RECENT DECISIONS

PRESUMPTION OF INTOXICATION—VT. STAT. ANN. tit. 23, § 1204(a)(3) CREATES A PERMISSIVE INFERENCE AND NOT A REBUTTABLE PRESUMPTION AS PREVIOUSLY INTERPRETED—*State v. Dacey*, 138 Vt. 491, 418 A.2d 856 (1980).

STATEMENT OF THE CASE

In *State v. Dacey*[1] the defendant appealed his conviction under title 23, section 1204(a)(3) of Vermont Statutes Annotated.[2] The statute provides that a person operating a vehicle on a highway with .10 percent or more by weight of alcohol in his blood is presumed to have been under the influence of intoxicating liquor.[3]

On the morning of October 1, 1979 Dacey's tractor-trailer ran off a Vermont highway. Within fifteen minutes of the accident a state police officer arrived on the scene, and after observing the defendant's behavior, processed him for driving while under the influence of alcohol. Breath tests revealed the defendant had a blood-alcohol content of .23 percent by weight at the time of testing. At trial the defendant contended that he had nothing to drink before the accident, and only afterwards had accepted a couple of drinks from a passing motorist. On appeal the defendant challenged the jury instructions on three grounds.[4] The Vermont Su-

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1. 138 Vt. 491, 418 A.2d 856 (1980), *motion for reargument denied per curiam*, 138 Vt. 497, 418 A.2d 859 (1980).

2. VT. STAT. ANN. tit. 23, § 1204(a)(3) (1978).

3. A person is deemed under the influence of alcohol when the person's reflexes and judgment have been impaired so the person cannot operate a vehicle in the manner of a prudent person. A finding of guilty may be based upon a chemical test determining the defendant's blood-alcohol content and expert testimony relating the blood-alcohol tests to the time of operation. Other evidence is admissible to prove the elements of time and degree of intoxication. *See generally* C. MCCORMICK, MCCORMICK'S HANDBOOK ON THE LAW OF EVIDENCE § 209 (2d ed. 1972); Taylor, *Blood-Alcohol Presumptions: Guilty Until Proven Innocent*, 1978 CAL. L.J. 170, 170.

4. The defendant's three arguments were: (a) the use of the presumption (that the defendant was intoxicated both at the time of the accident and at the time of the test) was constitutionally impermissible because the facts were too remote; (b) once evidence is offered to rebut the presumed fact, the trial judge must not instruct the jury on the presump-

preme Court, however, found analysis of the defendant's arguments unnecessary because the statutory term "presumption" now gives rise to a permissive inference, not a mandatory presumption.[5]

To effect its decision, the supreme court distinguished the characteristics of mandatory presumptions and permissive inferences, and outlined the application of the new statutory interpretation. Two significant questions are raised by the manner of the court's analysis: first, whether the *Dacey* decision established a new statutory interpretation of the term "presumption;" and second, whether the rule of *Dacey* significantly changes the duties of the parties at trial.

I. Vermont's Common Law of Presumptions

Generally, the term presumption means that when a designated fact is proved, existence of another fact may be assumed by the trier of fact.[6] As a legal device, the presumption can (1) shift the burden of producing evidence or the burden of persuasion, (2) control the permissibility of inferences, or (3) permit the trial judge to make directed findings for one of the parties.[7] A presumption reduces the prosecution's burden of proof[8] and serves the interests of "economy and convenience in the administration of criminal justice."[9]

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tion; and, (c) the presumption shifts the burden of persuasion to the defendant, in violation of his due process rights. Brief for Appellant at 5, 8, and 13, State v. Dacey, 138 Vt. 491, 418 A.2d 859 (1980).

5. 138 Vt. at 494, 418 A.2d at 858.

6. *See* Hecht & Pinzler, *Rebutting Presumptions: Order Out of Chaos*, 58 B.U.L. Rev. 528, 528 (1978).

7. *Id.* at 529.

8. The term "burden of proof" has two components: (a) the burden of producing evidence and (b) the burden of persuasion. Presumptions shift the burden of one or both of these components for many different policy reasons. Due to the relationships between burdens of proof and presumptions, presumptions may potentially have a great impact on the parties during litigation. *See generally* C. McCormick, McCormick's Handbook on the Law of Evidence §§ 336, 343, 344 (2d ed. 1972); G. Lilly, The Law of Evidence §§ 16, 18, 19 (1978).

9. Shelley, *Proof of Extreme Emotional Disturbance in Oregon Murder Prosecutions: A Constitutional Analysis*, 1979 Or. L. Rev. 98, 99. *See* State v. Stevens, 137 Vt. 473, 481, 408 A.2d 622, 626 (1979) (permitting the trier of fact to infer intoxication from the defendant's blood-alcohol concentration obviates the need for expert testimony); C. McCormick,

In *Dacey*, the court recognized two types of presumptions,[10] mandatory presumptions and permissive inferences.[11] A mandatory presumption shifts the burden of persuasion[12] or of producing evidence to the party the presumption opposes; if the party fails to meet its burden, the trier of fact must accept the presumed fact.[13] A permissive inference, however, shifts no burdens and merely allows the trier of fact the discretion to find the inferred fact.[14] Although often given different labels, this general definition of presumptions has been frequently applied.[15]

Originally the Vermont rule of presumptions was explained in *Tyrrell v. Prudential Insurance Company*.[16] This rule shifts to the defendant the burden of producing evidence rebutting the presumption. If the defendant's evidence fairly and reasonably tends to show the real fact is not as presumed, the judge is not to instruct the jury on the presumption. If, however, the trial judge finds the defendant has not sufficiently met his burden, then an instruction on the presumption is proper.[17] The decision of *State*

McCormick's Handbook on the Law of Evidence § 209 (2d ed. 1972).

10. The Vermont courts have stated that presumptions take many forms to perform a variety of functions in a variety of situations. Gardner v. Dep't of Social Welfare, 135 Vt. 504, 507, 380 A.2d 87, 89 (1977). *See* Morgan, *Instructing the Jury Upon Presumptions and Burden of Proof*, 47 Harv. L. Rev. 59, 77 (1933).

11. 138 Vt. at 494, 418 A.2d at 858.

12. In criminal cases the burden of persuasion may never be shifted to the defendant. *See* Sandstrom v. Montana, 442 U.S. 510, 524 (1979); Mullaney v. Wilbur, 421 U.S. 684, 701 (1975); State v. Gokey, 136 Vt. 33, 38, 383 A.2d 601, 604 (1978).

13. 138 Vt. at 494-95, 418 A.2d at 858. *See* Ulster County Court v. Allen, 442 U.S. 140, 157-58 (1979).

14. 138 Vt. at 495, 418 A.2d at 858. *See* Ulster County Court v. Allen, 442 U.S. 140, 157-58 (1979).

15. *See* State v. Gokey, 136 Vt. 33, 37-38, 383 A.2d 601, 603 (1978) (rebuttable presumptions); Gardner v. Dep't of Social Welfare, 135 Vt. 504, 507, 380 A.2d 87, 89 (locative presumptions); Larmay v. Van Etten, 129 Vt. 368, 371, 278 A.2d 736, 739 (1971) (legal presumptions); Tyrrell v. Prudential Ins. Co., 109 Vt. 6, 23, 192 A. 184, 192 (1937) (disputable presumptions).

16. 109 Vt. 6, 192 A. 184 (1937).

17. *See* Tyrrell v. Prudential Ins. Co., 109 Vt. at 23-24, 192 A. at 192. *See, e.g.*, State v. Gokey, 136 Vt. 33, 37-38, 383 A.2d 601, 603 (1978); Lambert v. Equinox House, Inc., 126 Vt. 229, 232, 227 A.2d 403, 405 (1967); Smith v. Grove, 119 Vt. 106, 111-12, 119 A.2d 880, 883-84 (1956); *In re* Bibens, 115 Vt. 383, 390, 61 A.2d 598, 602-03 (1948); State v. Lizotte, 109 Vt. 378, 387, 197 A. 396, 400 (1938); *but see In re* Estate of Jones, 110 Vt. 438, 442-45, 8 A.2d 631, 633-35 (1939); Sheldon v. Wright, 80 Vt. 298, 319-20, 67 A. 807, 814-15 (1907).

v. Brown[18] applied the *Tyrrell* rule to cases of driving while under the influence of intoxicating liquor.[19]

In later cases, the *Tyrrell* rule was not strictly applied. The court held in *State v. Bessette*[20] that the statute created a "rebuttable presumption of *guilt.*"[21] The *Bessette* court described the statutory presumption as a "true legal presumption in the nature of evidence and . . . is to be weighed as such."[22] Although the court reiterated the *Tyrrell* rule, it held that the truth of the presumption was a question for the jury—not for the trial or appellate courts.[23] The *Tyrrell* rule had prohibited the trial judge from instructing the jury on the presumption when rebutting evidence is introduced, but in *Bessette* such instructions were in fact given.[24] The court's action in *Bessette* implied that instructing the jury on the presumption was permissible even when rebutting evidence was introduced.[25]

Later, in *State v. Adams,*[26] the Vermont Supreme Court held that blood-alcohol evidence created a presumption, *not of guilt or innocence,* but of one fact at issue, intoxication.[27] As in *Bessette,* the *Adams* court shifted the burden of producing evidence to the defendant once the prosecution produced evidence of his blood-alcohol content.[28] The supreme court found it permissible to instruct the jury on its discretion to *accept or reject* the presumption in

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18. 125 Vt. 58, 209 A.2d 324 (1965).

19. *Id.* at 63-64, 209 A.2d at 328.

20. 130 Vt. 438, 296 A.2d 179 (1972).

21. *Id.* at 442, 296 A.2d at 181 (emphasis added).

22. *Id.*

23. *Id.* at 442-43, 296 A.2d at 181-82.

24. *Id.* at 441, 296 A.2d at 181.

25. The court never expressly stated why the jury should always be instructed on the presumption. Theoretically, the instruction will result in the jury giving the presumed fact greater weight during deliberation. *See generally* C. McCormick, McCormick's Handbook on the Law of Evidence § 345(a) (2d ed. 1972); Hecht & Pinzler, *Rebutting Presumptions: A Constitutional Analysis,* 58 B.U.L. Rev. 527, 528 (1978); Morgan, *Instructing the Jury Upon Presumptions and Burden of Proof,* 47 Harv. L. Rev. 59, 71 (1933).

26. 131 Vt. 413, 306 A.2d 92 (1973).

27. *Id.* at 419, 306 A.2d at 96.

28. *Id.*

light of all the evidence.[29] Significantly, the *Adams* decision narrowed the potential effect of the presumption by allowing the jury to assume only one element of the crime—not the crime itself.[30] Thus *Bessette* and *Adams* mark evolutionary steps in the development of the statutory presumption: first, by limiting the mandatory nature of presumptions through greater jury discretion; and second, by expanding the situations where a jury instruction on the presumption is permissible.[31]

II. Concerns of the *Dacey* Court

If one assumes the decisions prior to *Dacey* interpreted the statutory presumption as a mandatory presumption,[32] one will better understand why the *Dacey* decision articulated concern with the characteristics of mandatory presumptions. The court's opinion displays uneasiness with the concept of imposing upon the defendant the burden of producing evidence.[33] Echoing earlier opinions,[34] the supreme court also expressed concern regarding the "disappearing aspect"[35] of presumptions under *Tyrrell*.[36] If the legislature created a standard for the effect of blood-alcohol evidence as proof at trial, the court reasoned that to allow "some small quantum of evidence" to preclude a jury instruction on the presumption would frustrate that legislative standard.[37] Finally, the court admits that the legislative standard needs to be rescued

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29. *Id.* at 420, 306 A.2d at 96.

30. *Id.* at 419, 306 A.2d at 96.

31. *See* State v. Stevens, 137 Vt. 472, 481, 408 A.2d 622, 626 (1979), where the court mentions "permissible inferences" in dictum. This phrase is evidence of the court's continuing development of the presumption as a permissive inference.

32. The Vermont Supreme Court had not used the term "mandatory presumption" to describe the presumption created by Vt. Stat. Ann. tit. 23, § 1204(a)(3) (1978), until its decision in *Dacey*. *See* note 15 *supra* for further evidence of the variety of language used by the court to describe the statutory presumption.

33. 138 Vt. 491, 495, 418 A.2d 856, 858 (1980).

34. *See, e.g.*, State v. Bessette, 130 Vt. 438, 442, 296 A.2d 179, 181 (1972), where the court discusses the weight to be given to presumptions.

35. The term "disappearing aspect" signifies the rule that the trial judge cannot instruct the jury on the presumption once the defendant has introduced some quantum of rebutting evidence. See text accompanying notes 15-17 *supra*.

36. 138 Vt. at 495-96, 418 A.2d at 858-59.

37. *Id.*

from the " 'welter of loose language and discordant decisions' engendered by the niceties of burden-shifting presumptions."[38]

The language of the *Dacey* decision appears to change significantly the prior interpretations of the statutory presumption by overruling *Adams, Bessette,* and *Brown.*[39] Yet the similarities between *Adams* and *Dacey* suggest the court may not have significantly changed the rule,[40] but merely gave the statutory interpretation a new label—permissive inference. An examination of some recent United States Supreme Court cases reveals further reasons for the apparent change in Vermont law.

III. Guidance from the United States Supreme Court

In analyzing the problem of presumptions, the United States Supreme Court has been concerned with the parties' procedural and substantive rights under the Constitution. The Court has stated that presumptions may substantially and unconstitutionally reduce the prosecution's burden of proof.[41] As a consequence of shifting the burden of producing evidence, the presumption may (1) diminish the factfinder's responsibilities at trial, or (2) diminish the prosecutor's duty to prove its case beyond a reasonable doubt.[42] Unless each element of the crime is demonstrated beyond a reasonable doubt, the defendant is to be presumed innocent and acquitted.[43]

Conceptually, the inferential nature of presumptions concerned the Court where the presumption *requires* the jury to find

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38. *Id.* (citing Tyrrell v. Prudential Ins. Co., 109 Vt. 6, 22, 192 A. 184, 191 (1937)).

39. 138 Vt. at 496, 418 A.2d at 858-59.

40. What may be the most apparent difference between *Adams* and *Dacey* is that *Dacey* does not shift the burden of producing rebutting evidence. *Id.*, 418 A.2d at 859. Under *Adams* the defendant is not in fact compelled to produce rebutting evidence, because the jury has the discretion to reject the presumption, regardless of the absence of rebutting evidence.

41. Sandstrom v. Montana, 442 U.S. 510, 524 (1979); Ulster County Court v. Allen, 442 U.S. 140, 156 (1979); *In re* Winship, 397 U.S. 358, 364 (1970); Leary v. United States, 395 U.S. 6, 37 (1969).

42. The Supreme Court has explained in dictum that burden-shifting presumptions are one type of mandatory presumption. Ulster County Court v. Allen, 442 U.S. at 157-58, n.16.

43. *In re* Winship, 397 U.S. 358, 364 (1970).

the assumed fact merely because the defendant is unwilling or unable to produce sufficient rebutting evidence.[44] Consequently, presumptions have the appearance of coercing defendants to present evidence contrary to their fifth amendment right to remain silent. The Court has specifically held that such apparent pressure does not violate the defendant's fifth amendment right.[45] While not unconstitutional per se, mandatory presumptions must be applied with judicial care and scrutiny.[46] In *Sandstrom v. Montana*[47] the Supreme Court outlined its mode of analysis for determining the constitutional validity of presumptions:

> [T]he threshold inquiry in ascertaining the constitutional analysis . . . is to determine the nature of the presumption it describes. That determination requires careful attention to the words actually spoken to the jury . . . for whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction.[48]

To determine whether a set of jury instructions meets the test developed in *Sandstrom*, a court must find whether the "jurors could reasonably have concluded that they were directed to find against the defendant"[49] on the factual element presumed. If the court found the jurors could have concluded their verdict was directed, then the defendant's constitutional right was violated.

The Supreme Court has indicated a preference for permissive inferences and explained their advantages in *Ulster County Court v. Allen*.[50] Permissive inferences grant the trier of fact discretion to evaluate the inference in light of the evidence, reducing the need for judicial scrutiny.[51] More importantly, only where "there is no

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44. Sandstrom v. Montana, 442 U.S. at 524; Ulster County Court v. Allen, 442 U.S. at 157-58.

45. Barnes v. United States, 412 U.S. 837, 846-47 (1973); Yee Hem v. United States, 268 U.S. 178, 185 (1925).

46. Leary v. United States, 395 U.S. 6, 37 (1969).

47. 442 U.S. 510 (1979).

48. *Id.* at 514 (citations omitted).

49. *Id.* at 523.

50. 442 U.S. 140 (1979).

51. *Id.* at 157.

rational way the trier [of fact] could make the connection permitted by the inference" is the use of the permissive inference reversible error.[52] The purposes of efficiency are served because placing the inference before the factfinder is a simple matter of offering proof of the basic fact.[53] Impliedly, the Court's opinion finds the use of permissive inferences advantageous since it does not unnecessarily shift the burden of producing evidence.[54] Nothing under the rule of permissive inferences precludes the trial judge from instructing the jury on the inference, thus eliminating disputes of whether any jury instruction on the presumption should have been given.[55] Implicitly, the Supreme Court encouraged other courts to adopt the rule of permissive inferences.[56]

By redefining section 1204(a)(3) as creating a permissive inference, the Vermont Supreme Court has apparently attempted to avoid future constitutional challenges. The *Dacey* decision recognized that permissive inferences do not shift evidentiary burdens,[57] which the United States Supreme Court stated was a characteristic of mandatory presumptions.[58] In cases using permissive inferences, judicial scrutiny of jury instructions to protect the defendant's due

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52. *Id.* Two standards exist for determining the constitutionality of presumptions. First, the "rational connection" test permits the use of presumptions where a logical connection exists between the proved and presumed facts. A more stringent standard, the "beyond a reasonable doubt" test, applies to presumptions used in criminal cases. The latter standard requires more than just a logical connection; it requires that the logical relationship between the proved fact and the presumed fact be founded on proof beyond a reasonable doubt. *See also In re* Winship, 397 U.S. 358, 364 (1970); Leary v. United States, 393 U.S. 6, 36-37 (1969).

53. *See* Ulster County Court v. Allen, 442 U.S. at 157-58.

54. *Id.* at 157.

55. *Id.*

56. The *Ulster County Court* decision uses the term "permissive inference" and "presumption" interchangeably, suggesting the theoretical closeness of the terms. If, however, permissive inferences are distinct from presumptions, then the question arises whether the Vermont court has authority to depart radically from the intentions of the legislature through creative statutory interpretation. This question goes beyond the scope of this comment. *See generally* Turner v. United States, 396 U.S. 398, 431-32 (1970) (Black, J., dissenting); Leary v. United States, 395 U.S. 6, 37 (1969). *See also* State v. Stevens, 137 Vt. 473, 481-82, 408 A.2d 622, 627 (1979); Cross v. Passumpsic Fibre Leather Co., 90 Vt. 397, 407, 98 A. 1010, 1014-15 (1916); J.H. WIGMORE, WIGMORE ON EVIDENCE § 1356 (3d ed. 1972).

57. 138 Vt. at 495, 418 A.2d at 859.

58. Ulster County Court v. Allen, 442 U.S. at 157-58, n.16.

process rights will be less strict, and less necessary.[59] Furthermore, the state's legislative standard for blood-alcohol test evidence will be maintained since the judge will instruct the jury on the permissive inference created by the statute.[60] The *Dacey* rule also eliminates the problem of judicial discretion inherent in the *Tyrrell* rule by requiring jury instructions on the inference.[61]

Although the *Dacey* decision focused on statutory interpretation, the court also indicated that one element of the crime was not sufficiently addressed in the lower court.[62] The United States Supreme Court requires that there be a rational connection between the proved fact—blood-alcohol level—and the presumed fact—intoxication.[63] To prevail at trial, the prosecution must also relate the blood-alcohol tests back to the time of operation of the vehicle, possibly through the use of expert testimony.[64] The *Dacey* opinion clarified the state's burden of proof by reminding the prosecutor that the time of intoxication must be proved, as well as the defendant's intoxication.

Conclusion

Considering the pre-*Dacey* statutory interpretation of presumption, it now appears that much of the uncertainty of the old rule vanishes, but not its essential characteristics.[65] The factfinder will be instructed on the presumption and not be required to ac-

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59. *Id.* at 157-58.

60. As a guideline for trial courts in applying the *Dacey* holding, the Vermont Supreme Court cited other courts that had already used the "new" presumption as recommended in *Dacey*: State v. Hansen, 203 N.W.2d 216, 219 (Iowa 1972); State v. Lebreton, 364 A.2d 645, 646-48 (Me. 1976); State v. Cooke, 270 N.C. 644, 650, 155 S.E.2d 165, 169 (1967); Commonwealth v. Di Francesco, 458 Pa. 188, 200, 329 A.2d 204, 211 (1974).

61. Tyrrell v. Prudential Ins. Co., 109 Vt. 6, 23-24, 192 A. 184, 192 (1937). *See* note 60 *supra*, for examples of how and when the jury should receive an instruction on the statutory presumption.

62. 138 Vt. at 497, 418 A.2d at 859.

63. Tot v. United States, 319 U.S. 463, 467 (1943).

64. 138 Vt. at 497, 418 A.2d at 859. In a per curiam decision, the court found blood-alcohol test evidence was admissible even though no expert testimony was introduced to relate the test back to the time of the operation of the vehicle. State v. Dacey, 138 Vt. 491, 418 A.2d 856 (1979), *motion for reargument denied per curiam*, 138 Vt. 497, 418 A.2d 859, 859-60 (1979).

65. State v. White, No. 141-79 (Vt., filed Sept. 8, 1980).

cept the presumed fact. Additionally, the defendant should feel no greater pressure to introduce rebutting evidence. The Vermont court's earlier holdings described the statute as creating a mandatory, rebuttable, disputable, or legal presumption. Under *Dacey*, however, the presumption has a more specific label—permissive inference. With consistent application of the requirements of permissive inferences, prosecutions under the statute should be more easily administered by the courts.

Lon T. McClintock

AGGRAVATED ASSAULT—AUTHENTICATING TAPE RECORDINGS, CUSTODIAL INTERROGATION, AND PSYCHIATRIST-PATIENT PRIVILEGE—*State v. Mecier*, 138 Vt. 149, 412 A.2d 291 (1980).

STATEMENT OF THE CASE

Richard Mecier was arrested and charged with two counts of aggravated assault[1] after shooting his estranged wife and their daughter.[2] He was convicted at a jury trial on both counts, and appealed, claiming several errors by the trial court.[3] The Vermont Supreme Court affirmed the conviction, denying defendant's claims on each error alleged.[4]

At the trial Mecier did not deny the shootings, but relied instead on the insanity defense.[5] The facts were established as follows:[6] After the shooting, which occurred at his daughter's apartment, Mecier returned to his home and barricaded himself inside. A Rutland County deputy sheriff called him on the telephone to

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1. VT. STAT. ANN. tit. 13, § 1024(a) (1974).

2. State v. Mecier, 138 Vt. 149, 151, 412 A.2d 291, 293 (1980).

3. Printed case of the Appellant at 14, State v. Mecier, 138 Vt. 149, 412 A.2d 291 (1980).

4. *Id.* at 158, 412 A.2d at 297.

5. *Id.* at 151, 412 A.2d at 293. Vermont's insanity defense is codified at VT. STAT. ANN. tit. 13, § 4801 (1974).

6. 138 Vt. at 152, 412 A.2d at 293.

try to convince him to surrender. The deputy sheriff recorded this conversation and others between Mecier and his relatives. When efforts to convince the defendant to surrender failed, the police used tear gas to drive him out and arrested him.

I. The Decision

The court ruled on eight claims of error raised by the defendant.[7] This discussion will focus on the three most important issues addressed in the opinion: the standard for determining the authenticity of the tape recordings, the scope of custodial interrogation, and the applicability of the psychiatrist-patient privilege to defense psychiatrists.

A. *Authenticity of the Tapes*

Defendant appealed the admission of the tape recordings of his phone conversations, claiming that the state had not laid the proper foundation for their use as evidence.[8] In particular, the defendant claimed that the state failed to establish a complete chain of custody for the tapes,[9] and that such a chain is necessary to demonstrate sufficient evidence of authenticity to admit tape recordings.[10] This claim raised a significant question: should noncompliance with technical requirements for a complete chain of custody, in the absence of tampering or fraud, be sufficient grounds for suppression of tape recordings? The majority of the court formed one answer to this question; in his concurrence, Justice Hill formed another.

The *Mecier* court chose to adopt a flexible standard after analysis of its prior decisions in driving-while-intoxicated cases.[11] In

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7. State v. Mecier, 138 Vt. 149, 412 A.2d 291. (The court addressed Mecier's claims in serial fashion.)

8. 138 Vt. at 152, 412 A.2d at 293.

9. The usual form for establishing a chain of custody consists of a statement that "the witness attended the recording, that he retained custody or caused safekeeping of the . . . tape recording until trial time, and that it actually reproduces sounds of the original event." Conrad, *Magnetic Recordings in the Courts*, 40 Va. L. Rev. 23, 25 (1954). *See generally* 2 J. Wigmore, Evidence §§ 411-412, 417 (3rd ed. 1940).

10. 138 Vt. at 152, 412 A.2d at 293.

11. 138 Vt. at 152-53, 412 A.2d at 293-94 (citing State v. Burack, 133 Vt. 482, 346 A.2d

these cases the defendants challenged the admissibility of the results of alcohol tests on the grounds that the prosecution failed to establish the authenticity of the samples through a complete chain of custody.[12] In each case the court held that, in the absence of actual evidence of tampering or inauthenticity, the prosecution met its burden by introducing evidence substantial enough for the jury to justifiably rely on it.[13] To the extent that the evidence did not establish the authenticity to an absolute certainty, defects in proof were factors to be considered in the weight accorded the evidence, not in determining its admissibility.[14] The *Mecier* court reasoned by analogy that, in the absence of contrary evidence, tape recordings could be admitted if they were identified and authenticated to a reasonable certainty.[15]

The position adopted by the majority in *Mecier* mirrors the holding in *United States v. Fuentes*.[16] The facts in *Fuentes* were similar to those in *Mecier* in that the defendant did not introduce evidence to challenge directly the authenticity of the tape recordings.[17] In *Fuentes*, the Court of Appeals for the Second Circuit rejected the use of rigid technical requirements for chain of custody in favor of a more flexible standard.[18] Under the *Fuentes* formulation, the prosecution must produce "clear and convincing evidence

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192 (1975) (breath sample); State v. Ross, 130 Vt. 235, 290 A.2d 38 (1972) (urine sample); State v. Magoon, 128 Vt. 363, 264 A.2d 779 (1970) (breath sample)). *See also* State v. Auger, 124 Vt. 50, 196 A.2d 562 (1963) (blood sample), which the *Mecier* court did not cite but which formed the basis for the holdings in the intoxication cases. In all of these cases, the defendants were charged with driving while intoxicated, and the samples were analyzed for alcohol content. Apparently, there was no direct precedent in Vermont law for the authentication of magnetic tape recordings.

12. State v. Burack, 133 Vt. 482, 483, 346 A.2d 192, 193 (1975); State v. Ross, 130 Vt. 235, 240, 290 A.2d 38, 40 (1972); State v. Magoon, 128 Vt. 363, 364, 264 A.2d 779, 780 (1970).

13. State v. Burack, 133 Vt. 482, 484, 346 A.2d 192, 194 (1975); State v. Ross, 130 Vt. 235, 241, 290 A.2d 38, 41 (1972); State v. Magoon, 128 Vt. 363, 366-67, 264 A.2d 779, 781 (1970).

14. State v. Burack, 133 Vt. 482, 484, 346 A.2d 192, 194 (1975); State v. Ross, 130 Vt. 235, 241, 290 A.2d 38, 41 (1972); State v. Magoon, 128 Vt. 363, 366-67, 264 A.2d 779, 781 (1970).

15. 138 Vt. at 153, 412 A.2d at 294.

16. 563 F.2d 527, 532 (2d Cir. 1977).

17. *Id.*; 138 Vt. at 152, 412 A.2d at 293.

18. 463 F.2d at 532.

of the authenticity" of the tape recordings to admit them into evidence.[19]

In his concurring opinion in *Mecier*, Justice Hill relied[20] on the reasoning in *United States v. McKeever*.[21] The *McKeever* court stressed the necessity of "[s]afeguards against fraud or other abuse" if the benefits of new technologies such as sound recording were to be realized.[22] To this end, and after reviewing relevant authorities, the *McKeever* court developed a seven-step process for laying the foundation for admission of tape recordings:

> (1) That the device was capable of taking the conversation now offered into evidence.
> (2) That the operator of the device was competent to operate the device.
> (3) That the recording is authentic and correct.
> (4) That changes, additions, or deletions have not been made in the recording.
> (5) That the recording has been preserved in a manner that is shown to the court.
> (6) That the speakers are identified.
> (7) That the conversation elicited was made voluntarily and in good faith, without any kind of inducement.[23]

Justice Hill noted that the Vermont Supreme Court had expressed its approval of the *McKeever* standard in dictum in a prior opinion.[24] Applying the standard to the facts of *Mecier*, he found that the prosecution failed to comply with the requirements relating to the chain of custody.[25] Although he did not specifically identify these, they appear to be requirements (3), (4), and (5) of the *McKeever* standard. Despite his objection to the admissibility of the tapes, Justice Hill concurred in the result, basing his decision

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19. *Id.*

20. 138 Vt. at 159, 412 A.2d at 297 (Hill, J., concurring).

21. 169 F. Supp. 426 (S.D.N.Y. 1958).

22. *Id.* at 431.

23. *Id.* at 430.

24. State v. Mecier, 138 Vt. at 159, 412 A.2d at 297 (Hill and Bristow, J.J., concurring) (citing State v. Davis, 132 Vt. 290, 294, 318 A.2d 664, 666 (1974)).

25. 138 Vt. at 158, 412 A.2d at 297 (Hill and Bristow, J.J., concurring).

on other "overwhelming evidence of guilt."[26]

B. *Custodial Interrogation*

Defendant challenged the admissibility of certain of the tape recorded statements on the grounds that they were obtained during a custodial interrogation[27] before he was properly informed of his rights under *Miranda v. Arizona*.[28] The challenge raised the issue of the scope of custodial interrogation, particularly its extension to conversations with barricaded fugitives.

The definition of custodial interrogation in Vermont law has been evolving ever since *Miranda*.[29] The present standard emerged in a concurring opinion written by Justice Billings.[30] It was adopted by the Vermont Supreme Court in *State v. Hohman*.[31] A person is in custody for purposes of custodial interrogation when, based on the totality of the circumstances, he could reasonably believe that he is not free to leave.[32] This standard follows Justice Marshall's dissent in *Oregon v. Mathiason*[33] in which the United States Supreme Court apparently adopted a totally objective test of freedom to leave.[34] Thus, Vermont's standard for determining custody does not conform to the standard adopted by the United

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26. *Id.* at 159-60, 412 A.2d at 298 (quoting State v. Howe, 136 Vt. 53, 69, 386 A.2d 1125, 1134 (1978) (Billings and Larrow, J.J., concurring)).

27. 138 Vt. at 153, 412 A.2d at 294. A custodial interrogation is characterized by two elements: 1) deprivation of the subject's liberty, or a reasonable belief by the subject that such a deprivation has occurred; and 2) some form of questioning by law enforcement officials. *See* State v. Hohman, 136 Vt. 341, 349, 392 A.2d 935, 940 (1978). *See also* note 29 *infra*.

28. 384 U.S. 436 (1966). In *Miranda* the United States Supreme Court held that the prosecution could not use statements resulting from custodial interrogation unless the subject was effectively advised of his fifth amendment right against self-incrimination and his sixth amendment right to counsel. *Id.* at 467. These are the right to remain silent and the right to have counsel present at any interrogation. *Id.* at 467-73.

29. For a detailed discussion of Vermont's custodial interrogation decisions, see Note, *Custodial Interrogation in Vermont After State v. Hohman*, 5 VT. L. REV. 383 (1980).

30. State v. Howe, 136 Vt. 53, 68, 386 A.2d 1125, 1134 (1978) (Billings and Larrow, J.J., concurring).

31. 136 Vt. 341, 349, 392 A.2d 935, 940 (1978).

32. *Id.*

33. 429 U.S. 492, 496 (1977) (Marshall, J., dissenting).

34. *Id.* at 495.

States Supreme Court. In Vermont, the focus of the inquiry is the defendant's reasonable subjective belief, whereas the United States Supreme Court allows inquiry into the objective ability of the defendant to leave.

In *Mecier*, the Vermont Supreme Court refined its definition of custody to reflect the peculiar position of the barricaded fugitive. The court held that Mecier had reason to believe that he could move freely in his house and could stop the interrogation at any time; therefore he was not in custody.[35]

C. *Psychiatrist-Patient Privilege*

Defendant also claimed error because the cross-examination of a psychiatrist, retained by him for testimony, elicited evidence which violated the psychiatrist-patient privilege.[36] Defendant's claim raises the question of the scope of psychiatrist-patient privilege when the insanity defense is raised.[37] The basis of the claimed privilege was Vermont's patient privilege statute,[38] which the Vermont Supreme Court first applied to defense psychiatrists in *State v. Lapham*.[39] In *Lapham*, the court reversed the defendant's conviction for murder on the ground that the admission of incriminating statements made by the defendant to a psychiatrist, retained by him for testimony, violated the psychiatrist-patient privilege.[40] In so doing, the court equated the patient privilege statute with the state examining statute for court-appointed psychiatrists.[41] The state examining statute provides that incriminating statements made by the defendant to a court-appointed psychiatrist are inadmissible at trial.[42] In *Lapham*, the court found that the statements elicited from the defendant's psychiatrist on cross-examina-

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35. 138 Vt. at 153-54, 412 A.2d at 294.

36. Printed case of the Appellant at 14, State v. Mecier, 138 Vt. 149, 412 A.2d 291 (1980).

37. *See generally* Note, *Cross-Examination of Psychiatric Witnesses Under the Vermont Patient's Privilege When the Issue of Insanity is Raised*, 3 VT. L. REV. 191 (1978).

38. VT. STAT. ANN. tit. 12, § 1612 (Supp. 1980).

39. 135 Vt. 393, 377 A.2d 249 (1977).

40. *Id.* at 404, 377 A.2d at 255-56.

41. *Id.* at 402-03, 377 A.2d at 256.

42. VT. STAT. ANN. tit. 13, § 4816(c) (1974).

tion "tended to prove commission of the offense charged," and should have been excluded.[43] The court held that the patient privilege could not be waived unless the incriminating statements were first raised on direct examination of the psychiatrist.[44]

The analysis employed by the *Lapham* court has been criticized, on the one hand, for failing to address the historical and policy bases of the doctrine of privilege.

> The United States Supreme Court has stated that the chief policy of the physician-patient privilege is to encourage proper medical treatment by relieving the patient from the fear of embarassing disclosures. Such confidentiality concerns are not present when a defendant consults a psychiatrist for the purpose of bolstering an insanity defense.[45]

On the other hand, application of the *Lapham* rule is subject to criticism because it could lead to the admission of prejudicial evidence of little probative value on the grounds of impeachment of the psychiatrist's testimony rather than as evidence tending to prove commission of the crime charged.[46] The application of the privilege doctrine in *Lapham* was dissimiliar to the practice in most states where testimony is privileged only if the psychiatrist is retained for treatment.[47] The court, nonetheless, followed and extended *Lapham* in *State v. Hohman*.[48]

In *Hohman*, the defendant made incriminating statements to a defense investigator.[49] The investigator's report formed part of the factual basis of the defense-retained psychiatrist's opinion regarding the defendant's sanity. The incriminating statements were elicited from the psychiatrist on cross-examination.[50] The court

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43. 135 Vt. at 404, 377 A.2d at 255.

44. *Id.* at 403, 377 A.2d at 255.

45. Note, *supra* note 37, at 196-97 (citing Arizona & N.M. Ry. v. Clark, 235 U.S. 669, 676-77 (1915)).

46. "Evidence such as defendant's past crimes, misconduct, bad reputation, homosexuality and sadistic tendencies have all been admitted as relevant to the issue of insanity." Note, *supra* note 37, at 205.

47. *Id.* at 192-93.

48. 136 Vt. 341, 345-46, 392 A.2d 935, 938.

49. *Id.* at 345, 392 A.2d at 938.

50. *Id.*

held that the incriminating statements were privileged, inasmuch as they related to elements of the crime charged.[51] The court cited *Lapham* as controlling authority.[52]

In the present case, defendant claimed that the incriminating statements obtained on cross-examination of his psychiatrist and supplemented on rebuttal tended to prove an element of the alleged crime, aggravated assault, namely that it was committed purposely.[53] The cross-examination focused on the relationship between the defendant and a young girl he claimed was his daughter, the relationship between the defendant and his wife, and the amount of alcohol the defendant had consumed prior to the shooting.[54] On rebuttal, the state inquired further into the relationship between the defendant and the young girl, particularly that he took nude pictures of her.[55] The court cited *Lapham* and *Hohman* as setting the proper standard to be applied.[56] It held, however, that the evidence obtained was not privileged because it did not tend to prove motive, but was properly introduced to impeach the factual basis of the psychiatrist's testimony.[57] Given this view of the record, the holding accorded with the standard of admissibility under the state examining statute[58] and with *Lapham*.[59] The court failed to address the problem of whether to admit statements which do not tend to prove commission of the offense charged, but which are unduly prejudicial to the defendant. Such statements are not privileged under *Lapham* and *Hohman*. This question was also raised but not answered definitively in *Hohman*.[60] Implied in the *Mecier* holding is the decision that such prejudicial information is admissible—provided it is introduced to impeach the psychiatrist's opinion.

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51. *Id.*
52. *Id.*
53. State v. Mecier, 138 Vt. 149, 155, 412 A.2d 291, 295 (citing VT. STAT. ANN. tit. 13, § 1024(a) (1974)).
54. 138 Vt. at 154-55, 412 A.2d at 295.
55. *Id.* at 155, 412 A.2d at 295.
56. *Id.* at 154, 412 A.2d at 295.
57. *Id.* at 155, 412 A.2d at 295.
58. VT. STAT. ANN. tit. 13, § 4816(c). See text accompanying note 42 *supra*.
59. 135 Vt. at 404, 377 A.2d at 255; see text accompanying note 43 *supra*.
60. 136 Vt. at 346, 392 A.2d at 937.

D. *Disposition of the Other Claims*

The court disposed of the remaining claims in a perfunctory manner. Mecier was arrested on October 10, 1978, and tried on July 18, 1979, nine months later.[61] He claimed this delay denied him his right to a speedy trial.[62] Much of the delay was caused by the defendant, who filed numerous pretrial motions, some of them late.[63] The court held that, inasmuch as the delay was of the defendant's making, his right to a speedy trial was not abridged.[64] The court indicated that it might have held differently had the defendant shown that, through diminished memory or missing witnesses, the delay prejudiced him at trial.[65] Also, there was no showing that the delay disrupted the defendant's family life or employment.[66]

The court also held that the admission of color slides of the victims' wounds was not error because the state had to prove bodily injury.[67] It was within the discretion of the trial judge to rule that they were admissible, and such a decision is not ordinarily reviewable.[68]

The court ruled that a letter written by Mecier to a witness, asking her to lie on his behalf, was admissible on rebuttal to impeach expert testimony even when excluded as direct evidence.[69] Also, admission of a single non-responsive utterance made by the defendant at the time of arrest was upheld.[70] The rationale for these holdings was that the errors were not preserved due to the defendant's failure to object at trial.[71]

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61. 138 Vt. at 157, 412 A.2d at 296.
62. *Id.*
63. *Id.*
64. *Id.* at 158, 412 A.2d at 297.
65. *Id.*
66. *Id.*
67. *Id.* at 155-56, 412 A.2d at 295.
68. *Id.* at 156, 412 A.2d at 295.
69. *Id.*
70. *Id.* ("I did wrong.").
71. *Id.* at 156-57, 412 A.2d at 296.

Conclusion

In *Mecier*, the Vermont Supreme Court confronted three major problems. It clearly resolved the question of which standard to apply to the admissibility of tape recordings not absolutely authenticated by adopting a flexible approach. It refined the definition of custodial interrogation in a manner which leaves some confusion as to the standard, but reflects an attempt to adjust to a unique fact situation. Finally, it avoided addressing a disturbing result of its prior interpretations of the psychiatrist-patient privilege. This leaves the issue of the scope of admissibility of prejudicial disclosures on cross-examination of a psychiatrist presently unresolved.

Robert H. Opel

Divorce Decree—Standard of Review For Issues of Custody, Visitation, Division of Property and Child Support— *Palmer v. Palmer*, 138 Vt. 412, 416 A.2d 143 (1980).

Statement of the Case

Plaintiff-appellee was awarded a decree of divorce by the Chittenden County Superior Court on the grounds that she and her husband had lived separate and apart for six consecutive months, and the resumption of marital relations was not reasonably probable.[1] The parties had five children, ranging in age from six to fifteen at the time of the divorce.

The decree granted care and custody of the parties' children to the plaintiff.[2] In doing so, however, the trial court refused to grant the defendant's request that it consider the wishes of the children over fourteen years of age in this matter.[3] The defendant was granted visitation rights, but with the specific limitation that he "shall not have the children overnight when spending it with a

1. Palmer v. Palmer, 138 Vt. 412, 413, 416 A.2d 143, 144 (1980).
2. *Id.*
3. *Id.*

woman who is not his wife."[4] In regard to the marital property, the trial court ordered that the dwelling house be held by the parties as tenants in common, with the plaintiff having exclusive use and occupancy until all the minor children are emancipated.[5] At that time, the plaintiff would have the option of buying the defendant's half interest for an amount equal to one-half the net equity at the time of the divorce, plus interest at the rate of five percent per annum from the date of the judgment order.[6] Additionally, the defendant was ordered to pay child support in the amount of $35 per week per child.[7]

On appeal, the Vermont Supreme Court upheld the trial court's ruling on all four of these issues.[8] The court pointed out that in a case such as this the defendant had the burden of showing that the trial court's conclusions were so unreasonable or untenable as to be an abuse of discretion.[9] Since the defendant failed to meet that burden, the judgment would not be disturbed. Judge Bristow disagreed with the affirmation of the trial court's decision regarding visitation and division of the equity in the dwelling house.[10]

I. Standard of Review

The questions of custody, visitation, property division, and child support are areas in which trial courts in Vermont have broad discretion.[11] "The court's overall conclusions will not be dis-

4. *Id.* at 414, 416 A.2d at 145.

5. *Id.*

6. *Id.*

7. *Id.* at 417, 416 A.2d at 146 (1980). The amount of child support was, in total, $175.00 per week. On appeal, defendant claimed that this was excessive given that his current income was approximately $21,000, and that the court had awarded most of the personal property, as well as a disproportionate share of the equity in the dwelling house, to his wife.

8. *Id.* at 417, 416 A.2d at 146 (1980).

9. *Id.*

10. *Id.* at 417-18, 416 A.2d at 146-47 (1980)(separate opinion) (Bristow, District Judge, specially assigned).

11. *See* Wetmore v. Wetmore, 129 Vt. 583, 586, 285 A.2d 711, 713 (1971); McKinney v. Kelley, 120 Vt. 299, 302-03, 141 A.2d 660, 663 (1957), *cert. denied* 356 U.S. 972 (1958); Partridge v. Cole, 98 Vt. 373, 375, 127 A. 653, 654 (1925); Miller v. Miller, 89 Vt. 547, 548, 95 A. 928, 929 (1915).

turbed by us unless the record discloses that the discretion of the trial court was exercised on grounds, or for reasons, clearly untenable, or to an extent clearly unreasonable."[12] Other jurisdictions have afforded similar discretion to trial courts when deciding these questions.[13]

The reasons for granting the trial court such broad discretion are several. The Vermont Supreme Court has said that the trial court has before it "the freshest revelations of family history"[14] which allow it to make a better determination than the appellate court. Thus, the Vermont Supreme Court, in reviewing divorce decrees, will not, in place of the trial court, weigh facts and reach its own conclusions.[15] Some authorities have also expressed concern for the unsettling effects on the child of reversals of trial court rulings in the areas of custody and visitation.[16]

It is obvious that the broader the discretion granted to trial courts by appellate courts, the smaller the likelihood of reversal. Following the *Palmer* decision, the reversal on appeal of a divorce decree governing the issues of custody, visitation, child support and property division is even less likely.[17]

II. Custody

In *Palmer*, the Vermont Supreme Court reversed its previous position regarding the consideration trial courts should give to the preferences of children fourteen years of age or older in cases

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12. McKinney v. Kelley, 120 Vt. 299, 314, 141 A.2d 660, 667 (1957).

13. *See, e.g.*, Paddock v. Paddock, 240 F.2d 926, 929 (9th Cir. 1956); Wiseman v. Wiseman, 212 F.2d 251, 251 (D.C. Cir. 1954); Waldecker v. Waldecker, 178 Cal. 566, 567, 174 P. 36, 37 (1918); Durham v. Durham, 137 Fla. 506, 507, 188 So. 609, 609 (1939); Robbins v. Robbins, 234 Iowa 650, 652-53, 12 N.W.2d 564, 566 (1954); Smith v. Smith, 54 R.I. 236, 239, 172 A. 323, 324 (1934).

14. Boone v. Boone, 133 Vt. 170, 174, 333 A.2d 98, 101 (1975).

15. Davidson v. Davidson, 111 Vt. 24, 28, 9 A.2d 114, 116 (1939).

16. A. Fruend, J. Goldstein, A. Solnit, Beyond The Best Interests Of The Child 37-39 (1973).

17. This is not to say that an aggrieved party to divorce does not have any remedy. As the *Palmer* court noted, he or she may, in the areas of custody, visitation, and child support, seek modification of the order. Modifications, however, are generally used to respond to some material change in circumstances, and may be deemed inappropriate where no such change has occurred. McKinney v. Kelley, 120 Vt. 299, 314, 141 A.2d 660, 667 (1957).

where custody is an issue. The *Palmer* trial court refused to consider the wishes of the children over fourteen years of age.[18]

The defendant in *Palmer* argued that the trial court was bound by the decision in *Cameron v. Cameron*[19] to consider the wishes of children fourteen years of age or older as a factor in determining custody. In *Cameron*, the supreme court held that in a custody hearing, the trial court had not abused its discretion in refusing to call as a witness or examine in chambers the parties' six year old child for the purpose of allowing her to state her preferences as to parental custody. In so holding, the court said that they could "find no statutory requirement that would compel a trial court to call as its own witness a child of tender years for an inquiry as to his or her parental preferences."[20] The court, however, went on to say that:

> [o]n the contrary, the child has, by statute, no right to choose his own guardian until he has reached the age of 14 years. 14 V.S.A. § 2650. *Until that time*, as has been previously stated, the wishes or preferences of the child are not *controlling factors* in the court's decision upon the issue of custody, and the court is not bound by the child's preference.[21]

A fair interpretation of this language is that once a child has reached the age of fourteen, the child's wishes will be a controlling factor on the issue of custody.

The effect of *Palmer* is to narrow greatly the *Cameron* decision:

> In *Cameron* we held that a trial court did not abuse its discretion in refusing to allow a six year old child to testify [regarding] his or her parental preference. The decision to allow a child to testify is in the trial court's discretion, and, absent a showing that it clearly abused its discretion, will not be placed in error.[22]

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18. 138 Vt. 412, 413, 416 A.2d 143, 144 (1980).

19. 137 Vt. 12, 398 A.2d 294 (1979).

20. *Id.* at 14, 398 A.2d at 295.

21. *Id.* at 14, 398 A.2d at 295-96 (emphasis added).

22. 138 Vt. 412, 413, 416 A.2d 143, 144 (1980). It is interesting to note that not only did the *Cameron* court, albeit in dictum, consider the wishes of children fourteen years of age or

By ignoring its own reasoning[23] in *Cameron*, the *Palmer* court ended any presumption that if a child is able to choose his own guardian, his preference in a custody proceeding is a factor to be considered by the trial court in making its determination. Prior to the *Palmer* decision, Vermont had been one of those jurisdictions which, apparently, gave considerable weight in custody proceedings to a child's preferences if he or she was over fourteen.[24] Under *Palmer*, consideration of the preferences of children over fourteen is solely a matter for the discretion of the trial court with no practical guidelines as to what constitutes abuse of discretion.

The second reason given by the court for finding that the trial court had properly exercised its discretion in not hearing the childrens' wishes was that the defendant had taken no preliminary steps to prepare for a custody dispute:

> He did not request that an attorney be appointed . . . to represent the childrens' interests, cf. *Lumbra v. Lumbra*, . . . or request that the Department of Social Welfare investigate, or even obtain and offer witnesses, other than himself, at trial to testify as to his fitness for custody and the childrens' best interests.[25]

The court cites no precedent requiring the defendant to request an

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older to be a factor, but, in fact, the controlling factor. The *Palmer* court did not, apparently, feel that this should be the standard.

23. See text accompanying note 22 *supra*.

24. Cameron v. Cameron, 137 Vt. 12, 398 A.2d 294 (1979). *See also* Lumbra v. Lumbra, 136 Vt. 529, 394 A.2d 1139 (1978); Valeo v. Valeo, 132 Vt. 526, 532, 322 A.2d 306, 311 (1974). The question of whether a trial court should consider the testimony of children as to their preference in custody proceedings is often addressed in one of three ways: (1) a statute making such consideration mandatory, *see, e.g.*, GA. CODE ANN. § 30-127(a) (1962); (2) a statute making such consideration discretionary, *see, e.g.*, CAL. PROB. CODE § 1406 (1931); (3) or the incorporation by reference of guardianship statutes, *see, e.g.*, Patterson v. Cooper, 163 Ark. 364, 26 S.W. 988 (1924); Latham v. Latham, 223 Miss. 263, 8 So. 2d 147 (1955). *See generally*, 4 A.L.R. 3d 1396 (1963) and cases therein.

Cameron aside, Vermont has not specifically incorporated by reference the guardianship statute for use in custody proceedings. Vermont courts have, rather, viewed the preferences of children over fourteen as a factor, having varying weight in varying circumstances, which will aid in reaching the result that will be in the best interest of the child. The defendant's objection in *Palmer* is that the preferences of the children over fourteen were not considered at all.

25. 138 Vt. 412, 414, 416 A.2d 143, 145 (1980)(citations omitted).

investigation by the Department of Social Welfare as a necessary preliminary step. Additionally, the trial court record does show that the defendant had attempted to have such an investigation performed, but the plaintiff refused to agree.[26] Given this attempt on the defendant's part, and plaintiff's refusal, it seems curious that the court should find that the defendant failed to take a necessary preliminary step.

In *Lumbra v. Lumbra*,[27] cited by the court for the proposition that the defendant should have requested that the trial court appoint an attorney for the children, the request was made pursuant to a stipulation of *both* parties.[28] The plaintiff in *Palmer* objected to the defendant's request that the court hear the children over fourteen in chambers.[29] It is possible that a party who would object to an *in camera* consideration of the older childrens' wishes might not agree by stipulation to appointment of counsel, which could involve direct testimony and cross-examination in the open courtroom. Yet the *Palmer* court viewed defendant's inaction as another failure on the defendant's part to take "preliminary steps."[30]

III. Visitation

The defendant's second claim of error attacked the order which granted him visitation rights with the specific limitation that he "shall not have the 'children overnight when spending it with a woman who is not his wife.' "[31] On appeal, the court noted that both parents had extra-marital affairs and that since the divorce both were seeing other persons.[32] The trial court found, however, that "defendant spends a great deal of time with his girlfriend, often staying overnight, while plaintiff's relationship is more discreet and, apparently, less involved. Exposure to defen-

26. Brief for Appellant at 1, Palmer v. Palmer, 138 Vt. 412, 416 A.2d 143 (1980).
27. 136 Vt. 529, 394 A.2d 1139 (1978).
28. *Id.* at 530, 394 A.2d at 1141.
29. Printed Case of the Appellant at 11, Palmer v. Palmer, 138 Vt. 412, 416 A.2d 143 (1980).
30. 138 Vt. 412, 414, 416 A.2d 143, 145 (1980).
31. *Id.* at 414, 416 A.2d at 145.
32. *Id.*

dant's living arrangement would not, according to the trial court, be in the best interests of the children."[33]

The majority was apparently concerned with this finding, as it went on to note that courts should not base their decisions solely on moralistic values; yet they upheld the decision of the trial court. Judge Bristow dissented to this portion of the opinion which he thought was based solely on moralistic values. He said that "[c]onditions placed upon a parent's visitation rights should be imposed solely on the basis of the child's best interests. Although such a determination may involve factors entailing moralistic values, special conditions should be imposed only when exposure to certain conduct will injuriously affect the child."[34]

In *Palmer*, the trial court never made findings as to how the defendant's living arrangements would have injuriously affected the children. The defendant alleged in his proposed findings of fact that the children were comfortable with his relationship with a widow and her minor children.[35] The trial court, by refusing to hear the children in chambers, ignored its best source of information regarding the possibly injurious effects overnight visitation with their father and his girlfriend might have. The defendant argued that by not making specific findings indicating why such limitations on visitation were necessary, the *Palmer* trial court had abused its discretion.

Previous Vermont cases have held that limitations on visitation may only be imposed where it is shown to be in the best interests of the child.[36] In *Loeb v. Loeb*,[37] the Vermont Supreme Court reversed a trial court order refusing modification of limitations on the defendant's visitation rights. The defendant in that case was granted visitation with his nine year old daughter only if the plaintiff, or someone of her choosing, were present. There the court, on

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33. *Id.*

34. *Id.* at 417, 416 A.2d at 147 (separate opinion).

35. Defendant's Request for Findings at 15-16, Palmer v. Palmer, 138 Vt. 412, 416 A.2d 143 (1980).

36. Valeo v. Valeo, 132 Vt. 526, 528-31, 322 A.2d 306, 309-10 (1974); Loeb v. Loeb, 120 Vt. 489, 492-93, 144 A.2d 825, 827-28 (1958).

37. 120 Vt. 489, 144 A.2d 825 (1958).

appeal, delved extensively into the findings of the lower court and found no basis for restricting visitation rights.[38] The court concluded that the facts determined by the trial court did not justify the drastic restraint placed upon visitation, and therefore, the trial court had exceeded the limits of its discretion.[39]

Palmer signals a change in the standard of review as regards restrictions placed on visitation. The *Loeb* standard, that the trial court must make specific findings of fact indicating the best interests of the child before restricting visitation,[40] was not used by the court in *Palmer*. The conclusory findings of the *Palmer* trial court that exposure to the defendant's living arrangements during visitations was not in the best interests of the children are now sufficient, even in the absence of specific findings of fact to support such a conclusion.[41]

IV. Division of Property

The defendant objected to the division of the equity in the dwelling house. He argued that the *Palmer* trial court erred by restricting the appreciation rate to five percent per annum and by dividing the equity in the house based on the value as of the date of the judgment order.[42] He felt that the trial court's valuation of the equity in the property and the appreciation rate did not adequately reflect the true appreciation in market value that will occur from the time of the judgment order until the children reach majority. The plaintiff, he argued, would receive an undeserved windfall. The defendant sought reversal on the ground that the trial court's division was unfair and an abuse of discretion.[43] The majority, however, upheld the decision of the trial court.[44]

The dissenting judge agreed with the defendant that

38. *Id.* at 494, 144 A.2d at 828-29.

39. Loeb v. Loeb, 120 Vt. 489, 144 A.2d 825 (1958).

40. Valeo v. Valeo, 132 Vt. 526, 528-31, 322 A.2d 306, 309-10 (1974); Loeb v. Loeb, 120 Vt. 489, 492-93, 144 A.2d 825, 827-28 (1958).

41. 138 Vt. 412, 416 A.2d 143 (1980).

42. *Id.* at 415, 416 A.2d at 145.

43. *Id.*

44. *Id.* at 416-17, 416 A.2d at 146.

"[b]ecause of the speculative nature of the disposition of the home, the trial court has not properly exercised its discretion."[45] He, like the defendant, felt that the *Palmer* trial court had not followed the mandate of title 15, section 751 of Vermont Statutes Annotated[46] in disposing of the equity in the home. The dissent pointed out that "[b]ecause of the uncertain value of future appreciation of the home, it was improper for the trial court to make a property division based upon present value, coupled with a specified interest rate . . . . [A]n attempt must be made to dispose of the property in a 'just and equitable' manner."[47]

The supreme court had previously noted in *Sweeney v. Sweeney*[48] that the division of marital property does not lend itself to a precise mathematical formula.[49] By employing such a formula in *Palmer*, Judge Bristow noted, the trial court had "made the division of equity subject to unforeseen variables."[50]

Other cases[51] in Vermont have indicated that while the trial court does have wide discretion, the division of property must follow the legislative intent of disposing of marital property in a manner that is "just and equitable."[52] The court in *Palmer*, however, said that it "cannot and will not make an exact determination of the net value plaintiff derived from her exclusive use of the house and its potential future appreciation in value, as this was a matter for the trial court."[53]

The trial court, however, never made findings supporting the

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45. *Id.* at 418, 416 A.2d at 147.

46. VT. STAT. ANN. tit. 15, § 751 (1974) states that the court shall

> decree such disposition of the property owned by the parties separately, jointly, or by the entirety, as shall appear just and equitable, having regard to the respective merits of the parties, to the condition in which they shall be left by such divorce, [and] to the party through whom the property was acquired.

47. 138 Vt. 412, 418, 416 A.2d 143, 147 (1980), citing VT. STAT. ANN. tit. 15, § 751 (1974).

48. 136 Vt. 199, 388 A.2d 388 (1978).

49. *Id.* at 200, 388 A.2d at 389.

50. 138 Vt. 412, 418, 416 A.2d 143, 147 (1980).

51. *See, e.g.*, Sweeney v. Sweeney, 136 Vt. 199, 388 A.2d 388 (1978).

52. VT. STAT. ANN. tit. 15, § 751 (1974).

53. 138 Vt. at 416, 416 A.2d at 146.

division of the equity in the home either. By upholding a division that sets the value of the equity at the current value of the home, with five percent annual appreciation and with actual division to occur some thirteen years hence, the supreme court has allowed a standard of just and equitable division to be replaced by formulae which do not make provisions for the variables of the marketplace.[54]

Conclusion

The supreme court in *Palmer* has given trial courts very broad discretion in deciding questions of custody, limitations on visitations, and division of property. The supreme court will continue to hear pleas of "abuse of discretion" on appeal in divorce cases, but it remains to be seen what facts will support such an assertion following *Palmer*. Trial courts will apparently not be required to consider the preferences of children over fourteen regarding custody. The party wishing the preferences of the children to be heard should take preliminary steps by requesting that individual counsel be appointed to represent the children. The trial court need not make substantial findings of fact to support restrictions placed on visitation. Property may be divided according to mathematical formulae, even though variables of the marketplace may prove such a division inequitable.

Kathleen McDonnell Moore

Exclusionary Rule—Irregularities of Prior Arrest Do Not Vitiate Governor's Extradition Warrant—*In re Saunders*, 138 Vt. 259, 415 A.2d 199 (1980).

Statement of the Case

The petitioner was arrested by a Vermont state trooper on an

54. *Id.* at 417-18, 416 A.2d at 146-47. (Bristow, J. dissenting in part).

information and warrant charging the petitioner with being a fugitive from justice from the State of Michigan, a violation of title 13, section 4953 of Vermont Statutes Annotated.[1] The petitioner was about to enplane from an airport in Vermont when the arrest took place.[2] At the arraignment, the acting district court judge found probable cause that petitioner may have fled from the State of Michigan in order to avoid serving a sentence.[3] The petitioner, while incarcerated for failure to meet the bail requirements, filed a petition for a writ of habeas corpus in the Rutland Superior Court to test the legality of his arrest.[4]

In Rutland Superior Court a writ of habeas corpus was granted ordering the discharge of petitioner from his incarceration.[5] The court found petitioner's arrest as a fugitive from justice to be illegal as it was made without probable cause.[6] When the court issued this order, it did not know that petitioner had already been arrested that morning on a Governor's warrant, issued by the Governor of Vermont, in response to Michigan's initiation of extradition proceedings.[7]

A hearing was held to resolve this dilemma. In Rutland Superior Court the petitioner's request for discharge was granted on a second writ of habeas corpus pending an appeal by the state to the Vermont Supreme Court.[8] The Rutland Superior Court, applying the exclusionary rule, found the petitioner's re-arrest under the Governor's extradition warrant to be so closely related to the illegal arrest at the airport as to taint the second arrest.[9]

On appeal the Vermont Supreme Court vacated the order and directed petitioner to respond to the Governor's warrant.[10] The

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1. VT. STAT. ANN. tit. 13, § 4953 (1974).
2. *In re* Saunders, 138 Vt. 259, 260, 415 A.2d 199, 200 (1980).
3. *Id.*
4. *Id.*
5. *Id.* at 261, 415 A.2d at 200.
6. *Id.*
7. *Id.*
8. *Id.* at 261, 415 A.2d at 201.
9. *Id.* at 261-62, 415 A.2d at 201.
10. *Id.* at 264, 415 A.2d at 202.

court refused to extend the exclusionary rule to the second habeas corpus proceeding.[11] The issue, as framed in the Vermont Supreme Court, was whether the petitioner's prior illegal arrest invalidated an arrest under a subsequent extradition warrant.[12] In vacating the lower court order, the Vermont Supreme Court's opinion carefully pointed out that this was a narrow ruling and that the court was not deciding the question of whether or not the fourth amendment applies to the extradition process.[13]

I. History of Exclusionary Rule

In order to understand the novel application of the exclusionary rule attempted by the petitioner in *Saunders*, it is first necessary to review the historical development of the exclusionary rule. The fourth amendment exclusionary rule is regarded as an evidentiary rule of criminal procedure which mandates exclusion at trial of evidence obtained in violation of privileges guaranteed by the fourth amendment of the United States Constitution.[14] The fourth amendment guarantees people the right to be secure in their homes and property against unreasonable searches and seizures and provides that no warrants shall issue except upon probable cause, supported by oath or affirmation, and specifically describing the place to be searched and persons or things to be seized.[15] The fourth amendment originated as "a reaction to the evils associated with the use of the general warrant in England and the writs of assistance in the Colonies."[16]

The exclusionary rule is a judicially created remedy designed to safeguard the rights secured by the fourth amendment.[17] During the early years of American law, admissibility of evidence generally remained unaffected by any impropriety in its procurance.[18] Judi-

11. *Id.* at 263, 415 A.2d at 202.
12. *Id.* at 262, 415 A.2d at 201.
13. *Id.* at 263, 415 A.2d at 202.
14. C. McCormick, Law of Evidence §§ 164, 165 (2d ed. 1972).
15. U.S. Const. amend. IV.
16. Stone v. Powell, 428 U.S. 465, 482 (1976).
17. *Id.*
18. 8 J. Wigmore, Evidence § 2183 (McNaughton rev. 1975).

cial unwillingness to forego the use of probative evidence and reluctance to introduce complex collateral issues into court proceedings formed the basis for this position.[19]

The United States Supreme Court, in 1914, ruled that evidence obtained through a violation of the fourth amendment's prohibition against unreasonable searches and seizures was inadmissible only in federal criminal trials.[20] In 1949, the Court held that the fourth amendment was binding upon the states through the fourteenth amendment's Due Process Clause,[21] but the Court stopped short of requiring the states to use the exclusionary remedy by reasoning that other methods could be equally effective.[22]

In 1961 the Court held in *Mapp v. Ohio*[23] that the fourth amendment exclusionary rule was binding upon the states.[24] No United States Supreme Court decision, however, has ever reached the question of whether or not the exclusionary rule functions as a remedy where a prior illegal arrest has occurred. This was the attempted argument in *Saunders* based upon the petitioner's conception of the policy underlying the exclusionary rule.

II. Purpose and Policy

The stated purpose of the judicially created exclusionary rule is the protection of fourth amendment rights by removing the incentive for their violation.[25] This purpose of "policing the police" is designed to deter wrongful police conduct and compel respect for the constitutional privileges afforded by the fourth amendment.[26]

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19. C. McCormick, Law of Evidence § 165 (2d ed. 1972).

20. Weeks v. United States, 232 U.S. 383 (1914).

21. Wolf v. Colorado, 338 U.S. 25, 27-28 (1949).

22. *Id.* at 28-33.

23. 367 U.S. 643 (1961).

24. *Id.* The Court's decision was based upon a major shift in the factual foundation of earlier cases. More states had been accepting the exclusionary rule as a matter of state law. For this reason it could no longer be said that the states held a view contrary to that of federal courts. In addition, alternative methods of safeguarding fourth amendment rights had proven "worthless and futile." *Id.* at 651-53.

25. 138 Vt. at 263, 415 A.2d at 201.

26. *Id.*

The policy justification for the exclusionary rule rests upon the dual rationales of deterrence and fairness.[27] The exclusionary rule is not a personal constitutional right nor is it a redress for injury to the privacy of the victim of the search or seizure.[28] Furthermore, the Court has stated that, as in the case of any remedial device, the rule will be applied only where its remedial objectives are best served.[29]

This justification limits the application of the fourth amendment exclusionary rule. The rule will operate only when police conduct has as its objective the gathering of evidence to be used in prosecution. Furthermore, the rule only applies to evidence obtained in contravention of the fourth amendment and not to the illegal arrest itself. The exclusionary rule will have no deterrent effect where police violate a person's constitutional rights as part of a pattern of harassment to discourage future criminal conduct.[30]

III. Recent Exclusionary Rule Trend

The post-*Mapp* trend has generally been to limit the scope of the exclusionary rule due to concern that "[a]pplication of the rule . . . deflects the truthfinding process and often frees the guilty."[31] The argument against the rule is that the windfall given a guilty defendant by application of the rule runs counter to the idea of proportionality, a central concept of justice.[32] In addition, because exclusion of evidence can result from an officer's improper conduct, he is given the de facto power to confer immunity upon the subject.

The trend toward limiting the exclusionary rule has parallelled the tenure of the Burger Court. In *Bivens v. Six Unknown Named Agents*,[33] Chief Justice Burger dissented and urged the abolition of the exclusionary rule and its replacement with a statutory damages

27. Stone v. Powell, 428 U.S. 465, 486 (1976).
28. *Id.*
29. *Id.* at 486-87.
30. *Id.* at 488.
31. *Id.* at 490.
32. *Id.*
33. 403 U.S. 388 (1971).

remedy.[34] In 1974 the Court held that the exclusionary rule may not be invoked by a witness before a grand jury to bar questioning based on evidence obtained in an unlawful search and seizure.[35]

More recently, the Court has further limited the parameters of the exclusionary rule in *Stone v. Powell*.[36] This decision effectively prevents a state prisoner from relitigating his exclusionary rule argument in a federal habeas corpus action. The decision also illustrates that the United States Supreme Court has become increasingly concerned with the societal costs of applying the exclusionary rule.[37] The Vermont Supreme Court relied heavily upon the policy justifications and reasoning enunciated in *Stone v. Powell* in reaching its decision in *Saunders*.[38]

IV. Effect of Illegal Arrest—Extradition Context

The precedent in Vermont supports the proposition that a Governor's extradition warrant is not vitiated by any prior irregu-

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34. *Id.* at 411-24. The Court held that a violation of the fourth amendment's command against unreasonable searches and seizures by federal agents gave rise to a federal cause of action for damages to vindicate the personal interests protected by the fourth amendment. The fourth amendment violations alleged by the plaintiff were that F.B.I. agents, acting without a warrant and without probable cause, had entered his apartment, used unreasonable force in effecting the arrest, searched the apartment, and later interrogated him and subjected him to a visual strip search. *Id.* at 397.

35. United States v. Calandra, 414 U.S. 338 (1974). The majority stressed that the deterrence function of the exclusionary rule would not be furthered by barring evidence which could not be used at trial. This conclusion controlled both the fruits of an unlawful search and seizure and any related evidentiary questions. *Id.* This "fruit of the poisonous tree" doctrine originated in Wong Sun v. United States, 371 U.S. 471 (1963), which held that evidence obtained, even indirectly, through constitutional violations must be excluded as fruit of an unlawful arrest. An exception to the "fruit of the poisonous tree" doctrine is the purged taint doctrine; if enough additional factors intervene between the original illegality and the final discovery of evidence, neither the deterrence nor judicial fairness rationales supporting the exclusionary rule apply. In such a case the evidence may be admissible despite the fact that it would not have been discovered but for the illegality. *Id.* at 488.

36. 428 U.S. 465 (1976). Where the state has provided an opportunity for full and fair litigation of a fourth amendment claim, a state prisoner will not be granted federal habeas corpus relief on the ground that unconstitutionally obtained evidence was introduced at his state trial. *Id.* at 469.

37. *Id.* at 474-95.

38. 138 Vt. at 261-63, 415 A.2d at 201.

larities in arrest and the extradition process. *In re Bryant*[39] illustrated that arrest under a Governor's extradition warrant is not defective because of possible illegality in a previous detention. In *Bryant* the petitioner was held beyond the statutory time under arrest on a fugitive from justice warrant, and then served with a Governor's warrant. The petitioner would have been entitled to a writ releasing him from detention had he filed a petition after the statutory time expired but before the Governor's warrant was served.[40] The court held, however, that he was legally detained under the Governor's warrant and that its legality was not affected by the questionable validity of the previous detention.[41] In reaching this decision, the Vermont Supreme Court relied on *Stallings v. Splain*[42] which held that where a fugitive under indictment in another jurisdiction is arrested without a warrant, and "where sufficient ground for detention exists, a prisoner will not be discharged for defects in the original arrest or commitment."[43]

The majority of jurisdictions are in accord with this proposition.[44] *In re Brown*,[45] relied on in *Saunders*,[46] affirms that lack of probable cause in the initial arrest will not invalidate the subsequent arrest upon a Governor's warrant. *Brown* suggests that the petitioner should attack the initial illegal arrest.[47] Even if the petitioner is successful in attacking the initial arrest and obtains release, the second illegal arrest will not be considered "fruit" for

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39. 129 Vt. 302, 306, 276 A.2d 628, 631 (1971).

40. *Id.* at 305, 276 A.2d at 630-31.

41. *Id.* at 305-08, 276 A.2d at 630-32.

42. *Id.* at 306, 276 A.2d at 631; Stallings v. Splain, 253 U.S. 339 (1920).

43. 253 U.S. at 343.

44. *See, e.g.*, Levick v. Smedley, 553 P.2d 482 (Alaska 1976); Reese v. Warden & Keeper of County Jail, 193 Colo. 7, 561 P.2d 339 (1977); Bailey v. Cox, 260 Ind. 448, 296 N.E.2d 422 (1973); Bell v. Janing, 188 Neb. 690, 199 N.W.2d 24 (1972); *Ex parte* Worden, 502 S.W.2d 803 (Tex. 1974); State *ex rel.* Holmes v. Spice, 68 Wis. 2d 263, 229 N.W.2d 97 (1975).

45. 370 Mass. 267, 346 N.E.2d 830 (1976).

46. *In re* Saunders, 138 Vt. at 263-64, 415 A.2d at 202.

47. 370 Mass. at 270, 346 N.E.2d at 832. *In re* Brown is only distinguishable from *Saunders* on the fact that no habeas corpus petition was filed during the pendency of petitioner's allegedly illegal detention. *Brown* did not examine the effect a prior judicial release would have on a subsequent rearrest pursuant to a Governor's warrant. *Id.* at 271, 346 N.E.2d at 832.

purposes of invalidating the re-arrest upon a Governor's warrant.[48]

The *Brown*[49] court relied on *People ex rel. Taylor v. Johnson*,[50] a factually similar case, where the court ruled that the asylum state could not justify penalizing the demanding state for the wrongful actions of the asylum state. The *Taylor* court decided an issue which the *Saunders* court would not consider, namely, that the strength of the policy considerations supporting the exclusionary rule become attenuated when applied to an extradition proceeding rather than to an ordinary criminal trial.[51] For this reason, the *Brown* court opined that "[t]o work such a deprivation would be to push an exclusionary rule beyond its proper limits."[52]

Interstate extradition is a summary executive procedure designed to enlarge the territorial area of lawful arrest by adding the asylum jurisdiction to the demanding jurisdiction.[53] Extradition is mandated by article IV, section 2, clause 2 of the United States Constitution and implemented through the Uniform Extradition Act, which has been adopted in Vermont.[54] In *Michigan v. Doran*[55] the United States Supreme Court ruled that the courts of the asylum state are bound by the United States Constitution and by the Uniform Extradition Act, if enacted in the involved states, and that a Governor's extradition warrant is "prima facie evidence that the constitutional and statutory requirements have been met."[56]

The Court held that once the governor of an asylum state has acted on a requisition for extradition founded on the demanding state's judicial determination that probable cause existed, no further judicial inquiry on that issue is necessary in the asylum

48. State *ex rel.* Arnold v. Justus, 84 Minn. 240, 87 N.W. 770 (1901).
49. *In re* Brown, 370 Mass. at 270, 346 N.E.2d at 832.
50. 47 Ill. 2d 103, 264 N.E.2d 198 (1970).
51. *Id.* at 104, 264 N.E.2d at 199.
52. 370 Mass. at 271, 346 N.E.2d at 832.
53. *In re* Maldonado, 364 Mass. 350, 361-62, 304 N.E.2d 419, 421 (1973).
54. VT. STAT. ANN. tit. 13, §§ 4941-4969 (1974).
55. 439 U.S. 282 (1978).
56. *Id.* at 289.

state.[57] The rationale is that the extradition clause of the United States Constitution "[n]ever contemplated that the asylum state was to conduct the type of preliminary inquiry traditionally intervening between the initial arrest and trial."[58] Although the concurring opinion in *Michigan v. Doran* states that the fourth amendment applies in the extradition context,[59] the majority did not so rule.

V. The Decision

In the instant case the petitioner asserted that the fourth amendment exclusionary rule applied to the extradition process and that he should be granted a writ of habeas corpus, as his second arrest on a Governor's warrant was tainted by his earlier illegal arrest. The petitioner argued the applicability of the exclusionary rule even though it had previously applied only to evidence obtained in violation of the fourth amendment and not to the illegal arrest itself. The Vermont Supreme Court did not accept the petitioner's argument due to policy considerations and recent well-articulated precedent.

The court reasoned that the exclusionary rule is "not a personal right of the petitioner, but rather is a rule to deter wrongful police conduct."[60] The court opined that no deterrent effect would be served by punishing the demanding state for Vermont's wrongful actions. The court did not consider Vermont's interest in extraditing alleged criminals to protect public safety and enforce its own laws prohibiting fugitives from justice, and thus did not consider the deterrent effect upon Vermont's law enforcement officers.

The court also avoided the question as to the applicability of the exclusionary rule to the extradition process. By relying on re-

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57. *Id.* at 290. Subsequently, *Saunders* has been cited in *In re* Everett, No. 171-80 (Vt. Feb. 3, 1981), for the proposition that in a review of extradition proceedings the Vermont Supreme Court's function is "to determine the compliance of the documentation with the statute, not to look behind it." *In re* Everett, No. 171-80, slip op. at 43 (Vt. Feb. 3, 1981).

58. 439 U.S. at 288.

59. *Id.* at 294 (Blackmun, J., concurring).

60. 138 Vt. at 263, 415 A.2d at 202.

cent precedent, *In re Bryant*,[61] the court noted that it had been decided repeatedly that a Governor's extradition warrant is not vitiated by irregularities in a prior arrest by which the petitioner may have been held until the Governor's warrant issued.[62] The Vermont Supreme Court followed its reasoning in *Bryant* where the court adopted the view enunciated in *Stallings v. Splain*[63] that where sufficient ground for detention exists, defects in the original arrest or commitment will not discharge a prisoner.[64] In addition, the *Saunders* court mentioned that due to the summary executive nature of extraditions, the invalidity of an earlier arrest becomes a moot issue, or merely a collateral grievance.

Conclusion

It is submitted that the decision on appeal was correctly decided, although sketchily reasoned. The instant case is of importance to the administration of criminal justice because it imposes a limit to the scope of the exclusionary rule. This reflects the recent federal trend. Furthermore, this case represents a conservative, if not hard, line in the field of corrections in contrast to the Vermont Supreme Court's expansive interpretations in the area of personal rights. Certainly in view of the court's recent concern with the societal costs of the exclusionary rule, especially when applied out of its original context, limitation of its scope is appropriate.

Laurie Stone Parker

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61. 129 Vt. 302, 276 A.2d 628 (1971).

62. In both *Bryant* and *Saunders*, petitioners sought to overturn Governor's warrants because the warrants' executions were allegedly tainted by the initial illegal detention. The petitioner in *Bryant* did not seek a writ of habeas corpus for his initial illegal detention. *Id.* The petitioner in *Saunders*, however, had sought and been granted a writ of habeas corpus based on lack of probable cause in his initial arrest. See text at note 37 *supra*.

63. 253 U.S. 339 (1920).

64. *In re* Bryant, 129 Vt. at 306, 276 A.2d at 631.

DISMISSAL OF STATE EMPLOYEES—THE REQUIREMENT OF NOTICE AS AN ELEMENT OF JUST CAUSE—*In re Yashko*, 138 Vt. 364, 415 A.2d 1322 (1980).

STATEMENT OF THE CASE

The appellant, Michael Yashko, was a sanitarian employed by the Department of Health of the State of Vermont. Appellant had held this position for over ten years when he was placed on a warning period on October 20, 1976. At this time appellant was cautioned by his supervisor that if his job performance did not improve he would be dismissed.[1] Four months later, appellant's warning period expired and he was notified of the termination of his employment.[2]

Subsequently, the Vermont State Employees' Association (hereinafter VSEA) filed a grievance on behalf of Yashko[3] pursuant to title 3, section 926 of Vermont Statutes Annotated.[4] The Vermont Labor Relations Board (hereinafter VLRB or the Board) rendered a decision in favor of the appellant and ordered his reinstatement on a three month "probationary period."[5] This decision was appealed to the Vermont Supreme Court by the State of Vermont and the Vermont Department of Health.[6] The Vermont Supreme Court dismissed this appeal for technical reasons.[7]

Appellant returned to work in his former position[8] although there were internal inconsistencies in the Board's order concerning

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1. Michael Yashko, 1 V.L.R.B. 119, 121-22 (1977).

2. *Id.* at 124.

3. *Id.* at 119.

4. VT. STAT. ANN. tit. 3, § 926 (Supp. 1980) provides in part, "The board shall hear and make final determination on the grievances of all employees who are eligible to appeal grievances to the board. Grievance hearings at the board level shall be conducted in accordance with the rules and regulations promulgated by the board."

5. Michael Yashko, 1 V.L.R.B. 119, 125 (1977). For a discussion of the significance of probationary status, see text accompanying notes 22-31 *infra*.

6. Printed Case at 27, *In re* Yashko, 138 Vt. 364, 415 A.2d 1322 (1980). *See also* Michael Yashko, 2 V.L.R.B. 54, 55 (1979).

7. This appeal was dismissed for lack of jurisdiction as there was no timely notice of appeal. Printed Case at 28, *In re* Yashko, 138 Vt. 364, 415 A.2d 1322 (1980). *See also* Michael Yashko, 2 V.L.R.B. at 55 (1979).

8. Michael Yashko, 2 V.L.R.B. at 55 (1979).

his reinstatement. The major flaw in the Board's order, according to Yashko, was that it placed him on a probationary period as if he were a new employee rather than a warning period in recognition of his permanent status.[9] In response to this discrepancy the VSEA, on behalf of Yashko, filed a motion to enforce which attempted to clarify the Board's order.[10]

While the motion to enforce was still pending, Yashko was informed that his three month probationary period had expired, and he was subsequently discharged.[11] The letter informing him of his dismissal was an indication of the confusion surrounding Yashko's status.[12] In opposition to Yashko's dismissal, the VSEA filed a second grievance[13] which was subsequently amended.[14]

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9. *Id.* at 57 (1979).

10. Printed Case at 29-31, *In re* Yashko, 138 Vt. 364, 415 A.2d 1322 (1980). Along with Yashko's probationary status came a substantial cut in salary and a loss of retroactive pay. The motion to enforce sought Yashko's retroactive pay which he had failed to receive, requested that Yashko not be placed at the bottom of his pay scale but rather at his former salary, and, most importantly, sought to have Yashko put on a "warning period" rather than a "probationary period." *Id.*

11. Michael Yashko, 2 V.L.R.B. at 56 (1979).

12. Printed Case at 48-49, *In re* Yashko, 138 Vt. 364, 415 A.2d 1322 (1980). The letter of dismissal reads, in part: "I understand there is some question as to whether your recent service is properly designated as 'probationary' or as a 'warning' period." *Id.* The letter further stated that Yashko's pay in lieu of notice and right to appeal were conditional upon the VLRB resolution in favor of a warning period; and if the Board ruled that a probationary period was in fact intended by the Board in its initial order, Yashko's case would be subject to dismissal. *Id.*

13. Michael Yashko, 2 V.L.R.B. at 54 (1979). Yashko's second grievance, filed as a result of his final discharge, requested that: 1) the Board rule on the issues presented in the motion to enforce, 2) if Yashko was entitled to a warning period which he had not yet received, that the Board should reinstate him with provisions for such a warning period, and 3) in any event the Board find no just cause for dismissal. Printed Case at 41-43, *In re* Yashko, 138 Vt. 364, 415 A.2d 1322 (1980).

14. Printed Case at 50-51, *In re* Yashko, 138 Vt. 364, 415 A.2d 1322 (1980). This grievance was amended to add: 1) if Yashko's probationary period were analogous to a warning period, the Board should find he was dismissed without just cause and 2) if the period in question were considered a warning period, the Board should find that Yashko's supervisor was biased and had a preconceived notion to dismiss him. *Id.*

In response to the motion to enforce, filed prior to the second grievance, the Board ordered that Yashko be given retroactive pay for the period in question. *Id.* at 38. *See also* Michael Yashko, 2 V.L.R.B. 54, 55 (1979). The other questions, pertaining to probationary status and subsequent pay scale ramifications, were not addressed in this Board order as these issues were the focus of the second grievance.

The VLRB dismissed Yashko's second grievance and affirmed his discharge.[15] The Board found the confusion of Yashko's status legally insignificant since, regardless of his classification, Yashko did have notice that he must improve his job performance.[16] The VSEA, on behalf of Yashko, gave notice of appeal to the Vermont Supreme Court in March, 1979.[17] The court reversed the VLRB's decision and reinstated Yashko in his former position.[18]

The focus of the appeal was the issue of whether there was just cause for Yashko's dismissal.[19] In deciding whether just cause existed as a matter of law, the court examined the elements of just cause, one of which is fair notice.[20] Therefore, the major issue before the court was whether or not a probationary period is equivalent to a warning period in terms of its function as notice. Although the VLRB had found these two classifications to be functionally identical, the court could not accept this reasoning and reversed the Board's decision on this ground.[21]

I. Probationary Periods

The collective bargaining agreement between the State of Vermont and the VSEA defines probationary period as "that working test period, normally six months from effective date of appointment, plus any extension, during which the employee is expected to demonstrate satisfactory performance of job duties."[22] The Rules and Regulations for Personnel Administration, from which the above agreement takes its authority, further explain the specific guidelines which define the status of a probationary em-

15. Michael Yashko, 2 V.L.R.B. 54, 60 (1979).

16. *Id.* at 59, 60. Though the Board recognized the ambiguity of their prior order, no attempt was made to clarify it. Instead, the Board stated "the intent of the order was that grievant be rehired at his former rate of pay and be given a three month period to improve his performance. In our view he did not do so during his period of reinstatement." *Id.*

17. Printed Case at 63, *In re* Yashko, 138 Vt. 364, 415 A.2d 1322 (1980).

18. *In re* Yashko, 138 Vt. 364, 366, 415 A.2d 1322, 1324 (1980).

19. *Id.* at 365, 415 A.2d at 1323.

20. *Id.*

21. *Id.* at 366, 415 A.2d at 1324.

22. Agreements Between the State of Vermont and the Vermont State Employees' Ass'n, Inc. at 14 (Effective July 1, 1977).

ployee.[23] These requirements include an acceptable performance evaluation[24] for completion of probation and written notice to the employee from the appointing authority that a probationary employee has or has not satisfactorily completed the required probationary period.[25] The rules also provide, however, that "[e]mployees serving on an original probationary period may be dismissed immediately without prior notice or pay in lieu of notice."[26]

Probationary status is, therefore, applicable to all classified employees at the start of their state service. At the successful completion of an employee's probationary period, that individual is entitled to the rights and privileges of a permanent employee.[27] Until that time, however, a probationary employee is accorded only limited statutory rights with regard to remedies for job related grievances.[28] The primary effect of these limitations is that a probationary employee can be dismissed without cause or a right to appeal during or at the completion of a probationary period unless dismissal has occurred because of discrimination.[29] This rule appears in the Rules and Regulations for Personnel Administration which prohibit discrimination "against any person in connection with recruitment, examination, appointment . . . or any other personnel action because of race, national origin, or any other non-merit factors."[30] Since 1971 the appeal process for probationers has been strictly defined: "[C]lassified employees in their initial probationary period and any extension or extensions thereof may appeal to the state labor relations board if they believe themselves discrimi-

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23. VT. DEP'T OF PERSONNEL, RULES AND REGULATIONS FOR PERSONNEL ADMINISTRATION §§ 10.06, 10.061 (undated).

24. *Id.* § 10.064.

25. *Id.* § 10.065.

26. *Id.* § 12.051.

27. *Id.* § 2.028 which defines permanent status as: "that condition attained by an employee upon satisfactory completion of an original probationary period entitling him to tenure and the statutory right of appeal. Additional rights and privileges . . . apply at any level where an appropriate probationary period has been completed." *See also* note 32 *infra.*

28. *See* VT. STAT. ANN. tit. 3, § 1001(a) (Supp. 1980).

29. *Id.*

30. VT. DEP'T OF PERSONNEL, RULES AND REGULATIONS FOR PERSONNEL ADMINISTRATION § 3.03 (undated).

nated against on account of their race, color, creed, sex, age or national origin."[31] Hence, a probationary employee's only recourse to dismissal is a claim that one of the above stated discriminatory practices has entered into the supervisor's decisionmaking process. Any other reason for dismissal, no matter how trivial or nonmeritorious, is sufficient to warrant a dismissal without appeal.

II. Warning Periods and the Requirement of Just Cause

An employee who has satisfactorily completed an initial probationary period is accorded permanent status and is entitled to additional rights and privileges.[32] For the purposes of this discussion, the significance of permanent status is that the "employee cannot be dismissed without 'just cause', has the right to be given reasons for his dismissal and to appeal his dismissal to [the] Board."[33] Unlike a probationary employee who can be dismissed without cause,[34] a permanent employee is safeguarded by the state and the VSEA from such action.[35]

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31. *Id.*; *See also* Vt. Stat. Ann. tit. 3, § 1001(a) (Supp. 1980).

32. Vt. Dep't of Personnel, Rules and Regulations for Personnel Administration § 10.07 (undated), which provides in part: "An employee appointed to a permanent position . . . shall gain permanent status upon satisfactory completion of an original probationary period. Permanent status entitles an employee to the statutory right of appeal and to additional rights and privileges as provided by the 'Rules and Regulations for Personnel Administration.' "

See also Agreements Between the State of Vermont and the Vermont State Employees' Ass'n, Inc. at 14 (Effective July 1, 1977) which define permanent status as "that condition which applies to an employee who has completed an original probationary period and is occupying a permanent classified position. Rights and privileges of permanent status include, but are not limited to, . . . appeal."

33. Michael Yashko, 2 V.L.R.B. 54, 58 (1979).

34. A probationary employee can be dismissed without notice or a right to appeal unless such discharge was motivated by statutorily proscribed discrimination. *See* note 32 and text accompanying note 26 *supra*.

35. *See* Agreements Between the State of Vermont and the Vermont State Employees' Ass'n, Inc., Article XV, § 2 at 25 (Effective July 1, 1977) which provide:

> the appointing authority or his authorized representative may dismiss an employee for just cause with two weeks notice or two weeks pay in lieu of notice. Written notice of dismissal must be given to the employee within twenty-four hours of verbal notification. In the dismissal notice, the appointing authority shall state the reason(s) for dismissal and inform the employee of his right to appeal.

Cf. note 32 and text accompanying note 26 *supra*. (Probationary employees are not provided

Both the VLRB and the Vermont Supreme Court have been faced with the task of delineating just cause requirements. In 1977 the court had occasion to specifically define the criteria for examining just cause as the term is used in the collective bargaining agreement between the state and the VSEA. In the case of *In re Brooks*,[36] the court stated:

> The ultimate criterion of just cause is whether the employer acted reasonably in discharging the employee because of misconduct. We hold that a discharge may be upheld as one for "cause" only if it meets two criteria of reasonableness: one that it is reasonable to discharge employees because of certain conduct, and the other, *that the employee had fair notice, express or fairly implied, that such conduct would be ground for discharge.*[37]

Using this standard, the court reversed the Board's reinstatement order after finding that just cause for Brooks' dismissal existed as a matter of law.[38] Crucial to the court's recognition of just cause was the finding that the employee had "fair notice from the circumstances that his conduct would be ground for discharge."[39] Hence, the element of notice emerged as a key requirement to sustain a dismissal for just cause.

Additionally, the VLRB has construed the Rules and Regulations for Personnel Administration and the collective bargaining agreement between the state and the VSEA to provide that before a permanent employee is dismissed, the individual should be placed on a warning period.[40] The Board has stated that to allow the immediate dismissal of a permanent employee before any attempt has been made at supervisory counseling "appears to be a

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with the protection of notice, pay in lieu of notice, or the right to appeal a dismissal.)

36. 135 Vt. 563, 382 A.2d 204 (1977).

37. *Id.* at 568, 382 A.2d at 207-08, (citing Civil Serv. Comm'n of Tucson v. Livingston, 22 Ariz. App. 183, 525 P.2d 949, 954 (1974); Carter v. United States, 407 F.2d 1238, 1244 (D.C. Cir. 1968) (emphasis added).

38. *Id.* at 569, 571, 382 A.2d at 208, 209 (1977).

39. *Id.* at 569, 382 A.2d at 208 (1977).

40. See note 43 *infra*, which lists cases before the Board between 1977 and 1979 where permanent employees were placed on a warning period and subsequently dismissed for just cause.

traumatic and perhaps too drastic a step."[41] Section 2.043 of the Rules and Regulations for Personnel Administration defines warning period as "a specified period immediately following the receipt of a marginal or unsatisfactory performance rating by a non-probationary employee, during which he is expected to achieve an adequate level of performance."[42] This warning period, then, can be reasonably interpreted to serve as fair notice to a permanent employee that unless job performance improves the employee will be dismissed with just cause.

Since the *Brooks* decision, the VLRB has successfully employed the court's just cause standard in several cases.[43] In each instance, a permanent employee was dismissed for just cause after being placed on a warning period. This procedural step of placing employees on warning appears, in each case, to have functioned as the fair notice requirement where just cause for dismissal was affirmed.[44]

III. Decision

In reversing the VLRB's final decision to sustain Yashko's dismissal, the Vermont Supreme Court invoked the *Brooks* criteria[45] as a means of examining the issue of just cause. The court reviewed the Board's findings as toYashko's alleged inadequacies on the job and then considered the legal relevance of Yashko's reinstatement on a probationary period rather than a warning period.[46]

Using the first criterion introduced in *Brooks,* that the conduct of the employee must be such that it reasonably warrants dis-

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41. Michael Yashko, 1 V.L.R.B. 119, 124 (1977).

42. Vt. Dep't of Personnel, Rules and Regulations for Personnel Administration § 2.043 (undated).

43. *See* Clifford Madru, 2 V.L.R.B. 203 (1979) (where mechanic was placed on warning period prior to dismissal with just cause); Olin Brooks, 1 V.L.R.B. 369 (1978) (where employee's initial probationary period was extended, employee was reinstated and then placed on warning period after which time he was dismissed with just cause); Harold Bobar, 1 V.L.R.B. 157 (1978) (where custodian was dismissed with just cause after six month warning period).

44. See note 43 *supra.*

45. See text accompanying notes 36-39 *supra.*

46. *In re* Yashko, 138 Vt. at 465-66, 415 A.2d at 1322-24 (1980).

missal,[47] the court entertained serious doubts as to whether the Board's findings with regard to Yashko's conduct were sufficient to sustain a just cause charge.[48] Upon a review of the findings below, the court concluded that the Board's reasoning in its order to reinstate Yashko was based on factors that did not address his alleged inefficiencies on the job.[49]

Additionally, the court noted that the Board's findings were "primarily a recital of the reasons given by appellant's supervisor for her decision to discharge him."[50] Citing "the familiar rule of *Krupp v. Krupp*,"[51] that such recitals are not findings, the court dismissed the possibility that a discharge for just cause based on Yashko's alleged misconduct was plausible: "The element of misconduct required as a basis for just cause has, indeed, scant justification in this record."[52]

Even though the court clearly rebuked the VLRB for its failure to make adequate findings as to Yashko's job performance, reversal of the Board's decision did not rest upon that ground. Instead, the court concluded, in adherence to the second part of the

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47. *In re* Brooks, 135 Vt. 563, 568, 382 A.2d 204, 207-08 (1977). *See also* text accompanying notes 36-37 *supra*.

48. *In re* Yashko, 138 Vt. at 365-66, 415 A.2d at 1323 (1980).

49. *Id.* The Board's decision to reinstate Yashko was based on two factors. First, the Board found that appellant's initial notice of dismissal did not conform with the provisions of the collective bargaining agreement between the State of Vermont and the VSEA. Michael Yashko, 1 V.L.R.B. 119, 124 (1977). Though this error was corrected, the Board nonetheless found the dismissal inadequate for a second reason in that notice of discharge was premature. *Id.* at 124. Yashko's supervisor had made no attempt at counseling or progressive discipline before discharging Yashko. *Id.* Both of these procedures were considered valid by the State Department of Personnel though not included in the collective bargaining agreement as a prerequisite to discharge. The Board's order for reinstatement included, *inter alia*, provisions for counseling under the supervision of the Vermont Department of Personnel. *Id.* at 125.

It is important to note, however, that in December, 1977 the Vermont Supreme Court held that step discipline is not inherent in just cause unless expressly stated in the collective bargaining agreement. Therefore, the Board's reason for reinstating Yashko would have been invalid. *In re* Brooks, 135 Vt. 563, 568, 382 A.2d 204, 207 (1977).

50. *In re* Yashko, 138 Vt. at 365, 415 A.2d at 1323 (1980).

51. Krupp v. Krupp, 126 Vt. 511, 514, 236 A.2d 653, 655 (1967) (citing Savard v. George, 125 Vt. 250, 254, 214 A.2d 76, 80 (1965); Amey v. Hall, 123 Vt. 62, 65, 181 A.2d 69, 72 (1962)).

52. *In re* Yashko, 138 Vt. at 366, 415 A.2d at 1323 (1980).

Brooks criteria, that the element of fair notice was "completely negated by the record."[53]

There is little doubt that the language used by the Board concerning Yashko's status upon reinstatement served only to mislead both Yashko and his employer as to the proper way to proceed. The VLRB ignored this dilemma in deciding to affirm Yashko's dismissal holding that "[w]hether he was in a 'warning period' or a 'probationary period' is . . . legally irrelevant since we find just cause for his dismissal."[54]

The Vermont Supreme Court completely rejected the VLRB's reasoning and noted that the Board's order to reinstate Yashko on probationary status was a "misnomer."[55] Thus, the court found it essential to clarify the distinctions between a probationary period and a warning period in order to determine whether the requirement of fair notice had been satisfied. Accordingly, the court considered the circumstances of an employee with the rights and privileges of permanent status relegated "to a status of complete uncertainty without any of the contractual safeguards provided for him."[56]

Yashko's only official notice, the court concluded, was that he could be dismissed without regard to his performance, "not that any specified conduct would be *grounds* for dismissal."[57] The Board failed to recognize that a warning period satisfied the requirement of notice as an element of just cause, and a probationary period did not. The court, conversely, found ample grounds for reversal in precisely that fact.[58]

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53. *Id.*

54. Michael Yashko, 2 V.L.R.B. 54, 60 (1979).

55. *In re* Yashko, 138 Vt. at 365, 415 A.2d at 1323 (1980).

56. *Id.* at 366, 415 A.2d at 1324 (1980).

57. *Id.*

58. *Id.* It should be noted that the court further commented on its inability to reach the just cause issue with regard to the first substantive requirement of *Brooks*. As a closing remark, the court suggested that the Board examine Yashko's allegations that his supervisor had a clear bias against him since such a finding would be determinative. *Id.*

Conclusion

The decision of the Vermont Supreme Court in the *Yashko* case exemplifies the judicial response to an administrative agency's failure to adhere to its own governing rules and regulations. Though the issue of just cause for Yashko's dismissal remains open, the court has attempted to impress upon the VLRB the need to assess the legal consequences of incorrectly classifying an employee.

If, after the *Yashko* opinion, it is nonetheless the state's position that a warning period and a probationary period are functionally identical, the collective bargaining agreement between the state and the VSEA should be amended to eliminate this source of confusion. This position would be tenable only if the state makes notice requirements for dismissal the same regardless of classification.

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