105-106.) According to Appellant, she moved from the left travel lane to the right travel lane "[b]ecause [she] thought [Officer Wenneman] was trying to get by [her] [vehicle]." (Tr. at 107.) When Officer Wenneman maneuvered his cruiser behind Appellant's vehicle, Appellant returned to the left travel

lane because she "was thinking [that] [the cruiser] was trying to get by me." (Tr. at 108.) The Appellant added that she was distracted by her conversation with her husband and did not utilize a turn signal when moving between the travel lanes. Id. When it became clear to Appellant that Officer Wenneman was going to initiate a traffic stop, Appellant promptly pulled to the side of the roadway in a controlled manner. (Tr. at 108-109.)

When asked to describe her initial encounter with Officer Wenneman, Appellant corroborated Officer Wenneman's testimony that she experienced difficulty retrieving her driver's license. (Tr. at 110.) However, Appellant attributed this difficulty to the fact that "at the time [of the stop] [she] had a very large pocketbook, and so [her] wallet was a lot smaller [in comparison to the size of the bag]." Id. In addition, Appellant testified that she was nervous because of the traffic stop and her recent altercation with her husband. Id.

When asked to describe the circumstances surrounding Officer Wenneman's request that she submit to field sobriety tests, Appellant was emphatic that she did not, upon exiting her vehicle, lean against the vehicle to support herself. (Tr. at 111.) The Appellant added that she was wearing "wedge" shoes with a one and one half inch heel at the time she walked to the rear of her vehicle for the field sobriety tests. (Tr. at 112.)

## III
## Trial Magistrate's Second Offer of a Continuance or Recall of Witnesses

At the conclusion of Officer Wenneman's testimony and the State's case, counsel for the Appellant again renewed his Rule 16 Motion to Dismiss:

> "Just for the record, I will renew my Rule 16 motion at this time. I think that under Rule 16 … I'm required to do so at the end of the State's case, I may be wrong, but [I am asking you to] review my motion to dismiss the case on the

violations of Judge Almeida's Court Order compelling the State and the City of Warwick to provide videographic exculpatory evidence." (Tr. at 87.)

The trial magistrate responded to counsel's request stating:

> "Well, for the reasons that I've put on the record before, your motion is denied. Certainly, you have the opportunity now to review the videotape, which has been provided to you, and I've given you also an opportunity, after having reviewed that videotape, to seek a continuance or even have the Officer recalled to the witness stand. I don't see any prejudice to you at this point, Mr. Liguori, or to your client. So based on that reasoning, the motion is denied." (Tr. at 87-88.)

Most importantly, as evidenced in the transcript, counsel for Appellant opted not to view the videotape prior to the Court hearing the presentation of the defendant's case. Thus, when the trial magistrate asked counsel for Appellant:

> "How did you wish to proceed, Mr. Liguori? Did you want an opportunity to review the tape prior to you putting on any evidence, should you choose to do so? How did you want to proceed?" (Tr. at 88.)

Counsel answered:

> "Why don't I proceed with my first witness, Judge, and then we'll see what the time frame is, and we might be able to do it at the break." Id.

Accordingly, due to counsel for the Appellant's response that he did not wish to stop the proceeding and immediately view the video tape, the trial continued with counsel calling their next witness, Ms. Trisha Murphy.

## IV
## Recess to Review the Videotape; Trial Magistrate's Third Offer of a Continuance or Recall of Witnesses

At the conclusion of Appellant's trial testimony, it became clear to the Court that the videotape depicting Appellant at the headquarters of the Warwick Police Department had arrived. (Tr. at 126.) The trial magistrate allowed for a recess in the trial in order to allow the trial magistrate, counsel for Appellant, and counsel for the State an opportunity to review the videotape. (Tr. at 127.) When the trial resumed, the trial magistrate asked counsel for Appellant whether he would like to seek a continuance, recall Officer Wenneman as a witness, or call any additional witnesses in light of his observations of the tape. The trial magistrate stated:

> "And after you had an opportunity to review the recording, since you've had an opportunity to play and review the recording, did you wish to either seek a continuance, reexamine Officer Wenneman, or call any other witness in support of your defense?" (Tr. at 128 – 129.)

Counsel for Appellant responded that he would not recall Officer Wenneman or any other witnesses, that a continuation would not be productive, and then rested his case.

## V
## The Trial Magistrate's Decision

After hearing closing arguments, the trial magistrate took the matter under advisement. In rendering his decision from the bench, the trial magistrate found, based on the "credible, believable, and honest" testimony of Officer Wenneman that: Appellant, while under arrest, refused to submit to a chemical test upon the request of Officer Wenneman; Appellant was fully informed of her right to an independent physical examination pursuant to § 31-27-3; and that Appellant was fully informed of the penalties that would be incurred if she refused to submit to a chemical test. (Dec. Tr. at 12.) The trial magistrate went on to say that the State's evidence on these elements of the charged violation of § 31-27-2.1 "went un-contradicted by the Defense in this matter." Id.

The trial magistrate then explained that "the only element which was in significant dispute during the trial was whether Officer Wenneman had reasonable grounds to believe that [Appellant] had been driving a motor vehicle while under the influence." (Dec. Tr. at 13.) In evaluating the record evidence to determine whether reasonable grounds existed, the trial magistrate found that Officer Wenneman's reasonable grounds determination was based, at least in part, on Appellant's "multiple violations of the traffic code, which included failing to obey a traffic control device and a lane roadway violation . . . observations that were made by Officer Wenneman." (Dec. Tr. at 14.) While the trial magistrate acknowledged that there may have been "an innocent explanation for those offenses," he continued by stating that this "[was] really of no moment in determining whether Officer Wenneman . . . was reasonable when he factored this type of conduct into his [reasonable grounds] determination . . . ." (Dec. Tr. at 15.)

The trial magistrate further reasoned that Officer Wenneman's determination was based on his personal observations of Appellant's physical appearance and demeanor, including the fact that Appellant "had bloodshot and watery eyes, . . . had a strong odor of alcohol, . . . admitted that [she] had been drinking, and . . . used the door frame for balance." (Dec. Tr. at 15-16.) The trial magistrate reiterated that "while there may have been another reason for the bloodshot and watery eyes, . . . it certainly wasn't unreasonable for Officer Wenneman to have concluded that those bloodshot and watery eyes were not as a result of . . .crying, but were the result of . . . being under the influence of either alcohol or a controlled substance." (Dec. Tr. at 16.) In addition, the trial magistrate found that "it was certainly not unreasonable . . . for Officer Wenneman to

have concluded [that] [Appellant's] failure of [the] [field sobriety] tests resulted from her being under the influence." (Dec. Tr. at 18.) Accordingly, the trial magistrate was satisfied that the State proved "overwhelmingly" that Officer Wenneman "had more than sufficient evidence and reasonable grounds to believe [Appellant] was driving a motor vehicle while under the influence." (Dec. Tr. at 18, 20.)

Upon finding that Officer Wenneman had reasonable grounds, the trial magistrate sustained the charged violation of § 31-27-2.1. The Appellant, aggrieved by this decision, filed a timely appeal to this Panel. The Decision of the majority of the Appeals Panel is rendered below. Magistrate Noonan, dissenting from this Decision, has filed a dissenting opinion.

## Standard of Review

Pursuant to G.L. 1956 § 31-41.1-8, the Appeals Panel of the Rhode Island Traffic Tribunal possesses appellate jurisdiction to review an order of a judge or magistrate of the Rhode Island Traffic Tribunal. Section 31-41.1-8(f) provides in pertinent part:

> The appeals panel shall not substitute its judgment for that of the judge or magistrate as to the weight of the evidence on questions of fact. The appeals panel may affirm the decision of the judge or magistrate, or it may remand the case for further proceedings or reverse or modify the decision if the substantial rights of the Appellee have been prejudiced because the judge's findings, inferences, conclusions or decisions are:
>
> (1) In violation of constitutional or statutory provisions;
> (2) In excess of the statutory authority of the judge or magistrate;
> (3) Made upon unlawful procedure;
> (4) Affected by other error of law;
> (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

In reviewing a hearing judge or magistrate's decision pursuant to § 31-41.1-8, this Panel "lacks the authority to assess witness credibility or to substitute its judgment for that of the hearing judge [or magistrate] concerning the weight of the evidence on questions of fact." Link v. State, 633 A.2d 1345, 1348 (R.I. 1993) (citing Liberty Mutual Insurance Co. v. Janes, 586 A.2d 536, 537 (R.I. 1991)). "The review of the Appeals Panel is confined to a reading of the record to determine whether the judge's [or magistrate's] decision is supported by legally competent evidence or is affected by an error of law." Link, 633 A.2d at 1348 (citing Environmental Scientific Corp. v. Durfee, 621 A.2d 200, 208 (R.I. 1993)). "In circumstances in which the Appeals Panel determines that the decision is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record or is affected by error of law, it may remand, reverse, or modify the decision." Link, 633 A.2d at 1348. Otherwise, it must affirm the hearing judge's [or magistrate's] conclusions on appeal. See Janes, 586 A.2d at 537.

**Analysis**

On appeal, Appellant argues that the trial magistrate's decision is in violation of constitutional provisions and characterized by abuse of discretion. Specifically, Appellant contends that the failure of the Department of the Attorney General and/or the Warwick Police Department to comply with the hearing judge's order to produce the requested videotape evidence—evidence that Appellant characterizes as material and exculpatory—is violative of Appellant's due process rights. The Appellant maintains that dismissal of the refusal charge was the only measure available to the trial magistrate that

would remedy the prejudice suffered by Appellant, and the trial magistrate's decision to continue with the proceeding in light of this contumacious conduct constitutes a clear abuse of his discretion.

First, a discussion of Rhode Island Traffic Tribunal Rule 11 is necessary. Unlike other courts discovery rules, Rule 11 is very specific as to what it allows. Most importantly, Rule 11 requires a motion to be filed with the Traffic Tribunal, the request of the court must be material to the defendant's case and the request must be reasonable. The motion must be ordered by a judge or magistrate of the Rhode Island Traffic Tribunal to be effective.

In this case, the May 18, 2007 request and the June 12, 2007 request for discovery were improper under Rule 11. These requests were not made by motion submitted to the Court as requested by Rule 11. The only valid Rule 11 motion made by Appellant was the June 19, 2007 request which was brought before the Court. This is an important fact in determining the reasonableness or the alleged willfulness of the failure of the State to ignore the discovery request. This June 19 date is also significant because six days later the case was dismissed by Judge Almeida on other grounds and remained on appeal for nineteen months until it was remanded by the Supreme Court and scheduled for trial on January 22, 2009.

Additionally, Rule 11(F) of the Traffic Tribunal Rules provide for a continuing duty to disclose information as well as remedy for failure to comply with its requirements. Rule 11 (F) states,

> If, subsequent to compliance with an order issued pursuant to this rule, and prior to or during trial, a party discovers additional material previously requested or ordered which is subject to discovery or inspection under the rule, the party shall promptly

> notify the other party's attorney or the court of the existence of the additional material. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as it deems just under the circumstance.

While the case law on the Traffic Tribunal Rules of Procedure is limited, the majority believes the trial Justice is in the best position to determine the harm, if any, resulting from a discovery rule violation, can best assess the possibility of mitigating that harm, determine what sanction should be imposed, and that decision should not be overturned absent clear abuse of discretion. In a similar case, State of Rhode Island vs. Brian Priest CA-T08-0048, Appellant had been arrested by the Burrillville Police Department and charged with refusing to submit to a chemical breath test. Prior to trial, before Magistrate Noonan, Appellant sought production of a videotape of the Burrillville Police Station Security camera for the time period relevant to Appellant's arrest. After a period of time, the videotape recording was automatically recycled by the Burrillivlle Police security recording system which taped over footage which may have captured Appellant while at station. Magistrate Noonan dismissed that violation based upon the police department's failure to produce the videotape. Even in that case, which factually is more egregious than the facts presented in the case at bar, the Magistrate's decision was overturned by the Appellate Panel of the Traffic Tribunal as well as by a Judge of the District Court when the matter was appealed from the panel.

Moreover, while the case law on the Traffic Tribunal Rules of Procedure is limited on the issue of alleged discovery violations, the majority believes our Supreme

Court has had occasion to address the similar issue of discovery violations in other Courts of our state. For example, the Rhode Island Supreme Court has discussed remedial measures for such violations under Rule 37 of the Superior Court Rules of Civil Procedure (Rule 37) and Rule 16 of the Superior Court Rules of Criminal Procedure (Rule 16).

The discussion of Rule 37 in the civil case of Mumford v. Lewiss, 681 A.2d 914 (R.I. 1996) is instructive. In Mumford, our Supreme Court held that pursuant to Rule 37,[6] "the entry of a final judgment dismissing an action for noncompliance with a discovery order is within the discretion of the motion justice." Id. at 916 (citing Providence Gas Co. v. Biltmore Hotel Operating Co., 119 R.I. 108, 112, 376 A.2d 334, 336 (1977)). The Mumford Court made clear that it would "reverse the decision of a trial justice to impose a sanction under Rule 37 for noncompliance with a discovery rule or order only upon a showing of an abuse of discretion." Id. (citing Senn v. Surgidev Corp., 641 A.2d 1311, 1320 (R.I. 1994)). While the Court recognized "the severity of a final judgment dismissing the action [for noncompliance with a discovery order]," the Court indicated that it would "affirm a trial justice's use of this type of drastic sanction in the face of a party's persistent failure to comply with discovery obligations." Id. (citing Roberti v. F. Ronci Co., 486 A.2d 1087, 1088 (R.I. 1985)).

The Mumford record contains numerous motions and orders that plaintiffs did not comply with or chose to completely ignore. Specifically, the plaintiffs in Mumford failed to "provide the requested information despite two motions to compel, an extension

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[6] Rule 37(b) (2) (C) provides that if a party fails to obey an order to permit discovery, the court may make "[a]n order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or a final judgment dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party . . . ."

agreed to by defendant, and an extension afforded by the conditional order of dismissal. 'Rather than take advantage of the offered opportunities to answer without penalt[y],' plaintiffs chose to be noncompliant and dilatory." Id. at 916. (quoting Providence Gas Co., 119 R.I. at 114, 376 A.2d at 337.)

The facts in this case, unlike the one in Mumford, contain only one valid Rule 11 discovery motion made by Appellant on June 19, 2007. This was the only proper motion request made under Rule 11 and (As previously stated, the May 18, 2007 and June 12, 2007 requests were improper under Rule 11) this case was dismissed on other grounds six days after the June 19, 2007 motion was granted. Thus, at that time the motion was granted the State had a limited opportunity to comply with the order and provide the videotape to Appellant.

We believe based or the facts of this case, that Appellant was not entitled to a dismissal, unlike the plaintiffs in Mumford, because the State's failure to comply with one valid discovery request did not show that the State's noncompliance rose to the level of "persistent failure" to abide by discovery obligations as the Court held in Mumford.

In addition, the Rhode Island Supreme Court reaffirmed the holding and reasoning of Mumford in Woloohojian v. Bogosian, 828 A.2d 522 (R.I. 2003), adding that the hearing justice, in dismissing a case for failure to comply with a discovery order, will have abused his or her discretion where there is no evidence "demonstrating persistent refusal, defiance or bad faith." Id. at 523 (quoting Travelers Insurance Company v. Builders Resource Corp., 785 A.2d 568, 569 (R.I. 2001)). The Woloohojian Court was satisfied that the hearing justice did not abuse his discretion because "[t]he defendant repeatedly refused to avail herself of various opportunities to comply with

discovery requests. The defendant failed to respond to three sets of interrogatories, did not produce documents requested, and ignored a court order entered upon plaintiff's motion to compel." Id. In concluding that "the defendant's persistent refusal to provide the requested information despite numerous opportunities to do so warranted a default," the Woloohojian Court emphasized that "there is often a point in litigation when a party is entitled to a dismissal of an action in which the opposing party's failure to comply with discovery requests and related court orders causes inordinate delay, expense, and frustration for all concerned." Id. at 524.

As previously stated, within the record before this Panel there was a failure of plaintiff to comply with only one Rule 11 motion. Unlike the defendant in Woloohojian who did not submit "three sets of interrogatories, . . . [numerous] documents, and [a] . . . court order entered upon plaintiff's motion to compel." Id. at 523. Additionally, by producing the subject videotape during trial the State did not chose to be "noncompliant and dilatory." Mumford, 681 A.2d at 916. The State's non-production of the videotape did not warrant a dismissal. Therefore, the trial magistrate's decision—to allow Appellant to seek a continuance, recall Officer Wenneman as a witness, or call any additional witnesses instead of dismissing the case—was warranted due to a lack of substantial delay, expense, and frustration for all concerned. Id.

Our Supreme Court revisited Mumford in Goulet v. OfficeMax, Inc., 843 A.2d 494 (R.I. 2004), wherein the Court affirmed the hearing justice's discretionary decision to enter a default judgment against the plaintiff pursuant to Rule 37. In reaching its decision, the Court focused on the fact that

> "plaintiff was given ample opportunity to comply with her discovery obligations. Despite two court orders, an

> extension agreed to by defendant and additional extensions afforded by two conditional orders of dismissal, plaintiff utterly failed to produce the requested information. The plaintiff failed to avail herself of the numerous extensions graciously and generously agreed to by defendant and the Superior Court. She missed every deadline." Id.

Thus, the Goulet Court was satisfied that, "[g]iven the plaintiff's continuous and willful noncompliance with discovery orders, the Superior Court [justice] acted well within [his] discretion in dismissing plaintiff's complaint." Id.[7]

Here, unlike the plaintiff in Goulet, the plaintiff's failure to produce the videotape was not a "persistent" one nor was the noncompliance "willful and continuous." Goulet, 843 A.2d at 496. Although the videotape was not produced until the date of Appellant's trial on January 22, 2009—nineteen months after the discovery motion to compel was

[7] Additionally, as evidenced in the following cases, the trial magistrate's decision not to dismiss Appellant's case was not in violation of constitutional provisions or characterized by abuse of discretion. See Flanagan v. Blair, 882 A.2d 569 (R.I. 2005) (holding that the motion justice did not abuse his discretion in granting defendant's motion for entry of final judgment because plaintiff's failure to comply in a timely manner with an explicit and clear order constituted "defiance" on the part of plaintiff. In the case at hand, the failure to comply was not "defiance" on the part of the Warwick Police Department, thus the trial magistrate's decision not to impose a Rule 37 sanction for noncompliance was not an abuse of discretion.); Lett v. Providence Journal Co., 798 A.2d 355 (R.I. 2002) (holding that the trial justice properly dismissed plaintiff's suit pursuant to Rule 37 because clear and convincing evidence was produced that plaintiff committed a fraud upon the court. Here, there was no fraud present in the facts to warrant a dismissal.); Burns v. Connecticut Mutual Life Ins. Co., 743 A.2d 566 (R.I. 2000) (concluding that the trial justice did not abuse her discretion in dismissing the case where the plaintiff continuously and flagrantly ignored the court's order to produce documents and then made obvious misrepresentations to the court to avoid dismissal because of his noncompliance. In this case, the persistent disobeying of court orders and subsequent misrepresentations was not present, thus dismissal was unwarranted.); Senn v. Surgidev Corp., 641 A.2d 1311 (R.I. 1994) (finding that the trial court abused its discretion in granting the plaintiff's motion for a default judgment as a sanction for inadequate response to discovery. Similarly to our case, the record of the Senn case did not contain the same level of persistent refusal, defiance or bad faith on which the most severe discovery sanctions have been grounded in the past.); Fournier v. Town of Coventry, 615 A.2d 118, 119 (R.I. 1992) (affirming a default judgment entered after defendant had failed to comply with the plaintiff's discovery request and had stalled and ignored court orders. Unlike the record in our case, the record in Fournier contained "a plethora of evidence demonstrating that the [defendant] grossly violated the spirit of discovery with unequivocal bad faith."); Trend Precious Metals Co. v. Sammartino, Inc., 577 A.2d 986 (R.I. 1990) (holding that the facts in that case, which are similar to the present case, did not justify the imposition of a severe sanction such as dismissal, when an alternative, less drastic method was readily available.); Providence Gas Co. v. Biltmore Hotel Operating Co., 119 R.I. 108, 376 A.2d 334 (1977) (holding that because defendant ignored interrogatories, the order to compel, the order for default giving defendant sixty additional days to answer or be defaulted, and then three weeks after the sixty days had expired filed patently insufficient answers, the trial judge's denial of the motion to remove the default judgment was not an abuse of discretion. Here, there was only one motion to compel that defendant ignored for six days and then subsequently, complied with nineteen months later when the case was re-tried.).

granted—this was not a result of bad faith or willful noncompliance, but rather the result of a dismissal of the case for that entire length of time on other grounds. Thus, the trial magistrate acted well within his discretion in not dismissing the case and instead offering counsel for Appellant the choice of seeking a continuance or recalling witnesses.

In this case, the trial magistrate's decision was similar to the Court in Alan Sampson, et al. v. Marshall Brass Co., 661 A.2d 971 (R.I. 1995). The Court in Sampson remanded the matter to the Superior Court for an evidentiary hearing to determine the reason(s) for the inability of the plaintiffs to produce for inspection the missing brass-regulator fitting. The Court stated, "[i]n the absence of a record exploring the[se] reasons . . . we are of the opinion that Rule 37(b)(2) does not permit such drastic consequences as dismissal with prejudice." Id. at 971.

Similarly to our case, the delay in production of the requested videotape did not prejudice Appellant enough to warrant the drastic consequence of dismissing her case. Additionally, the Sampson court said dismissal was not permitted pursuant to Rule 37(b)(2) when the "spoilation of evidence was neither willful, intentional nor the result of negligence on the part of the plaintiffs." Id. Here—although the evidence was not "spoiled," but only delayed in production—the delay was neither willful, intentional or the result of negligence on the part of the Warwick Police Department. Instead, it was the result of two improper Rule 11 motions and the subsequent nineteen month dismissal of the case.

Decisions rendered by our Supreme Court in the criminal context are equally instructive for the purpose of resolving the issue raised by Appellant on appeal. For example, in State v. Quintal, our Supreme Court reaffirmed that "[t]he imposition of any

of the [discovery violation] sanctions listed in Rule 16(i) [of the Superior Court Rules of Criminal Procedure][8] is a matter addressed to the sound discretion of the trial justice." Id. at 119 (quoting State v. Sciarra, 448 A.2d 1215, 1218 (R.I. 1982)). The Quintal Court indicated that "[t]he exercise of such discretion demands a consideration of what is right and equitable under all of the circumstances and the law." Id. "Although Rule 16(i) provides specifically for various sanctions for noncompliance, a trial justice is clearly free, within the bounds of sound discretion, to enter any order he or she deems most appropriate." Id. The Court stressed that it would "not disturb a trial judge's action in this regard absent a clear showing that the trial justice abused his or her discretion." Id. (citing State v. Coelho, 454 A.2d 241, 245 (R.I. 1982)).[9]

On the facts before it, the Quintal Court was satisfied that "[t]he State has failed to establish any abuse of discretion by the trial justice." Id. As the Court elaborated,

> "a previous order compelling discovery was not adequately complied with by the State. Since the case had not reached trial and since the records requested by defense counsel were never

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[8] Rule 16(i) reads:

> "If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, it may order such party to provide the discovery or inspection, grant a continuance, or prohibit the party from introducing in evidence the material which or testimony of a witness whose identity or statement were not disclosed, or it may enter such other order as it deems appropriate."

[9] See State v. Wilson, 568 A.2d 764 (R.I. 1990); State v. Padula, 551 A.2d 687 (R.I. 1988); State v. Boucher, 542 A.2d 236 (R.I. 1988); State v. Brown, 549 A.2d 1373 (R.I. 1988); State v. Payano, 528 A.2d 721 (R.I. 1987); State v. Coelho, 454 A.2d 241 (R.I. 1982) (holding that the trial court is in the best position to determine whether any harm has resulted from noncompliance with discovery motions and whether the harm can be mitigated. Therefore, its ruling should not be overturned absent a clear abuse of discretion.). See also State v. Lawrence, 492 A.2d 147 (R.I. 1985), State v. Engram, 429 A.2d 716 (R.I. 1984) (stating that the imposition of any of these sanctions is a matter addressed to the sound discretion of the trial justice.); State v. Verlaque, 465 A.2d 207 (R.I. 1983) (concluding that the imposition of any sanction for noncompliance with discovery obligations is a matter within the sound discretion of the trial court. The court's ruling should not be overturned absent a clear abuse of discretion.); State v. Darcy, 442 A.2d 900 (R.I. 1982) (finding that the imposition of any sanction under this rule is a matter within the sound discretion of the trial justice.).

> produced, a continuance was certainly not the proper sanction for the State's noncompliance. Finally, the records sought by defense counsel may well have contained exculpatory evidence, and thus the interests of justice, and the interests of defendant in particular, did not call for exclusion of any non-disclosed records." Id.

The Quintal Court went on to state that "[n]one of the sanctions specifically provided for in Rule 16(i) could possibly have neutralized the prejudice suffered by defendant, especially in light of the State's persistent refusal to comply with the court-ordered discovery." Id. Accordingly, the Court concluded that "the trial justice availed himself of the Rule 16(i) provision authorizing a trial justice to enter any such order he or she deems appropriate . . . . We cannot say that the trial justice in the present case abused his discretion in this regard." Id. (citing State v. Darcy, 442 A.2d 900, 902 (R.I. 1982)).

The Court also addressed the propriety of dismissal for noncompliance with a discovery order in State v. Musumeci, 717 A.2d 56 (R.I. 1998). As the Musumeci Court explained, "Rule 16, like its federal counterpart, seeks to promote broader discovery by both the defense and the prosecution [in order to] contribute to the fair and efficient administration of criminal justice by aiding in informed plea negotiations, by minimizing the undesirable effect of surprise at trial, and by otherwise contributing to an accurate determination of the issue of guilt or innocence." Id. at 60 (quoting Coelho, 454 A.2d at 244.))

The Musumeci Court indicated that "[b]ecause the trial justice is in the best position to determine the harm resulting from a discovery rule violation and can best assess the possibility of mitigating that harm, his or her ruling on what sanction should be imposed on that score will not be overturned absent a clear abuse of discretion." Id. Nevertheless, the Court made clear that "the trial court's discretion is not without limits

and is reviewable by this Court for an alleged abuse thereof." Id. While recognizing that the trial justice's decision to dismiss criminal charges is "both an available and permitted Rule 16(i) discovery violation remedy," the Court stressed that dismissal is an "extreme sanction." Id. The majority of the Panel in this case finds that the State's discovery violation does not warrant the extreme sanction of dismissal.

In Musumeci, the Court held that the second trial justice's dismissal of charges after first trial justice's grant of mistrial based on the State's negligent but nondeliberate late production of discoverable evidence was an abuse of discretion. Id. at 64. Similarly to the Court in Musumeci, here the trial magistrate believed that dismissal was to extreme of a sanction to impose on the State for their late production of discoverable evidence.[10] The trial magistrate concluded that dismissal was unwarranted because there was only one properly filed Motion to Compel under Rule 11. The other two requests made by Appellant for discovery of the videotape were improper because they were made directly to the Warwick Police Department. A copy of the videotape was not produced, thus violating the order. However, the charged violation was dismissed six days later on other grounds. Nineteen months later when the case was remanded for a new trial, the trial justice determined that failure to comply with the Motion to Compel in 2007 did not

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[10] See also State v. Allessio, 762 A.2d 1190 (R.I. 2000) (holding, similar to the present case, that defendant was not prejudiced by the state's "eleventh hour disclosure of part of his out-of-state criminal record" since he had an extensive record that had been disclosed to him already and the late addition of relatively inconsequential charges was thus simply cumulative. Here, the "eleventh hour" production by the state of the videotape was relatively inconsequential and did not rise to the level of "extreme" to warrant dismissal.); State v. Morejon, 603 A.2d 730 (R.I. 1992) (stating that the preclusion from evidence of the two additional convictions would have been an overly exacting penalty in response to the state's inadvertent nondisclosure. Similarly to the present case, "[i]n light of the lack of prejudice suffered by defendant and the availability of other remedies, it was not an abuse of discretion for the trial justice to refrain from imposing such a drastic sanction."); State v. Bibee, 559 A.2d 618 (R.I. 1989) (concluding that if the state's failure to provide discovery materials is inadvertent, prejudice to the opposing party controls the inquiry on appeal.); State v. Rudacevsky, 446 A.2d 738 (R.I. 1982) (stating similar options that the trial magistrate proposed to resolve the discovery violation in the present case, "[a] trial justice may preclude a party from introducing testimony of a person whose identity or statements were not disclosed, or grant a continuance or fashion some other appropriate remedy.").

warrant dismissal. The trial magistrate deemed dismissal to be an extreme sanction, instead allowing Appellant to seek a continuance, recall Officer Wenneman to testify or call other witnesses to the stand.

The purpose of Rule 16 is "designed to be broad in scope so that neither the defense nor the prosecution is surprised at trial." State v. Powers, 526 A.2d 489 (R.I. 1987).[11] Here, the trial magistrate found that counsel for Appellant was not surprised at trial. Counsel viewed the videotape at the Warwick Police Department in 2007 and was given the option, during the trial in 2009, to seek a continuance to have time to view the tape again and prepare adequate arguments or to call and/or recall witnesses for further testimony after watching the videotape. The fact that counsel for Appellant failed to utilize either opportunity evidenced that he was not "surprised" at trial by the evidence on the videotape.

Based on the foregoing authority, it is clear that the trial magistrate, when confronted with a record replete with conduct by the Department of the Attorney General and the Warwick Police Department, had various remedial options at his disposal—including the "extreme" and "drastic" sanction of dismissing the charged violation of § 31-27-2.1. As our Supreme Court made clear in Musumeci, the trial magistrate was "in the best position to determine the harm resulting from [the] discovery-rules violation[s] and [could] best assess the possibility of mitigating that harm . . . ." Musumeci, 717 A.2d at 60. In his discretion, the trial magistrate found that allowing counsel for Appellant to recall Officer Wenneman or in the alternative, request a continuance to view the

[11] See State v. Wyche, 518 A.2d 907, 910 (R.I. 1986), State v. Ricci, 639 A.2d 64 (R.I. 1994), State v. Wilson, 568 A.2d 764 (R.I. 1990), State v. Boucher, 542 A.2d 236 (R.I. 1988) (all note that "[the] purpose of this rule is to eliminate surprise and procedural prejudice."); State v. Concannon, 457 A.2d 1350, 1353 (R.I. 1983) (holding that "[t]he primary purpose of discovery is to eliminate surprise at trial. A prosecutor or a defendant who does not comply with the rules of discovery undermines the judicial process.").

videotape evidence would minimize any prejudice that resulted from the failure of the Department of the Attorney General and/or the Warwick Police Department to heed their discovery obligations. The trial magistrate specifically chose not to dismiss after having full knowledge that the tape, which was viewed by counsel for Appellant in 2007, was not provided when Officer Wenneman took the stand.

Furthermore, while Appellant consistently argues that Rule 11 was violated, he selectively fails to acknowledge that the Rule specifically provides for the remedy the trial magistrate chose in the decision of this case. Rule 11 states in relevant part,

> If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as it deems just under the circumstances.

In reviewing the facts of this case, the trial magistrate followed the Rule when he exercised his discretion not to dismiss the case, but rather chose to provide the alternative remedies of a continuance or recall. Rule 11 allows the judge to exercise his discretion and the trial magistrate followed the Rule explicitly.

While the majority members of this Panel may have dealt with such flagrant and willful disregard for an order of this Tribunal by imposing the "severe" remedy of dismissal, it would be improper for this Panel to substitute our judgment for that of the trial magistrate on how best to alleviate any resulting prejudice to Appellant.[12]

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[12] It is necessary to note here that the dissenting opinion refers to statements made by this Panel during the appeal. To clarify these statements, we are referring to the fact that the trial magistrate exercised sound discretion in deciding not to dismiss the case, even though we—if we had been the trial magistrates—may not have made the exact same decision. The main point is this Panel is prohibited from "assess[ing] witness credibility or substituting its judgment for that of the hearing judge [or magistrate] concerning the weight of the evidence on questions of fact." Link v. State, 633 A.2d 1345, 1348 (R.I. 1993) (Citing Liberty Mutual

Our conclusion that the trial magistrate did not abuse his discretion is bolstered by the fact that counsel for Appellant had an opportunity to review the videotape at the headquarters of the Warwick Police Department in June of 2007 and again when the tape arrived after the State had presented its case-in-chief. Counsel was offered not one, not two, but three opportunities to seek a continuance or the recall of the trial witnesses—before the Court had heard testimony and again when it became clear that the videotape had arrived. The trial magistrate acted well within his discretion when he proposed these remedial measures. Counsel for the Appellant chose not to avail himself of one or both of these proffered remedial measures in order to ensure that the videotape was fully incorporated into his defense, despite his repeated assertions that the videotape contained material and highly probative evidence of an exculpatory nature. Thus, once the videotape had arrived at this Tribunal, any additional prejudice that accrued to Appellant was directly attributable to counsel's decision to proceed with the trial rather than secure the additional time that he needed to conduct an in-depth review the videotape. Accordingly, the majority of this Panel that subscribe to this Decision conclude that the trial magistrate's decision to continue with the trial rather than dismiss the refusal was not characterized by an abuse of his discretion.

## Conclusion

This Panel has reviewed the entire record before it. Having done so, the majority of this Panel that subscribe to this Decision are satisfied that the trial magistrate's decision is not in violation of constitutional provisions or characterized by abuse of

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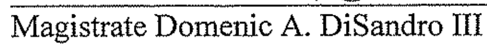
Insurance Co. v. Janes, 586 A.2d 536, 537 (R.I. 1991)) and the trial justice is in the best position to determine the harm resulting from a discovery rule violation, State v. Musumeci 717 A.2d 56 (R.I. 1998).

discretion. Substantial rights of Appellant have not been prejudiced. Accordingly, Appellant's appeal is denied, and the charged violation is sustained.

ENTERED:

Chief Magistrate William R. Guglietta (Chair)



Magistrate Domenic A. DiSandro III

DATE: 11/23/09

**NOONAN, M., DISSENTING:** While I agree with the two members of the majority that the trial magistrate conducted a trial free of legal error, I write separately because I firmly believe that Appellant's trial never should have occurred.

The central issue before this Panel is the Warwick Police Department's casual disregard for our Rules of Procedure and, perhaps more troubling, that Department's willful—possibly contemptuous—disregard for a signed order of this Court that extended over a period of approximately nineteen months. A brief recitation of the facts and travel of this case will illuminate the substantial and irremediable prejudice that accrued to Appellant prior to and during her trial on the charged violation of § 31-27-2.1.

On May 18, 2007, the day after Appellant's arrest, counsel for Appellant forwarded a written discovery request to the Warwick Police Department that closely tracked the language of Rule 11 of the Traffic Tribunal Rules of Procedure (Rule 11). After a month had elapsed without a response, counsel forwarded a second, more explicit discovery request to the headquarters of the Warwick Police on June 12, 2007. Counsel specifically instructed the Warwick Police Department to "hold, secure, protect and maintain [a videotape depicting Appellant on the night of her arrest] until resolution of this matter." As an added precaution, counsel traveled to the headquarters of the Warwick Police Department and was allowed to view the videotape. At this time, counsel determined that the videotape was relevant and material to the preparation of his defense and made both verbal and written requests for the Warwick Police Department to produce this exculpatory evidence. The Warwick Police Department ignored these requests and did not produce the tape.

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When it became clear that the Warwick Police Department was not going to produce the requested videotape, counsel for Appellant took the additional step of filing a motion to compel. Although counsel's motion to compel should have been made pursuant to Rule 11 and not Rule 26, said motion was heard and granted on June 19, 2007. In its order, the Court directed the Warwick Police Department to produce the videotape by 4:00 p.m. on June 21, 2007. The Warwick Police Department completely ignored the deadline set forth in the June 19th order.

Although the charged violation of § 31-27-2.1 was dismissed on June 25, 2007 based on the failure of the Warwick Police Department to advise Appellant of the correct penalties associated with refusal to submit to a chemical test—an issue ultimately resolved by our Supreme Court in Such v. State—the videotape was not made available to counsel until Appellant's second trial date on January 22, 2009. The minority finds it interesting, to say the very least, that the Warwick Police Department's approximately nineteen month period of non-compliance came to an end only after the State had presented its case-in-chief. The majority suggests that the fact that the counsel for the defendant viewed the video some two years earlier is a substitute for compliance with a court order to produce the videotape. I disagree.

It is abundantly clear from the record before this Panel that counsel for Appellant did everything that he was required to do pursuant to Rule 11 of the Traffic Tribunal Rules of Procedure to obtain the videotape evidence in the possession, custody, and control of the Warwick Police Department. As such, the trial magistrate erred in denying Appellant's dismissal motion on the grounds that counsel should have taken the additional—and completely unwarranted—step of subpoenaing the Warwick Police

Department to produce the videotape pursuant to Rule 12. (Tr. at 6-7.) In finding Rule 12 applicable, the trial magistrate seemingly overlooked the fact that Rule 11 has a built-in enforcement mechanism that does not contemplate the issuance of subpoenas. Where, as here, "a party discovers additional material previously requested or ordered which is subject to discovery or inspection . . . , the party shall promptly notify the other party's attorney or the court of the existence of the additional material." When these materials are not forthcoming, the judges and magistrates of this Court may order the non-compliant party "to permit the discovery or inspection of [the] materials not previously disclosed . . . ."

Thus, when it became clear that the Warwick Police Department had no intention of complying fully with his specific and detailed discovery requests, counsel for Appellant did <u>all</u> that he was required to do under the provisions of Rule 11: he notified the Warwick Police Department that material and highly probative evidence had been withheld and, when that evidence was not made available to him for the preparation of his defense, obtained an explicit order from this Court directing the custodian of the videotape to allow Appellant to inspect it by a date certain. Once counsel for Appellant had obtained an order of this Court compelling the production of the videotape, his obligation under our Rules had been completely discharged. The burden was now squarely on the Warwick Police Department to produce the videotape and emphatically <u>not</u> on counsel for Appellant to seek a subpoena pursuant to Rule 12. Accordingly, as I believe that the trial magistrate's reliance on Rule 12 is misplaced, I cannot subscribe to the majority Decision. It is interesting that the majority opinion is silent on this point. I,

on the other hand, believe that this misapplication of Rule 12 alone would be sufficient grounds to dismiss the case based on the misapplication of law and procedure.

Additionally, while I am mindful that dismissal of a case based on non-compliance with a discovery order is an "extreme" and "drastic" remedy for the court to employ, I am also mindful that dismissal has been found appropriate on facts far less egregious than those before this Panel. In support of its conclusion that the trial magistrate did not abuse his discretion when he refused to dismiss the charged violation of § 31-27-2.1 based on the Warwick Police Department's contumacious conduct, the majority relied on our Supreme Court's decisions in the civil cases of Mumford v. Lewiss, 681 A.2d 914 (R.I. 1996), Woloohojian v. Bogosian, 828 A.2d 522 (R.I. 2003), and Goulet v. OfficeMax, Inc., 843 A.2d 494 (R.I. 2004). However, a review of these cases reveals that the majority's reliance was misplaced.

For example, in Woloohojian v. Bogosian, 828 A.2d 522 (R.I. 2003), our Supreme Court held that dismissal pursuant to Rule 37 of the Superior Court Rules of Civil Procedure was an appropriate sanction for the trial justice to impose because "[t]he defendant repeatedly refused to avail herself of various opportunities to comply with discovery requests. The defendant failed to respond to three sets of interrogatories, did not produce documents requested, and ignored a court order entered upon plaintiff's motion to compel." Id. In concluding that "the defendant's persistent refusal to provide the requested information despite numerous opportunities to do so warranted a default," the Woloohojian Court emphasized that "there is often a point in litigation when a party is entitled to a dismissal of an action in which the opposing party's failure to comply with

discovery requests and related court orders causes inordinate delay, expense, and frustration for all concerned." Id. at 524.

Like in Woloohojian—and all of the civil cases cited by the majority—there came a point in the tortured travel of this case when the Warwick Police Department's failure to comply with Appellant's numerous discovery requests and an order of this Court had risen to the level of "persistent refusal, defiance [and] bad faith." Id. at 523. Over the course of nineteen months, the Warwick Police Department had had numerous opportunities to produce the videotape depicting Appellant on the night of her arrest. That the videotape was produced on the date of Appellant's trial and only after the State had presented its case-in-chief caused counsel for Appellant much more than "inordinate delay, expense, and frustration . . . ." Id. at 524. It effectively precluded counsel from incorporating this material and exculpatory videotape into his defense as he prepared for trial.

To conclude the review of the civil cases cited by the majority, it is interesting to note that in those cases the remedy of dismissal was upheld under less egregious circumstances than those present in this case. The majority's decision to cite the criminal cases of State v. Quintal, 479 A.2d 117 (R.I. 1984) and State v. Musumeci, 717 A.2d 56 (R.I. 1998) for the "dismissal is a drastic remedy" proposition is perhaps misplaced, but welcome. It is axiomatic that dismissal of a criminal charge based on non-compliance with a discovery order is an even more "drastic" remedy for the court to impose than dismissal of a civil case. However, in these criminal cases—most notably, Quintal—our Supreme Court concluded that dismissal pursuant to Rule 16 of the Superior Court Rules of Criminal Procedure was an appropriate sanction based on non-compliance

substantially similar to the conduct of the Warwick Police Department in the present case. Where "a previous order compelling discovery was not complied with by the State . . . and since the records requested by defense counsel were never produced [prior to trial]," the Quintal Court was satisfied that the granting of a continuance was not—as the trial magistrate suggested in the present case—an appropriate remedy for such non-compliance. The Quintal Court stressed that "a continuance was certainly not the proper sanction for the State's non-compliance." Id. at 119 (emphasis added.) Further, where, as here, there is a suggestion by defense counsel that the requested evidence "may well have contained exculpatory evidence," our Supreme Court has concluded that in "the interests of justice, and the interests of the defendant in particular, . . . exclusion of any non-disclosed [evidence]" is "not call[ed] for." Id.

Uniting our Supreme Court's Rule 37 and Rule 16 jurisprudence is the recognition that rules of court, if they are to be meaningful, must be consistently enforced. Flagrant violations of those rules must not go unaddressed. On facts substantially similar to those before this Panel, our Supreme Court has affirmed the use of the "drastic" remedy of dismissal in order to safeguard the integrity of the Superior Court's Rules of Civil and Criminal Procedure. Why, then, are the Traffic Tribunal Rules of Procedure not entitled to similar dignity and respect? If the Warwick Police Department's persistent disregard for the Traffic Tribunal Rules of Procedure and an order of this Court enforcing those Rules does not require dismissal of the charged violation, what abuses possibly could? While the two members of the majority readily stated on the record that they would have dismissed the charged violation of § 31-27-2.1 at trial in order to maintain the integrity of our Rules and to punish the Warwick Police

Department's flagrant disregard for an order of this Court, both refused to "substitute their judgment" in order to correct what amounts to a nullification of our Rules.

I would note that neither the period of time when this matter was being reviewed in Superior Court, nor the fact that according to the majority there was only "one valid request" (not withstanding the multiple formal requests, including the one that was memorialized as an order of the Court) were complied with in any way mitigates or excuses the travel above described nor warrants the defacto abrogation of our rules of procedure and their proper application.

The minority remains unpersuaded as I believe the Appellate Court should be by the cases cited in its opinion, beginning with its reliance on State of Rhode Island vs. Brian Priest CA-T08-0048, a Traffic Tribunal case which has been the subject of two corrected opinions in the District Court either one of which is clear to this Magistrate.

Additionally, the majority's reference of Allen Sampson et al vs. Marshall Brass Co. 661 A.2d 971 (R.I. 1995) is completely without meaningful application in this matter as it refers to the "spoliation" of evidence which is not suggested here. Rather, the majority concedes there is no spoliation and then makes the bare assertion that "the delay was neither willful, intentional, or the result of negligence on the part of the Warwick Police Department." This bare assertion does not substitute for the reasoning in that case nor is it applicable to the facts present in this matter where I believe the delay was willful, intentional or the result of negligence or perhaps all three on the part of the Warwick Police Department.

Another bare assertion in the minority's opinion which remains unsupported by facts, is that "here unlike the plaintiff in Goulet (referring to the matter of Goulet v.

OfficeMax, Inc., 843 A.2d 494 (R.I. 2004), the plaintiff's failure to produce the videotape was not a "persistent" one nor was the noncompliance "'willful and contentious. This is the chief factual disagreement between the majority and the minority. The minority believes that the failure to produce the videotape was persistent in that the noncompliance was "willful and contentious."

With regard to the flurry of footnotes contained at the bottom of Page 22 of the majority opinion, beginning with the majority's reliance on Flanagan v. Blair, 882 A.2d 569 (R.I. 2005), I cannot find a relevant nexus between the holdings of those cases and the facts at hand. For instance, unlike the findings in Flanagan, I believe there was "defiance" on the part of the Warwick Police Department. Also, contrary to the finding in Lett v. Providence Journal Co., 798 A.2d 355 (R.I. 2002) there was not even an allegation of fraud, the presence of which would at least make this case relevant to the set of circumstances present before the Court; nor was there any allegation of misrepresentations as was present in Burns v. Connecticut Mutual Life Ins. Co., 743 A. 2d 566 (R.I. 2000) cited by the majority. Senn v. Surgidev Corp., 641 A.2d 1311 (R.I. 1994) refers to an inadequate response to discovery, not a complete and willful disregard of the Court order. I believe the Fournier case, Fournier v. Town of Coventry, 615 A.2d 118, 119 (R.I. 1992) speaks to the point of the minority opinion through its reference to a "plethora of evidence demonstrating that the defendant [grossly] violated the spirit of discovery with unequivocal bad faith." The minority maintains that the Fournier standard is met and exceeded by the present facts.

Additionally, there is a complete factual misrepresentation contained after the footnote pertaining to Providence Gas Co. v. Biltmore Hotel Operating Co., 119 R.I. 108,

376 A.2d 334 (1977) specifically that "here, there was only one motion to compel that the defendant ignored for six days and then subsequently, complied with nineteen months later when the case was re-tried." A review of the record in this case will reveal that that is not true. There was a period of time when the case had been remanded back from the Supreme Court and was scheduled to proceed to trial. One order of the Court and several requests for compliance were pending during this period which was far greater than six days (many months, in fact) and the compliance occurred only on the actual day of trial after the presentation of the State's case

With regard to the cases cited in the footnotes contained on Page 26, I would note that they are all criminal cases which would have no application to the case at hand since the conduct that would remain unaddressed by a dismissal is far more egregious than that present in a civil context.

Cases cited in the footnote on Page 27, State v. Whiche, 518 A.2d 907, 910 (R.I. 1986), State v. Boucher, 542 A.2d 236 (R.I. 1988), and State v. Concannon, 457 A.2d 1350, 1353 (R.I. 1983) all refer to the consequences of surprise, an allegation that was not raised by either side in this case. The issue here is rather willful noncompliance with the Court order. Thus, the analysis on State v. Powers, 526 A.2d 489 (R.I. 1987) relied on by the majority would be equally inapplicable to this case.

The minority stated on the record during appellate argument its belief that the behavior of the Warwick Police Department rises above the contemptuous, beyond the objectionable, and into the realm of the ridiculous. Thus, I respectfully suggest that it is the duty of this Appeals Panel to "substitute its judgment" for that of the trial judge or magistrate where, as here, a decision of that judge or magistrate is characterized by a

clear abuse of discretion. If the trial magistrate's discretion is held not to have been abused on these facts, I cannot contemplate circumstances more egregious that would constitute such an abuse.

Accordingly, based on the foregoing analysis of the majority's decision and for reasons of both policy and precedent, as well as my desire to preserve some meaning to the procedural rules of this Tribunal, I respectfully dissent.

ENTERED:

Magistrate William T. Noonan

DATE: 12. 9 . 09