STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: September 15, 2015)

STATE OF RHODE ISLAND	:	
	:	
VS.	:	**P1/2014-0822 AG**
	:	
JOSE LOPEZ	:	

DECISION

KRAUSE, J. Defendant Jose Lopez urges dismissal of a single-count indictment alleging that on September 3, 2010, he discharged a firearm during a crime of violence (assault with a dangerous weapon), which resulted in permanently incapacitating Ramon Cruz, who is now a paraplegic. The penalty for conviction on that charge is a mandatory life sentence. G.L. 1956 § 11-47-3.2(a), (b)(4).[1]

The indictment, which was returned by a grand jury on March 26, 2014, does not include a count separately charging the defendant with the felony assault upon Mr. Cruz. The state had already charged him with that offense, as well as three other counts, in a criminal information which bears the Superior Court Clerk's file-stamp of September 9, 2013, six days beyond the three-year statute of limitations for assault with a dangerous weapon. See G.L. 1956 § 12-12-17(c). Accordingly, the defendant also filed a motion to dismiss that information as time-barred.[2]

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[1] Section 11-47-3.2 is fully set forth in Appendix A hereto.

[2] The criminal information (P2/2013-2574-AG) also charged the defendant with two additional felonies: committing a crime of violence (assault with a dangerous weapon) while armed with or having available a firearm (Count Two) and carrying a pistol without a license (Count Three). Count Four charged the misdemeanor offense of firing a gun within the city limits. The state acknowledges that Count Two should not have been charged in conjunction with the felony

Both dismissal motions were scheduled to be heard on August 17, 2015. On that day, however, both parties agreed, instead, to submit the matter to the Court for a decision based upon their several pleadings. The state also voluntarily dismissed the criminal information pursuant to Rule 48(a), Super. Ct. R. Cr. P., acknowledging in open court that there were "legitimate issues" associated with its statute of limitations argument.[3]

As grounds for both dismissal requests, leading up to the scheduled August 17 hearing, the defendant had principally argued that because the felony assault charge was time-barred, the state was precluded from using it as a predicate crime of violence under § 11-47-3.2. With the dismissal of the criminal information, that argument, at least on that narrow track, is no longer available to the defendant. That does not mean, however, that his principal argument is necessarily defused.

Distilled to its essence, he contends that an allegation under § 11-47-3.2 depends entirely upon the state's successful prosecution of a predicate crime of violence. In other words, it does not matter whether the felony assault was nullified by operation of the statute of limitations or by the state's voluntary dismissal of it, because, he argues, if the predicate crime of violence is no longer extant, a charge under § 11-47-3.2 cannot survive. That contention raises an issue of first impression in Rhode Island.

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assault in Count One, as it violates the double jeopardy provisions of the federal and state constitutions. State v. Ashness, 461 A.2d 659, 667 (R.I. 1983).

[3] Curiously, the state has declined to concede that the felony assault is time-barred. Because the state has dismissed the information, this Court need not sort out the parties' perceived differences over the timeliness of the filing of the information and the application of the statute of limitations, which consumed several pages of their briefs. Nevertheless, to avoid any lingering speculation as to the Court's view of that issue, suffice it to say that dismissal of the information, in its entirety, was foreordained.

Alternatively, the defendant contends that § 11-47-3.2 is simply a sentence enhancement mechanism and cannot support a stand-alone criminal cause of action. Additionally, invoking the state and federal constitutions, he complains that life imprisonment for shooting and permanently incapacitating another person is impermissibly harsh punishment. Lastly, he criticizes the state for allegedly exceeding the ethical boundaries of prosecutorial discretion by charging him under § 11-47-3.2(b)(4) and unfairly exposing him to such a severe penalty.

For the reasons set forth herein, the Court denies the defendant's motion to dismiss the indictment. The issues will be addressed *seriatim*.

The Absence of a Separate Charge Alleging a Predicate
Crime of Violence Does Not Affect a § 11-47-3.2 Prosecution

The state is neither obliged to convict nor even separately charge a defendant with an underlying crime of violence in order to secure a conviction under § 11-47-3.2. That statute provides in pertinent part, with emphasis added:

> "11-47-3.2. Using a firearm when committing a crime of violence.
>
> "(a) No person shall use a firearm while *committing or attempting to commit* a crime of violence ***.
>
> "(b) Every person who, while committing an offense violating subsection (a) of this section, discharges a firearm shall be guilty of a felony and be imprisoned as follows:
>
> ***
>
> "(4) Life . . . if the . . . permanent incapacity of any person (other than the person convicted) results from the discharge of the firearm[.]"

Nowhere in the statute is it mandated that a conviction be secured on the underlying crime of violence in order to find the defendant guilty under § 11-47-3.2. Indeed, the statute invites criminal liability even if the crime of violence is never completed; an *attempt* to commit the offense suffices. Sec. 11-47-3.2(a)(1). What is required is the commission of the act, that is to say, its performance, execution or accomplishment, or even its mere attempt. Any act of

violence, or its endeavor, if it is included in the list of violent crimes limned by the legislature in § 11-47-2(2), is simply an element which the state must prove for a § 11-47-3.2 offense. A judgment of conviction, with all the public trappings of a judicial decree, is not needed. [4]

If it is shown that a person purposefully and unjustifiably shoots another, he has unquestionably carried out an assault upon his victim with a dangerous weapon. It matters not whether the shooter is later prosecuted and ultimately convicted of that criminal charge. Indeed, if he is never caught and eludes apprehension for the remainder of his life, he has nonetheless committed, *i.e.*, performed, the act of assaulting another person with a dangerous weapon. The fact of the act itself is not diminished by the passage of time or by the absence of a conviction.

It is the view here that if the state can demonstrate that the defendant deliberately and indefensibly discharged a firearm in the course of committing, *i.e.*, carrying out, an assault upon Ramon Cruz resulting in his permanent incapacity, the state will have sustained its burden of proof under the statute. Copious federal decisions interpreting the federal version of such a statute support that conclusion.

Although the Rhode Island statute does not track the language of the federal version, 18 U.S.C. § 924(c)(1), our enactment nonetheless conveys and reflects the same import and similar intent with which Congress ordained the federal provision.

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[4] A crime of violence "means and includes any of the following crimes or an attempt to commit any of them: murder, manslaughter, rape, first or second degree sexual assault, first or second degree child molestation, kidnapping, first and second degree arson, mayhem, robbery, burglary, breaking and entering, any felony violation involving the illegal manufacture, sale, or delivery of a controlled substance, or possession with intent to manufacture, sell, or deliver a controlled substance classified in schedule I or schedule II of § 21-28-2.08, any violation of § 21-28-4.01.1 or 21-28-4.01.2 or conspiracy to commit any violation of these statutes, assault with a dangerous weapon, assault or battery involving grave bodily injury, and/or assault with intent to commit any offense punishable as a felony; upon any conviction of an offense punishable as a felony offense under § 12-29-5." Sec. 11-47-2(2).

Section 924(c)(1), fully set forth in Appendix B hereto, provides in relevant portion:

> "[A]ny person who, during and in relation to any crime of violence . . . for which the person may be prosecuted in a court of the United States, uses or carries a firearm . . . shall, in addition to the punishment provided for such crime of violence . . . be sentenced [from five years to as much as life in prison]."

Where, as here, there is no explication of a Rhode Island statute, we have traditionally relied upon federal case law interpreting a similar enactment for guidance. State v. Porto, 591 A.2d 791, 795 (R.I. 1991) (where state's RICO conspiracy statute had never been addressed, "we look for guidance to federal decisions that have passed upon the requirements for a conviction[.])" Even if the Rhode Island and federal statutes "are substantively different . . . we believe federal decisions offer sound conceptual guidance." Id. at 795 n.3.

The United States Court of Appeals for the Second Circuit has recently examined 18 U.S.C. § 924(c) and pointed out that "[e]very circuit court to have considered the issue has concluded that § 924(c) does not require the defendant to be convicted of (or even charged with) the predicate crime, so long as there is legally sufficient proof that the predicate crime was, in fact, committed." Johnson v. United States, 779 F.3d 125, 129 (2d Cir. 2015) (collecting federal cases). The Second Circuit then announced that it, too, would "join that consensus." Id.[5] That consensus holds that "it is only the *fact* of the offense, and *not a conviction*, that is needed to

[5] Not included in the Second Circuit's collection of federal cases are any decisions from the First, Seventh or D.C. Circuits. Omitting the D.C. Circuit was clearly an oversight, as that court has consistently followed its "previous view that a § 924(c)(1) conviction stands on its own even if the defendant is acquitted of the underlying offense or the underlying offense is not charged, so long as the government presents sufficient evidence to prove the predicate offense as an element of the § 924(c)(1) violation." United States v. Anderson, 59 F.3d 1323, 1326 (D.C. Cir. 1995) (en banc), *cert. denied*, 516 U.S. 999 (1995). The First and Seventh Circuits have not yet considered the issue, although the First Circuit, while construing parallel language in a different statute, has acknowledged, without any expression of disagreement, the holdings of its sister circuits in the § 924(c) arena. United States v. Vidal-Reyes , 562 F.3d 43, 55 n.9 (1st Cir. 2009).

establish the required predicate." United States v. Munoz-Fabela, 896 F.2d 908, 911 (5th Cir. 1990) (emphasis added), *cert. denied*, 498 U.S. 824 (1990).

Defendant Lopez, dismissive of the federal statute and all of the circuits aligned with that stated rule, contends that they are incorrect guideposts for construing § 11-47-3.2. He claims that the federal statute is more expansive than the Rhode Island version, and he presses the Court to adopt Priest v. State of Delaware, 879 A.2d 575 (Del. 2005) as its polestar. The Court disagrees.

The Rhode Island statute is, in fact, significantly more encompassing than the federal enactment. The defendant focuses on the introductory language of 18 U.S.C. § 924(c)(1), which targets a person "who, during and in relation to any crime of violence . . . for which the person *may be prosecuted"* employs a firearm, shall be sentenced to a mandatory prison term. He believes that the term "may be prosecuted" is somehow much broader than the language of § 11-47-3.2(a). He misconstrues the scope of our statute. Indeed, the opposite of what he argues is much more the case. In the federal domain, Congress opted to target a predicate crime of violence for which a defendant may or legally could be held criminally accountable. United States v. Carter, 300 F.3d 415, 424-25 (4th Cir. 2002) (citing Munoz-Fabela, *supra*). The General Assembly, as discussed, *supra*, framed § 11-47-3.2 with a much wider range, condemning even a mere *attempt* to commit any of the acts of violence listed in § 11-47-2(2).[6]

[6] Rhode Island does not have an over-arching criminal "attempt" statute, and most of the offenses listed in the subsection defining crimes of violence (footnote 4, *supra*) are not prosecutable as "attempts." Hence, the necessity, as the legislature surely recognized, of including the word "attempt" in the prefatory language defining the various crimes of violence. Thus, apart from § 11-47-2(2), an "attempt" to commit assault with a dangerous weapon is not a cognizable offense. Moreover, when the General Assembly has intended to criminalize an *attempted* offense, it has said so explicitly, criminalizing, for example, attempts to commit larceny (§ 11-41-6), money laundering (§ 11-9.1-5), bribery (§ 11-7-3), child pornography (§ 11-9-1.3), procuring perjury (§ 11-33-3), escape from prison (§ 11-25-1.1), and breaking and

The defendant's reliance on Priest is also unavailing. Torshiro Priest was charged under Delaware's "PFDCF" weapons statute, 11 Del. C. § 1447A, subsection (a) of which provides: "A person who is in possession of a firearm during the commission of a felony is guilty of possession of a firearm during the commission of a felony." Delaware charged Priest with several counts, including three predicate felonies: (1) trafficking in cocaine, (2) possession with intent to deliver cocaine, and (3) maintaining a vehicle for keeping or delivering controlled substances. The jury acquitted Priest of the first two felonies but convicted him of the third one and also the separate PFDCF offense.[7]

The Delaware Supreme Court reversed the defendant's conviction on the predicate motor vehicle felony for insufficient evidence. Having vacated the conviction of the only remaining predicate felony, the court then set aside the PFDCF conviction. It is upon that result which defendant Lopez fashions his demand for dismissal of the instant indictment. He argues that because the prosecutor has dismissed the time-barred felony assault charge, the state no longer has a predicate offense available upon which to prosecute him under § 11-47-3.2.

The defendant's focus on Priest and the Delaware statute is much too tapered, as it fails to take into account that statute's concluding directive in subsection (g), which supplied the Delaware court with its principal basis for vacating the PFDCF conviction. That subsection provides: "A person may be found guilty of violating this section notwithstanding that the felony

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entering (§ 11-8-1.1(b)). Even "attempts" to commit common law capital offenses such as murder, robbery, rape, and burglary cannot be prosecuted as distinct crimes. In order to prosecute what might otherwise be termed an "attempted murder," for example, the state would be obliged to charge an "assault with intent to murder."

[7] Unlike Rhode Island, Delaware does not limit the predicate offense to a crime of violence; any felony qualifies as an underlying offense under subsection (a) of that state's statute. (Subsections (b) through (f) simply list the various penalties for repeat offenders and also mandate that juvenile violators over age fifteen be tried as adults.)

for which the person is *convicted* and during which the person possessed the firearm is a lesser included felony of the one originally charged." 11 Del. C. § 1447A(g) (emphasis added). Addressing the plain language of subsection (g), the Delaware Supreme Court held, "By referring to the 'felony for which the person is convicted,' that legislative instruction indicates that the statute creates criminal liability only where a defendant is actually found guilty of *some* felony: either the felony charged in the indictment or a lesser-included felony." Priest, 879 A.2d at 584 (underscoring added; italics in original).

The Delaware court acknowledged that if its statute replicated the federal law - particularly the "may-be-prosecuted" term in § 924(c) - its decision would have been different, recognizing that the federal decisions stand for the proposition that "'[i]t is only the fact of the offense, and not a conviction, that is needed to establish the required predicate.'" Priest, 879 A.2d at 589 (quoting Munoz-Fabela, 896 F.2d at 911). However, the PFDCF charge could not survive, the court said, because the Delaware statute demands, as an indispensable element, the actual *conviction* of a predicate felony. Neither our statute nor the federal enactment is contingent upon the conviction of a predicate offense.

Indeed, the circumstances presented in Priest were duplicated in United States v. Ruiz, 986 F.2d 905, 911 (5th Cir. 1993) and United States v. Bracy, 67 F.3d 1421, 1430 (9th Cir. 1995). In both cases the defendants were acquitted of the predicate crimes of violence but nonetheless convicted of violating § 924(c). Hewing to what has now become the accepted federal rule that no predicate charge of violence need be charged for a § 924(c) conviction, the appeals of both Bracy and Ruiz were rejected. See also, Carter, 300 F.3d at 425-26 (holding that a hung jury on the predicate count did not prevent conviction under § 924(c)).

The Ninth Circuit applied the same rationale to affirm Bracy's conviction as was later espoused by the Priest dissent. The Priest majority held that the acquittal on the underlying

predicate crime was impermissibly inconsistent with a conviction on the PFDCF charge. Priest, 879 A.2d at 581. The dissent maintained that the acquittal should simply be attributed to jury lenity and that it did not create legally inconsistent verdicts. Id. at 590-91. Such was the justification the Ninth Circuit had employed when it affirmed Bracy's § 924(c) conviction a decade earlier, notwithstanding his acquittal on the underlying crime of violence:

> "Bracy acknowledges that the government was not required to charge him with the underlying crime of violence in count eight [violent crime in aid of racketeering] in order to charge him under count nine [18 U.S.C. § 924(c)(1)]. *See United States v. Hunter,* 887 F.2d 1001 (9th Cir.1989) ("[A] defendant charged with violating section 924(c)(1) must be proven to have committed the underlying crime, but nothing in the statute or the legislative history suggests that he must be charged with and convicted of the underlying offense."), *cert. denied,* 493 U.S. 1090 [ ](1990). However, he argues that once the government chose to charge him on count eight, a conviction under that count became a prerequisite to a conviction under count nine. We disagree.
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> "Bracy's acquittal on count eight does not mean that the government failed to prove that he committed the underlying crime of violence. Essentially, Bracy's conviction under count nine is inconsistent with his acquittal on count eight (i.e., the jury determined that he didn't commit the underlying crime of violence charged in count eight, but found that he did commit the underlying crime for purposes of count nine.) Faced with a similarly inconsistent verdict in *United States v. Powell,* 469 U.S. 57, 65 [ ] (1984), the Supreme Court reaffirmed the principle that an inconsistent jury verdict, without more, is not grounds for reversal. *See Dunn v. United States,* 284 U.S. 390, 393 [ ] (1932). We, too, have adhered to this rule. [ ] Therefore, we affirm Bracy's conviction on count nine." Bracy, 67 F.3d at 1430-31 (some internal citations omitted).[8]

The Rhode Island statute is just as, if not more, divergent from Delaware's measure as the federal statute. Unlike that state's measure, our enactment, like the federal law, requires no conviction of the predicate offense, or, for that matter, even a separate count charging one. All that is required under the Rhode Island statute, at minimum, is an attempt to commit the act or, at most, the commission of an act that reflects only "the fact of the offense." See Munoz-Fabela,

[8] Rhode Island also follows the teachings of Dunn and its progeny. See State v. Tully, 110 A.3d 1181, 1192 (R.I. 2015); State v. Allessio, 762 A.2d 1190, 1191 (R.I. 2000).

896 F.2d at 911. Accordingly, the holding in Priest affords the defendant no support at all here. Indeed, its analysis of the federal statute and its dissection of the federal cases reinforce this Court's within holding.

For all of the preceding reasons, this Court finds that § 11-47-3.2, like its federal counterpart, requires neither a conviction of nor a separate count charging a predicate crime of violence. So long as the state can factually demonstrate that the defendant's conduct includes the elements of the underlying crime of violence, and that he discharged a firearm resulting in the incapacity of another person, criminal liability exists under § 11-47-3.2(b).

Section 11-47-3.2 Is Not Simply a Sentence Enhancing Statute

As an alternative ground for dismissal of the indictment, the defendant argues that § 11-47-3.2 is simply a sentence enhancing tool and does not create a separate offense. He is mistaken.

Similar arguments, at the highest constitutional level, have failed. On several occasions the Supreme Court has flatly rejected double jeopardy claims and held that § 11-47-3.2 invites no merger with the predicate felony for sentencing purposes, including assault with a dangerous weapon. State v. Monteiro, 924 A.2d 784, 792-94 (R.I. 2007) (first degree murder); State v. Feliciano, 901 A.2d 631, 647-48 (R.I. 2006) (same); State v. Rodriguez, 822 A.2d 894, 904-08 (R.I. 2003) (same); State v. Linde, 965 A.2d 415, 416 n.1 (R.I. 2009) (second degree murder); State v. Marsich, 10 A.3d 435, 442 (R.I. 2010) (robbery); State v. Stone, 924 A.2d 773, 778-81 (R.I. 2007) (assault with a dangerous weapon under § 11-47-3 and explicated in the context of § 11-47-3.2).[9]

[9] Beyond the double jeopardy cases, § 11-47-3.2 has withstood all other constitutional challenges in the Rhode Island Supreme Court. Linde v. State, 78 A.3d 738, 742-44 (R.I. 2013) (Eighth Amendment/due process claim of cruel and unusual punishment); Sosa v. State, 949 A.2d 1014,

The defendant also suggests that the statute's legislative history reflects preclusion of the statute's application unless it is simultaneously charged with a predicate offense. He offers no authority for that awkward proposition other than to say that since the state has usually charged a predicate crime of violence when it filed a § 11-47-3.2 case, it must do so in every instance. Not one word of the statute or any part of the criminal code mandates such a cramped procedure.

Further, no logic attends such an assertion, particularly where neither the state nor the federal statute requires either a conviction of the predicate offense or that it even be charged. In any event, no impediment existed which precluded the state from subsequently submitting the case to a grand jury. Superseding indictments and amended informations are common occurrences and grist for the prosecutorial mill.[10]

The defendant's reliance on what he professes is the statute's legislative history is entirely misplaced.[11] Where, as here, there is nothing ambiguous about a statute, the Rhode Island Supreme Court has emphatically rejected any confidence in so-called "legislative history." In Such v. State, 950 A.2d 1150, 1158-59 (R.I. 2008), the Court issued the following admonition:

1016-17 (R.I. 2008) (separation of powers); State v. DeJesus, 947 A.2d 873, 884-86 (R.I. 2008) (equal protection); Monteiro, 924 A.2d at 792-96 (cruel and unusual punishment, separation of powers, as well as double jeopardy).

[10] The defendant has not, at least directly, claimed that the state has impermissibly targeted him for prosecution. If, however, that is what he is somehow implying, any such notion is farfetched. In order to mount a claim of unlawful selective prosecution, he would be obliged to demonstrate that charging him "has both a discriminatory effect and is 'deliberately based upon an unjustifiable standard such as race, religion, or some other arbitrary classification *** including the exercise of protected statutory and constitutional rights.'" State v. Price, 706 A.2d 929, 936 (R.I. 1998) (quoting State v. Ricci, 704 A.2d 210, 211 (R.I. 1997)); accord State v. Quinlan, 921 A.2d 96, 110 (R.I. 2007). There is nothing before this Court which in any way underwrites such a showing.

[11] The defendant concedes that significant portions of what he says is "legislative history" are not even available. (Def.'s Mem. at 6 n.2, May 8, 2014) (recordings of the House and Senate committee meetings discussing the respective bills cannot be obtained).

> "Finally, this Court emphasizes that it does not rely in reaching its decision upon the various indicia of legislative intent that the parties advanced. 'There is no recorded legislative history in Rhode Island from which to ascertain legislative intent.' Laird v. Chrysler Corp., 460 A.2d 425, 428 (R.I. 1983). To the extent that this Court examines the circumstances surrounding the enactment of a statute, it engages in this exercise only when the statute is ambiguous. First Republic Corp. of America v. Norberg, 116 R.I. 414, 418, 358 A.2d 38, 41 (1976). 'When the language of a statute expresses a clear and sensible meaning, this [C]ourt will not look beyond it.' Id. This Court, however, does not look to the public statements of officials, the political leanings of the members that introduced the legislation, the meaning of gubernatorial signing ceremonies, or the actions of the compiler in the Law Revision Office. Even the House or Senate's adherence or failure to follow its own internal rules carries little weight for the purposes of statutory construction."

Both parties acknowledge that § 11-47-3.2 was modeled after the federal statute. The same federal authorities which hold that no conviction of a predicate offense need be achieved or even charged have also expressly held that 18 U.S.C. § 924(c) is not merely a sentence enhancement statute. It, like our statute, carves out a separate offense distinct from the underlying predicate act. See United States v. Hunter, 887 F.2d 1001, 1003 (9th Cir. 1989), *cert. denied*, 493 U.S. 1090 (1990) ("We have long held section 924(c)(1) defines a separate crime rather than merely enhancing the punishment for other crimes."); accord United States v. Martinez, 924 F.2d 209, 211 n.2 (11th Cir. 1991).

Moreover, if § 11-47-3.2 were merely a punishment statute, as the defendant asserts, the General Assembly would have certainly said so, as it did last year when it enacted the Criminal Street Gang Enhancement law (Sec. 12-19-39). Subsection (e) of that statute declares: "This section does not create a separate offense but provides an additional enhanced sentence for the underlying offense." Id. The General Assembly chose not to include any such limitation in § 11-47-3.2, and no case in Rhode Island - for all of the challenges posed to the statute (see footnote 9, *supra*) - has ever imported one.

Accordingly, this Court rejects the defendant's assertion that § 11-47-3.2 is merely an ornamental sentence boosting apparatus without substantive effect. Our legislature, like Congress, has fashioned a separate and distinct criminal offense, one which our Supreme Court has expressly, indeed, at the most fundamental constitutional plane, held to be an offense distinct from the alleged predicate crime of violence. See *supra* at page 10.

And, because the penalty under § 11-47-3.2(b)(4) for causing permanent incapacitation is a life term, the offense is not time-barred. Sec. 12-12-17(a) (no statute of limitations for any offense for which the maximum punishment is life imprisonment). To adopt the defendant's position would effectively impose a time limit on every case brought under § 11-47-3.2(b)(2) (injury to a police officer) or (b)(4), directly contravening the clear and unambiguous legislative intent *not* to impose any time restriction for charging offenses which carry a life penalty.[12]

Eighth Amendment Challenge

The defendant's constitutional challenge to the life term mandated by § 11-47-3.2(b)(4) is premature. He has not been tried and convicted of that offense. If he is found guilty after trial,

[12] Entirely analogous to and congruent with this Court's ruling are the myriad decisions which hold that the expiration of the statute of limitations of the underlying felony is irrelevant to a prosecution for felony murder. See State v. White, 477 N.W.2d 24, 25-26 (Neb. 1991) (holding that the three-year statute of limitations of the underlying offense is not applicable to a felony-murder prosecution, and stating that "[t]he defendant need not be charged and convicted of an underlying felony"); State v. Jones, 553 S.E.2d 612, 614 (Ga. 2001) (collecting cases); People v. Seals, 776 N.W.2d 314, 323-25 (Mich. App. 2009); People v. Wilson, 808 N.E.2d 1169, 1173 (Ill. App. Ct. 2004); State v. Lacy, 929 P.2d 1288, 1298 (Ariz. 1996); State v. Dennison, 801 P.2d 193, 202 (Wash. 1990) (en banc); People v. Morris, 756 P.2d 843, 850 (Cal. 1988); Jackson v. State, 513 So.2d 1093, 1095 (Fla. Dist. Ct. App. 1987); People v. Harvin, 259 N.Y.S.2d 883, 885-86 (N.Y. Sup. Ct. 1965).

the Court will then consider whether this claim has merit. That issue, however, is not presently ripe for determination by the Court.[13]

Defendant's Claim of Ethical Overcharging is Meritless

The defendant's final imprecation criticizes the state for alleged unethical "overreaching." First, he says that the indictment constitutes "prosecutorial overcharging" because the felony assault is time-barred and that "subsequent recognition of this fact by the defense (*sic*) and prosecution resulted in the filing of the current charge[.]" Secondly, he claims that the state unethically charged him with an offense which "does not reflect the gravity of the criminal conduct." (Def.'s Mem. at 8-9, May 8, 2014.)

There are few tenets more basic to our system than the rule requiring an attorney's candor to the court. Rule 3.3, Article V of the Rules of Professional Conduct**.** The state's attorney has assiduously adhered to that precept in this case. At the very outset of the initial pretrial conference on March 4, 2014, the prosecutor, in precise keeping with his ethical obligations, immediately alerted both defense counsel and the Court that the charges in the information might be time-barred.[14] He further advised counsel and the Court that, apart from the statute of limitations issue, the victim's permanent incapacitation also invited a grand jury's review under § 11-47-3.2(b)(4). Such considered reflection by the state's attorney is entirely consistent with the ethical responsibilities and standards of prosecutorial conduct contemplated by the American Bar Association, which admonish a prosecutor to consider, *inter alia*, the interests of victims

[13] By raising this constitutional claim now, the defendant has preserved his right to advance it later in the proceedings if necessary. See Rule 12(b)(2), Super. Ct. R. Cr. P.

[14] A prosecutor has a "heightened duty of candor" and should disclose "legal authority in the controlling jurisdiction known to the prosecutor to be directly adverse to the prosecution's position and not disclosed by others." *ABA Standards for Criminal Justice: Prosecution Function and Defense Function,* Standard 3-1.4(a), (c) (Feb. 15, 2015).

when deciding to pursue appropriate criminal charges. *ABA Standards for Criminal Justice: Prosecution Function and Defense Function,* Standard 3-1.2(b) (Feb. 15, 2015).

It is a given that the Rhode Island Attorney General is vested with "considerable discretionary powers," the exercise of which our Supreme Court has historically accorded substantial deference. State v. Price, 706 A.2d 929, 936 (R.I. 1998) (recognizing "the extreme deference due prosecutors in their prosecutorial decisions and the official discharge of their duties"); see State v. Lead Indus. Ass'n, Inc., 951 A.2d 428, 474 (R.I. 2008) ("It is not the province of this Court, or the Superior Court, to dictate how the Attorney General elects to carry out the * * * functions of his office.") (citing Mottola v. Cirello, 789 A.2d 421, 425 (R.I. 2002)).

It must also be borne in mind that the decision to charge the defendant was not simply prompted by prosecutorial whimsy. The matter was, after all, submitted to a grand jury for its consideration. There has been no claim anywhere in the defendant's pleadings of irregularity by the state in its presentation of the case before that body. The evidence was duly considered by the grand jurors, and they reported a true bill. Accordingly, where, as here, "[a]n indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits." Costello v. United States, 350 U.S. 359, 363 (1956); State v. Mainelli**,** 543 A.2d 1311, 1313 (R.I. 1988).

> "We must bear in mind that when a grand jury returns an indictment, the people of the State of Rhode Island are entitled to have the issues of fact and the issues of guilt or innocence tried on their merits. *** [D]ismissal of the charges is in effect a punishment imposed upon the people of this state. Only in the most extraordinary of circumstances should the people of Rhode Island be deprived of their right to a trial of these charges." State v. DiPrete, 710 A.2d 1266, 1276 (R.I. 1998).[15]

[15] If the defendant is somehow attempting to couch a claim of vindictive prosecution in his ethical remonstrations, the Court finds nothing in this case reflecting any such purposeful or bad faith measure. A defendant shoulders an "exceedingly difficult" burden to establish actual

In his concluding entreaty to dismiss the indictment, the defendant protests that the state has unethically exposed him to a penalty which he professes the state knows does not reflect the gravity of the alleged criminal conduct. That complaint, in essence, is simply a renewal of his Eighth Amendment lamentation, which the Court has already found to be premature for consideration. To the extent that the defendant nonetheless persists in crying ethical foul on this score, the Court finds it baseless. The state is playing entirely within the boundaries charted by the ABA Standards for Criminal Justice and completely within the ground rules established by the General Assembly. The legislature created a separate criminal offense and prescribed a stiff penalty for crippling a person with a firearm during an act of violence. The state has simply pointed out, with the grand jury's approbation, that it believes the defendant has violated that statute. Nothing unethical flows from that accusation.

Whether the punishment for that offense should be adjudged impermissibly severe depends entirely upon the state's ability to support that accusation after a trial on its merits. Only if the state prevails at trial is judicial consideration of this issue required. Until then, such a determination is not ripe for review.

* * *

For all of the preceding reasons, this Court denies the defendant's motion to dismiss the indictment.

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vindictiveness, as it requires him to make a showing, with "objective evidence," that a prosecutor's actions were calculated "to punish a defendant for asserting his legal rights." State v. Maloney, 956 A.2d 499, 505 (R.I. 2008) (quoting State v. Tilson, 794 A.2d 465, 467 (R.I. 2002)). A rebuttable presumption of vindictiveness arises only if a defendant first presents sufficient circumstantial evidence to persuade a court to conclude that there is some basis to support such a presumption. Id. Here, the defendant has offered no evidence, direct or circumstantial, which falls within the parameters of either concept.

APPENDIX A

G.L. 1956 § 11-47-3.2. Using a firearm when committing a crime of violence.

(a) No person shall use a firearm while committing or attempting to commit a crime of violence. Every person violating the provisions of this section shall be punished: (1) for the first offense by imprisonment for ten (10) years; however, if the violation was committed by use of a machine gun as defined in section 11-47-2(6), the term of imprisonment shall be thirty (30) years; (2) for a second conviction under this section by imprisonment for twenty (20) years; however, if the violation was committed by use of a machine gun as defined in section 11-47-2(6), the term of imprisonment shall be life; and (3) for a third or subsequent conviction, the person shall be sentenced to life, or life without the possibility of parole by the sentencing judge after consideration of aggravating and mitigating circumstances contained in §§ 12-19.2-3 and 12-19.2-4. Any sentence imposed upon a person pursuant to this section shall be imposed consecutively to and not concurrently with any sentence imposed for the underlying crime or attempted crime, and the person shall not be afforded the benefits of deferment of sentence or parole; provided, that unless sentenced to life without the possibility of parole pursuant to subdivision (3) of this subsection, a person sentenced to life under this section may be granted parole.

(b) Every person who, while committing an offense violating subsection (a) of this section, discharges a firearm shall be guilty of a felony and be imprisoned as follows:

(1) Ten (10) years, if no injury to any other person results from the discharge;

(2) Twenty (20) years, if a person other than a police officer is injured by the discharge of the firearm, or if a police officer who is engaged in the performance of his or her duty is deliberately endangered by the person's discharge of the firearm;

(3) Life, if a police officer who is engaged in the performance of his or her duty is injured by the discharge of the firearm; and

(4) Life, if the death or permanent incapacity of any person (other than the person convicted) results from the discharge of the firearm; provided that, involuntary manslaughter shall not be considered a "crime of violence" for the purpose of subdivision (b)(4) only.

(c) The penalties defined in subsection (b) of this section shall run consecutively, and not concurrently, to any other sentence imposed and, notwithstanding the provisions of chapter 8 of title 13, the person shall not be afforded the benefits of deferment of sentence of parole; provided, that a person sentenced to life under subdivision (b)(3) or (b)(4) of this section may be granted parole.

APPENDIX B

18 U.S.C. § 924(c)(1). Penalties

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection—

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a second or subsequent conviction under this subsection, the person shall—

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law—

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46.

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and—

(A) has as an element the use, attempted use, or threated use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

(4) For purposes of this subsection, the term "brandish" means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.

(5) Except to the extent that a greater minimum sentence is otherwise provided under this subsection, or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries armor piercing ammunition, or who, in furtherance of any such crime, possesses armor piercing ammunition, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime or conviction under this section--

(A) be sentenced to a term of imprisonment of not less than 15 years; and

(B) if death results from the use of such ammunition--

(i) if the killing is murder (as defined in section 1111), be punished by death or sentenced to a term of imprisonment for any term of years or for life; and

(ii) if the killing is manslaughter (as defined in section 1112), be punished as provided in section 1112.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**State of Rhode Island v. Jose Lopez**
CASE NO:	**P1/2014-0822 AG**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**September 15, 2015**
JUSTICE/MAGISTRATE:	**Krause, J.**
ATTORNEYS:	
For Plaintiff:	**Joseph J. McBurney, Esq.**
For Defendant:	**David A. Cooper, Esq.**