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Criminal Law - The Dissipation of Reasonable Diligence - Commonwealth v. Rosario, 74 N.E. 3D 599 (Mass. 2017)

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CRIMINAL LAW—THE DISSIPATION OF REASONABLE DILIGENCE—*COMMONWEALTH V. ROSARIO*, 74 N.E. 3D 599 (MASS. 2017).

Rule 30 of the Massachusetts Rules of Criminal Procedure authorizes judges to grant new trials where there is evidence that justice did not prevail in the prior trial.[1] Accessibility to new trials depends heavily on whether the defendant can establish newly discovered evidence, or, in other words, evidence not discoverable at the time of trial.[2] In *Commonwealth v. Rosario*[3]—an arson case—the Massachusetts Supreme Judicial Court addressed whether Rosario's new psychological diagnosis, as well as advancements in fire science, constituted newly discovered evidence warranting a new trial.[4] Although the court found that Rosario's new psychological diagnosis was not newly discovered, it held that the underdeveloped fire science at the time of his trial casted doubt on the arson conviction, and ultimately granted a new trial.[5]

During the early hours of March 5, 1982, a fire spread throughout the first floor of a multi-unit apartment located in Lowell, Massachusetts.[6] The fire spread quickly and killed eight people, and as a result, the arson unit was contacted to investigate how the fire started.[7] The arson unit determined most of the damage occurred on the front right and left sides of the exterior of the building, as well as the inside of the first-floor apartment.[8] Despite the absence of wicks and flammable liquid, the arson unit found that the burn

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[1] MASS. R. CRIM. P. 30(b) (permitting judges to grant new trials where "justice may not have been done.").

[2] *See* Commonwealth v. Grace, 491 N.E.2d 246, 248 (Mass. 1986) (discussing how to establish newly discovered evidence).

[3] 74 N.E.3d 599 (Mass. 2017).

[4] *See id.* at 603-06 (reiterating issue regarding new evidence).

[5] *See id.* at 609 (affirming superior court judge's order granting a new trial). The new fire research evidence, in combination with the doubt of the voluntary nature of the statements made by Rosario, could allow for an alternative theory. *Id.* Taken together, these two factors could have persuaded the jury in ways that are unjust to the defendant. *Id.*

[6] *Id.* at 601-02 (identifying locations of alleged arson). In addition to the fire, there was "the sound of breaking glass." *Id.* at 601. Fire had consumed the whole building by the time the police arrived to the location—minutes after the emergency call was placed. *Id.* It took approximately one hour for the fire to cease. *Id.*

[7] *Id.* (explaining why arson unit was called).

[8] *Rosario*, 74 N.E.3d at 601-02 (addressing resulting damage). The arson unit studied the burn patterns on the first-floor apartment's hallway, living room, and kitchen, concluding that the fire travelled by the floor and baseboards. *Id.*

patterns were compatible with a flammable liquid, described as a "Molotov Cocktail."[9]

Multiple witnesses to the fire contributed information to police.[10] Upon further investigation, Rosario became a suspect of the alleged arson and was interrogated by police on March 6 and March 7.[11] Throughout the interrogation, Rosario's mental state depreciated.[12] The interrogation continued, despite Rosario's apparent incapacity, and Rosario made two statements to police relating to the fire.[13] The police officers wrote down three statements at the end of the interrogation, all of which were signed by Rosario.[14] After Rosario signed the statements, he was arrested.[15]

Once Rosario was taken into police custody and processed, he lost all mental capacity.[16] He was taken to the house of correction in Billerica,

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[9] *Id.* at 602 (clarifying Molotov cocktail evidence). The arson unit found that the fire resulted from a Molotov cocktail that was purposefully placed in the front hallway into the kitchen. *Id. See also* Molotov Cocktail. *Merriam-Webster Online Dictionary*. 2017. https://www.merriam-webster.com (21 Jan. 2017) (defining Molotov cocktail). A Molotov cocktail is a "a crude bomb made of a bottle filled with a flammable liquid (such as gasoline) and usually fitted with a wick (such as a saturated rag) that is ignited just before the bottle is hurled." *Id.*

[10] *Rosario*, 74 N.E.3d at 602 (reviewing witnesses' statements). A witness noted that there were three men outside of the building immediately before the fire. *Id.* Another witness emphasized that the defendant used drugs in her apartment earlier in the night, and that she observed Rosario breaking windows after she learned of the fire. *Id.* Additionally, Red Cross employees cared for Rosario's hand injury and brought him to the hospital. *Id.*

[11] *See id.* (describing nature of interrogation). The interrogation took place at the fire department headquarters. *Id.* The police provided an assisting interpreter for Rosario, since his native language was Spanish. *Id.*

[12] See *id.* 602-03 (acknowledging Rosario's mental state during interrogation). When Rosario first arrived at the fire department headquarters, he was relaxed and cooperative. *Id.* Later in the night, however, he claimed that he "was beginning to hear voices." *Id.*

[13] *Id.* at 602 (noting Rosario's mental state during ongoing questioning). Following the two statements provided by Rosario, an officer mentioned that they had "'certain information' and wanted 'to know if he was part of it.'" *Id.* Soon after, Rosario began to cry and pray in front of the officers for approximately ten to twenty minutes, but eventually relaxed. *Id.*

[14] *See id.* at 602-03 (summarizing Rosario's statements). Rosario signed the first statement at 12:15 A.M., conceding that he was at the scene of the burning apartment, and broke a window to help save children inside the building. *Id.* at 602. Subsequently, Rosario signed a second statement indicating that he was the designated "look out" for two other men involved in the crime. *Id.* Rosario claimed that it was one of these two men that threw the Molotov cocktail into the apartment complex. *Id.* Finally, in the last signed statement, Rosario admitted to utilizing the Molotov cocktails to ignite the building, along with the other two men. *Id.* The final statement also mentioned that prior to going to a bar that night, he observed the two other men creating three Molotov cocktails in his basement. *Id.* at 602-03. Lastly, the statement mentioned that one of the men wanted to light this fire "to get [one of the victims] over drugs." *Id.* at 603.

[15] *Rosario*, 74 N.E.3d at 603 (stating Rosario was arrested at 6:30 A.M. after signing statements).

[16] *Id.* (explaining Rosario's mental state). Rosario stated multiple times "that he was 'the son of God,' believed that the back of his head had been cut off, and did not recognize his girl friend when she came to visit him." *Id.*

Massachusetts, for a psychiatric evaluation.[17] At trial, the defense emphasized that Rosario's statements to police were involuntary in nature, and Rosario was actually near the burning building because he went with his friends to a nearby house to buy drugs.[18] At the end of Rosario's 1983 trial, the jury rendered a guilty verdict for one count of arson and eight counts of murder in the second degree.[19] In 2012, twenty-nine years after his trial, Rosario motioned for a new trial based on newly discovered evidence, resulting in a six-day evidentiary hearing that addressed the police interrogation, Rosario's psychiatric diagnosis, and new fire evidence.[20] The

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[17] *Id.* (noting Rosario's transfer for a psychiatric evaluation). Psychiatrists claimed Rosario was psychotic. *Id.* Upon treatment, however, he regained his mental capacity and was deemed competent to stand trial without any recurring symptoms. *Id. See also Psychosis,* Healthline.com, http://www.healthline.com/health/psychosis (last visited on Sept. 10, 2017). Healthline defines psychosis as "an impaired relationship with reality. And it is a symptom of serious mental disorders. People who are psychotic may have either hallucinations or delusions." *Id.*

[18] *Rosario*, 74 N.E.3d at 603 (recounting defense's perspective on case). Rosario testified to injuring his hand by breaking a window to help save children from the burning building. *Id.* In addition, the defense asserted that the statements provided and signed to the police were involuntary because of his psychosis. *Id.* Rosario also stated that he did not recall telling the police any of the signed statements. *Id.* Additionally, Rosario asserted that he was not familiar with the term "Molotov cocktail" until the police began interrogating him. *Id.* The judge informed the jury on the humane practice rule, which emphasizes that the Commonwealth must prove beyond a reasonable doubt that the defendant's statement was voluntary. *Rosario*, 74 N.E.3d at 603 n.7 (Mass. 2017) (referring to Commonwealth v. Taveras, 430 N.E.2d 1198, 1205-06 (Mass. 1982)). The jury asked the court for the transcripts of the doctors' testimony during deliberations, but the court did not supply the requested transcripts. *Id.* at 603. Furthermore, the doctors' reports on Rosario's mental state were not allowed into evidence. *Id.*

[19] *See Rosario*, 74 N.E.3d at 603 (stating jury's verdict).

[20] *See Rosario*, 74 N.E.3d at 603-06 (outlining Rosario's motion for new trial). According to Rosario's interpreter's affidavit, Rosario did not mention that he was a "look out" for the other men, nor did Rosario mention that he assisted in using Molotov cocktails. *Id.* at 603-04. Further, the interpreter mentioned that the police "suggested these details" and put them in the written statements. *Id.* at 604. Notably, the first and second statements were completely translated prior to signing, but the third statement—regarding the use of Molotov cocktails—was never translated for Rosario. *Id.* The interpreter acknowledged Rosario's mental incapacity during the questioning. *Id.* Prior to Rosario's total incoherence, he "had referred constantly to being possessed by the devil and to being the son of God." *Id.* The interpreter also revealed that Rosario admitted to taking heroin before the questioning began. *Id.* In addition to this new interrogation information, two new psychiatric experts diagnosed Rosario with Delirium Tremens ("DTs"), rather than psychosis. *Id.* DTs is "a withdrawal symptom occurring in persons who have developed physiological dependence on alcohol, characterized by tremor, visual hallucinations, and autonomic instability." *Delirium Tremens*, DICTIONARY.COM, http://www.dictionary.com/browse/delirium-tremen?s=t (last visited Jan. 4, 2018). The court in this case summarized the symptoms of DTs:

> The symptoms of the condition worsen over the course of five days. Within twelve hours, the person may be confused or agitated but knows where he is and who he is. By the second day of withdrawal, the person may experience auditory hallucinations, as well as a sense of persecution. The most characteristic symptoms of DTs develop on the third day, when the person may experience visual, tactile, olfactory, and auditory hallucinations. From the third day onward, the person becomes extremely disoriented

motion judge found that the DTs diagnosis and fire evidence were both newly discovered; however, the motion judge relied heavily on the new diagnosis in granting a new trial.[21]

> and agitated, and other functions of the nervous system start to break down. The hallucinations peak at day three or day four. DTs is an acute syndrome and subsides as the person recovers from alcohol withdrawal, typically beginning at around days five, six, and seven.

Rosario, 74 N.E.3d at 604. At the new trial motion hearing, the defense referenced Rosario's past head injury and substance abuse to validate his susceptibility to DTs. *Id.* Rosario typically began drinking around 9:00 A.M., consuming hard liquor and a case of beer a day. *Id.* The defense indicated that Rosario's drinking significantly slowed after the fire, and provided evidence that Rosario's girlfriend's son witnessed him acting in "extreme, unusual ways." *Id.* The psychiatric experts estimated that Rosario was concluding the second day of alcohol withdrawal, and approaching day three when he arrived for interrogation. *Id.* At this juncture, DTs symptoms had consumed Rosario. *Id.* The court summarizes the defense's psychiatric experts' explanation for the misdiagnosis of Rosario:

> They hypothesized that because the previous psychiatrists did not examine him when his symptoms were most aligned with delirium, by the time the defendant was diagnosed, eight or more days after the fire, his alcohol withdrawal had progressed such that the residual symptoms of DTs might present as a psychotic disorder. One of the experts further hypothesized that the language barrier made it difficult to get a complete history, including the defendant's history of alcohol abuse.

Rosario, 74 N.E.3d at 604-05. Lastly, the defense addressed new fire science at the evidentiary hearing. *Id.* at 605. Equipped with the most recent fire research, two fire experts indicated that the evidence of the fire is also equally consistent with an accidental fire, with no present flammable liquids, and only one starting point. *Id.* The experts testified that the fire could have spread because of a "flashover":

> Flashover is a phenomenon that occurs when the fire goes from being controlled by fuel to being controlled by the oxygen available in the room depending upon the ventilation. Once flashover occurs, there is "full room involvement," where the intensity of the fire—and, as a result, the burn patterns—may vary depending upon the areas of ventilation. Once this happens, the point of a fire's origin cannot be accurately identified because the fire causes the most damage in areas where there is more oxygen available, generally near doors and windows. They further explained that because irregular curved or pool-shaped patterns are common in postflashover conditions and may result from the effects of hot gases, smoldering debris and melted plastics, the presence of flammable liquids should be confirmed by laboratory analysis and should not be based on appearance alone.

Id. at 605. In 1982, the arson unit initially identified two damaged areas of the building that seemingly were not connected (indicating two separate "points of origin"), but the defense's experts at the 2014 evidentiary hearing discussed that this could have occurred because of the increasing amount of oxygen in the areas of the building. *Id.* Furthermore, the defense experts denounced the 1982 arson investigator's opinion that the burn pattern near the kitchen door was a result of flammable liquid. *Id.* The experts explained that new research indicates "that hot gases in one room can cause burning on the other side of a closed door . . . [and] the blistering effect that was thought to be consistent with the use of flammable liquid is now known to be found in many types of fires, whether or not flammable liquids were present." *Id.*

[21] *See Rosario*, 74 N.E.3d at 605-06 (summarizing motion judge's rulings). The motion judge decided that the diagnosis of DTs "could not have been uncovered by defense counsel's due

Massachusetts values the finality of convictions and recognizes that a defendant does not necessarily need a perfect trial, as long as it's a fair one.[22] Notably, however, under Rule 30 of the Massachusetts Rules of Criminal Procedure, a judge may grant a new trial whenever "it appears that justice may not have been done."[23] Massachusetts Supreme Judicial Court precedent creates "specific standards" to aid judges in deciding whether to grant a new trial, such as looking for newly discovered evidence.[24] In order to decipher whether the evidence is new, it "must . . . have been unknown to the defendant or his counsel and not reasonably discoverable by them at the time of trial."[25] Merely because evidence is new does not mean that it will guarantee a new trial: the evidence needs to be "material and credible, but also must carry a measure of strength in support of the defendant's position."[26]

When addressing newly discovered evidence, as well as the other standards, judges sometimes need to observe how different variables work together to create a "miscarriage of justice."[27] Upon the trial judge's decision to grant a new trial, a higher court must review their determination.[28] The standard of review used by the appellate court is "abuse of discretion."[29]

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diligence by the time of trial," and ultimately called into question Rosario's statements under interrogation. *Id.* Although the judge found the fire evidence constituted newly discovered evidence, she did not believe it was sufficient, in isolation, to question Rosario's conviction. *Id.* at 606.

[22] *See* Commonwealth v. Brescia, 29 N.E.3d 837, 845-46 (Mass. 2015) (emphasizing the right to a fair trial); *see also* Commonwealth v. LeFave, 714 N.E.2d 805, 809-10 (Mass. 1999) (reiterating value of finality regarding convictions).

[23] *See* MASS. R. CRIM. P. 30(b) (awarding judges the ability to grant new trials when justice has not been served).

[24] *See* Commonwealth v. Brescia, 29 N.E.3d 837, 843-44 (Mass. 2015) (emphasizing certain standards in granting new trials). Judges may consider a multitude of factors, including: (1) if a prejudicial constitutional error occurred, (2) whether the result would have been different absent non-constitutional specific error, and (3) the presence of newly discovered evidence. *Id.* Another factor to be considered is effective counsel. *Id.* at 844 n.10. *See also* Commonwealth v. Randolph, 780 N.E.2d 58, 66-67 (Mass. 2002) (discussing how trial error must have been substantial enough to change outcome of case); Commonwealth v. Grace, 491 N.E.2d 246, 248 (Mass. 1986) (discussing need for newly discovered evidence); Commonwealth v. Saferian, 315 N.E.2d 878, 882-83 (Mass. 1974) (establishing ineffective counsel as a reason for a new trial).

[25] *See Grace*, 491 N.E.2d at 248 (discussing requirements for proper newly discovered evidence). Notably, "[t]he defendant has the burden of proving that reasonable pretrial diligence would not have uncovered the evidence." *Id.*

[26] *See id.* (explaining the weight of newly discovered evidence).

[27] *See Brescia*, 29 N.E.3d at 843-44 (noting the inquiry regarding miscarriage of justice). The *Brescia* court addressed how multiple factors contributed to the defendant's lack of a fair trial. *Id.* at 849.

[28] *See* Commonwealth v. Ellis, 57 N.E.3d 1000, 1014 (Mass. 2016) (reviewing trial judge's decision to grant new trial).

[29] *See* Commonwealth v. Wright, 14 N.E.3d 294, 309 (Mass. 2014) (reiterating the "abuse of discretion" standard during appellate review).

Furthermore, when deciding whether a defendant made voluntary statements, the jury must find the statements were voluntary beyond a reasonable doubt.[30] Notably, there are circumstances where interrogation strategy provokes false admissions by defendants, ultimately invalidating the voluntary nature of a statement.[31] Although false admissions do not neatly fit into the category of "newly discovered evidence," judges can consider them in addition to any newly discovered evidence to adequately assess whether that evidence would have had an impact on the jury.[32]

In addressing and applying the applicable law, the *Rosario* court affirmed the motion judge's decision to grant a new trial, but did not agree with how she made her decision.[33] The court acknowledged concerns regarding the police interrogation and Rosario's DTs diagnosis, as they both called into question the voluntariness of Rosario's statements to officers.[34] Furthermore, the court reasoned that the motion judge's findings—in respect to the interpreter's affidavit—cast doubt on the reliability of Rosario's statements.[35] The court also reasoned that there were three interrogation techniques that could have resulted in a false confession from Rosario.[36] The

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[30] *See* Commonwealth v. Tavares, 430 N.E.2d 1198, 1206 (Mass. 1982) (indicating "beyond a reasonable doubt" standard for finding voluntary statements). The justification for this high standard lies in the fact that a defendant's confession regarding a crime is key evidence of "proof of guilt." *Id.* (quoting Clifton v. United States, 371 F.2d 354, 362 (D.C. Cir. 1966)) (concurring opinion).

[31] *See* Commonwealth v. Tremblay, 950 N.E.2d 421, 428-29 (Mass. 2011) (mentioning how interrogations can provoke false confessions). The Massachusetts Supreme Judicial Court does not endorse police utilizing "deception or trickery," as it calls into question whether the defendant willingly made a confession. *Id.* at 429.

[32] *See Ellis*, 57 N.E.3d at 1017 ("The determination of whether newly discovered evidence would have been a real factor in the jury's deliberations requires that the new evidence be considered in light of the totality of the evidence presented at trial."); *see also Brescia*, 29 N.E.3d at 849 (utilizing "confluence of factors" standard).

[33] *See* Commonwealth v. Rosario, 74 N.E.3d 599, 606 (Mass. 2017) (stating holding despite disagreement on diagnosis). The Supreme Judicial Court diverted from the motion judge's decision, stating that Rosario's DTs diagnosis did not constitute newly discovered evidence. *Id.* However, the court found that Rosario deserved a new trial when reviewing the "confluence of factors." *Id.*

[34] *See id.* at 607-08 (discussing how DTs diagnosis affects police interrogation process). The court explains that unlike psychosis, DTs interferes with the brain's processing, ultimately creating confusion. *Id.* at 607-08. The court went on to state that the jury may have decided differently on the defendant's voluntariness if they had known the effects of DTs on Rosario. *Id.* Additionally, if the jury was aware of this information and found Rosario's statement involuntary, the prosecution's case would have been greatly diminished. *Id.*

[35] *See id.* at 608 (emphasizing information from interpreter's affidavit). The affidavit revealed that when the police drafted Rosario's statements, the officers not only incorporated their own thoughts about Rosario starting the fire, but also failed to translate the third statement into Spanish so that Rosario could understand it. *Id.*

[36] *See id.* at 608-09 (acknowledging possibility of false confession). The court was quick to explain that the interrogation strategies and the possibility of a false confession do not constitute

court found these particular techniques problematic when a suspect is easily manipulated and not provided with a sufficient translation of their statements to police.[37]

The court's reasoning then transitioned from the police interrogation to the new fire science that was brought before the motion judge.[38] The court recognized that the defense attorney in the first trial did not counter any of the evidence provided by the prosecution's fire experts.[39] The court reasoned that while the new fire science does not eliminate the theory of arson, it offers another understanding of how the fire originated, and demonstrates that burn patterns are not enough to establish that flammable liquid created the fire.[40] The court found that with this new evidence, the Commonwealth would need to prove more to satisfy its burden for arson.[41] Ultimately, the court found that the motion judge did not abuse her discretion in granting a new trial because the new fire evidence—as well as the combination of the DTs diagnosis, the interpreter's affidavit, and the interrogation techniques—could have affected the jury's decision.[42]

The *Rosario* court correctly affirmed the new trial for Rosario on the basis of the police interrogation, DTs diagnosis, and the new fire evidence.[43]

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newly discovered evidence, but that the court will "consider these flaws in evaluating whether justice requires a new trial under the totality of the circumstances." *Id.* at 608. The court first addressed how the police dishonestly told Rosario that a witness saw him in the area before the fire, despite having been told by Rosario that he only approached the area to help people escape from the burning building. *Id.* at 608-09. Second, the court recognized how the police compelled Rosario to admit to the crime by emphasizing that if Rosario's friends were the ones who committed the crime, they would probably frame him for it. *Id.* at 609. Finally, the court reviewed the third interrogation strategy, honing in on the fact that police provided corroborating information to the defendant, which Rosario soon embraced in his statements to the officers. *Id.* The court went into detail, stating that Rosario was told by police that "he acted as a lookout for his friends; that there were three points of origin for the fire; and that the fire was started with Molotov cocktails." *Id.*

[37] *See id.* at 609 (explaining interrogation strategies cast doubt on defendant's confession). The court also reasons that Rosario had notified police that he was unfamiliar with Molotov cocktails. *Id.* Further, until the last statement to police, Rosario had repeatedly explained that he was at the crime scene to help people out of the burning building. *Id.*

[38] *See Rosario*, 74 N.E.3d at 609 (discussing new fire evidence).

[39] *See id.* (addressing lack of challenges made to experts).

[40] *See id.* (explaining relevance of new fire science and jury determinations).

[41] *See id.* (establishing Commonwealth's burden is higher with presence of this fire science). The court mentions that the fire evidence could have changed the way the jury viewed Rosario's admission, in addition to whether the Commonwealth met its burden. *Id.*

[42] *Id.* at 609 (affirming motion judge's ruling).

[43] *See Rosario*, 74 N.E.3d at 609 (justifying necessity and validity of new trial); *see also* Commonwealth v. Brescia, 29 N.E.3d 837, 849 (Mass. 2015) (using "confluence of factors" standard). Instead of addressing each individual factor separately to see if there was a miscarriage of justice, the court considered how the DTs diagnosis, the interrogation concerns, and the new fire evidence worked collectively to create significant doubt in the defendant's conviction. *Rosario*, 74 N.E.3d at 609.

Notably, however, the court mislabeled the DTs diagnosis as discoverable evidence.[44] The court operated under the literal notion that because the DTs diagnosis was prevalent in the psychology field at the time of Rosario's trial, it was accessible, and therefore discoverable evidence.[45] Technically speaking, the DTs diagnosis was an available diagnosis during the psychiatrists' examination of Rosario.[46] Despite this reality, whether the diagnosis was available to the psychiatrist is not the test for newly discovered evidence; rather, it's whether the evidence was reasonably discoverable at the time of trial, with the burden on the defendant to reveal that "pretrial diligence would not have uncovered the evidence."[47] Under the standard reiterated in *Grace*, the real issue becomes whether the diagnosis was reasonably discoverable, and whether Rosario's counsel was reasonably diligent in obtaining an accurate diagnosis for his client.[48]

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[44] *See Rosario*, 74 N.E.3d at 606 (finding evidence discoverable).

[45] *See id.* at 606, n.11 (stating DTs diagnosis was "widely recognized" at the time of Rosario's trial); *see also* Commonwealth v. Shuman, 836 N.E.2d 1085, 1089-90 (Mass. 2005) (defining discoverable evidence). In *Shuman*, the court explicitly labeled evidence discoverable because "it was available prior to the trial." *Id.*

[46] *See* Stern et al., *Current Approaches to the Recognition and Treatment of Alcohol Withdrawal and Delirium Tremens: "Old Wine in New Bottles" or "New Wine in Old Bottles"*, THE PRIMARY CARE COMPANION TO THE J. OF CLINICAL PSYCHIATRY (2010), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2947546/ (describing history of *Delirium Tremens*). Outlining the history of DTs, Stern notes "[d]escriptions of alcohol withdrawal, including delirium tremens (DTs), have filled the medical literature since the late 1700s. Decades later in 1813, Pearson labeled alcohol withdrawal as 'brain fever' secondary to 'frequent and excessive intoxication.' In that same year, Sutton coined the syndrome *delirium tremens*." *Id.* Rosario's trial took place in 1983, so DTs was an available diagnosis. *Rosario*, 74 N.E.3d at 601.

[47] Commonwealth v. Grace, 491 N.E.2d 246, 248 (Mass. 1986) (utilizing reasonable diligence standard). *See also* Commonwealth v. Williams, 503 N.E.2d 1, 4-5 (Mass. 1987) (acknowledging diligence of lawyer in addressing newly discovered evidence); Brief for Defendant at 33, Commonwealth v. Rosario, 74 N.E.3d 599 (Mass. 2017) (arguing for reasonable diligence standard for newly discovered evidence). The Supreme Judicial Court of Massachusetts utilized this reasonable diligence test in *Grace* in 1986, but only cites this case in their *Rosario* decision as establishing the need for newly discoverable evidence—failing to recognize that this very case utilizes a reasonable diligence standard for newly discovered evidence. *Rosario*, 74 N.E.3d at 606.

[48] *See Grace*, 491 N.E.2d at 248 (stating counsel must exert reasonable diligence in obtaining evidence). Notably, this very standard is used in a 2005 Massachusetts case that is similar to *Rosario*. *See* Commonwealth v. Buck, 835 N.E.2d 623, 624-27 (Mass. App. Ct. 2005) (finding videotape evidence newly discovered evidence despite its availability at trial). In *Buck*, the court addressed whether a surveillance videotape was newly discovered evidence, although it was available during the first trial. *Id.* at 624-25. The court admitted the videotape to the jury in the first trial, but prefaced to the jury that the video did not cover the entire day. *Id.* at 625. Upon the defendant's appeal, the appellate counsel learned that the videotape did cover the entire day, and argued that this was newly discovered evidence since the first trial counsel was not aware of this. Id. at 626-27. The video was critical to the trial, as it covered the entire day and corroborated the defendant's alibi. *Id.* The lower court judge granted a new trial finding the evidence was newly discovered. *Id.* at 627. The *Buck* court agreed with the lower court judge rationalizing that "[d]efense counsel was not obliged to search for something he did not know existed." *Id.* Here, the burden on defense counsel was part of the decision process for deciding whether the piece of

In a separate footnote, the court seems to answer this question in the affirmative, noting

> we cannot say that defense counsel was ineffective for failing to discover it. He relied upon the expertise of others—three psychiatrists who examined the defendant while he was in custody opined that the defendant was psychotic at the times they examined him, one opined only that he was not suffering from a mental illness at the time of questioning, and an expert witness retained by the defense opined that the defendant was psychotic during the interrogation—in a field in which the attorney was not himself trained. It would be a high hurdle indeed to expect counsel to continue to search for an alternative diagnosis where he reasonably could not be expected to know that one existed. See *Commonwealth v. Buck*, 64 Mass. App. Ct. 760, 764, 835 N.E.2d 623 (2005). This is especially so where several different psychiatrists concluded that the defendant had suffered from psychosis either during the interrogation or after booking, even if the judge was later persuaded that this diagnosis was incorrect.[49]

Commendably, the court understands the burden placed on lawyers to do everything in their capacity to access a piece of relevant evidence.[50] It is this very analysis that should have been the crux of their decision regarding the DTs diagnosis.[51]

It is important to note psychology diagnoses are not always one hundred percent accurate—making it all the more difficult for a lawyer to find the right diagnosis utilizing reasonable pretrial diligence.[52] Therefore,

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evidence was newly discovered. *Id.* In contrast, the *Rosario* court recognized this burden, but did not include it in their analysis of whether the DTs diagnosis was newly discovered. *Rosario*, 74 N.E.3d at 606. The issue in *Rosario* is relatively similar, considering Rosario's initial defense counsel did not have any reason to believe that the diagnosis was anything other than what the multiple psychiatrists said it was: psychosis. *Id.* at 602-03; *see also* Brief for Defendant at 33, Commonwealth v. Rosario, 74 N.E.3d 599 (Mass. 2017) (arguing for reasonable diligence standard for newly discovered evidence).

[49] *Rosario*, 74 N.E.3d at 608 n.13 (acknowledging the lawyer's diligence in obtaining diagnosis).

[50] *See id.* (acknowledging the burden on lawyers).

[51] *See id.* at 607-08 (noting the weight the diagnosis could have had in the jury deliberations). As the court pointed out, "there are substantial differences between psychosis and DTs that may have made a real difference in the jury's verdict." *Id.*

[52] *See* Kyung M. Song, *Diagnosis of Mental Illness Hinges on Doctor as Much as Symptoms*, THE SEATTLE TIMES, Oct. 23,2003, https://www.seattletimes.com/seattle-news/health/diagnosis-

even if Massachusetts did not adhere to a reasonable diligence standard for newly discovered evidence, it certainly would behoove the state to adopt one.[53] Admittedly, labeling the DTs diagnosis discoverable did not hurt Rosario's case; there was new fire evidence, and a plethora of issues regarding his interview, which were exacerbated by the fact that he had DTs.[54] Notwithstanding the granting of a new trial for Rosario, post-conviction relief is an uphill battle.[55] The absence of a reasonable diligence analysis for newly discovered evidence in *Rosario* could keep an innocent

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of-mental-illness-hinges-on-doctor-as-much-as-symptoms/ (emphasizing frequency of misdiagnosis because a diagnosis depends on a doctor's interpretation of symptoms). The article states:

> Despite the scientific wizardry of modern medicine, diagnosing mental disorders remains a subjective exercise. Lacking genetic markers or brain scans to confirm psychiatric illnesses, doctors identify schizophrenia, phobias and other mental disorders based on a much more primitive diagnostic aid—the symptoms. The universal screening tool for clinicians in the United States is an 886-page tome called the "Diagnostic and Statistical Manual of Mental Disorders" (DSM), published by the American Psychiatric Association. The DSM contains a checklist of symptoms and the minimum number of them that must be present in order to meet the requirements for each disorder. By standardizing the classifications of symptoms, the DSM is intended to ensure uniformity in diagnoses. Yet people with mental disorders too often are misdiagnosed or not diagnosed at all . . . Another problem: A single patient may get different diagnoses according to which doctor he sees. That's especially likely when two distinct conditions, such as anxiety disorders and depression, produce similar symptoms.

Id. On a narrower scale, psychosis itself can simply be a symptom of a larger issue, causing more disarray in diagnoses. *See* Oliver Freudenreich, *Differential Diagnosis of Psychotic Symptoms: Medical "Mimics"*, PSYCHIATRIC TIMES (Dec. 3, 2010), http://www.psychiatrictimes.com/all/editorial/psychiatrictimes/pdfs/2010cme-PT205426-Freudenreigh.pdf. Doctor Freudenreich discusses how there are a variety of medical diseases that consist of psychotic symptoms. *Id.* Freudenreigh writes, "Psychosis is a frequent ancillary symptom of delirium that can overshadow its cardinal cognitive features. It is therefore critical to routinely consider the possibility of a delirium in any patient with psychosis." *Id.* (citations omitted). Accordingly, it would make sense to utilize a standard for newly discovered evidence that recognizes the subjectivity of the mental health field, and the burden on lawyers to have to make sure they get the accurate diagnosis for their clients. *Id.*; *see also* Commonwealth v. Rosario, 74 N.E.3d 599, 608 (Mass. 2017) (acknowledging difficulty for lawyer to find accurate diagnosis for clients).

[53] *See* Freudenreich, *supra* note 52 (referring to the unpredictability of diagnoses).

[54] *See* Commonwealth v. Rosario, 74 N.E.3d 599, 609 (Mass. 2017) (concluding that Rosario deserved new trial due to variety of factors).

[55] *See* Shannon Padgett, *Post Conviction Relief—One Last Chance*, DALE CARSON L. (Jan. 1, 2015), http://www.dalecarsonlaw.com/one-last-chance/ (discussing the difficulty of post-conviction motions). Padgett writes, "[t]he law for post-conviction motions are complicated and make it difficult to win. The defendant must argue specific legal grounds in order to be successful. There are also deadlines to file these motions." *Id.*

defendant—seeking relief solely based on a new psychological diagnosis—incarcerated.[56]

In the context of a Rule 30 review, the *Rosario* court addressed whether new fire science and a new psychological diagnosis for Rosario constituted newly discovered evidence. The court ultimately held that the fire evidence was newly discovered, but the DTs diagnosis was discoverable because it was available at the time of trial. The court failed to apply the reasonable diligence standard to Rosario's DTs diagnosis, which could have detrimental effects for future defendants seeking post-conviction relief solely based on a different diagnosis.

Lauren C. Simard

[56] *See Rosario*, 74 N.E.3d at 606, n.11 (lacking discussion of reasonable pretrial diligence on part of defendant's lawyer).

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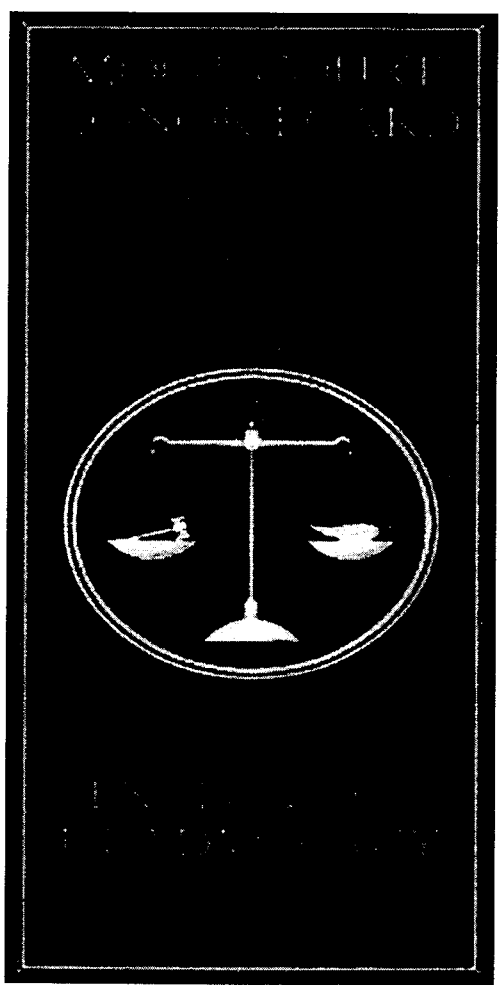

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