THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2009–0620

State of New Hampshire

v.

Melanie Deschene

Appeal Pursuant to Rule 7 from Judgment
Of the Hillsborough County Superior Court
Northern District

BRIEF FOR THE DEFENDANT

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(15 Minutes Oral Argument)

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TEXT OF RELEVANT AUTHORITY

New Hampshire RSA 264:25

264:25 Conduct After Accident. -

I. The driver of a vehicle who knows or should have known that he or she has just been involved in any accident which resulted in death, personal injury or damages to property, shall immediately stop such vehicle at the scene of the accident and give to the driver or owner of any other vehicle involved in said accident, and to any person injured, and to the owner of any property damaged, the driver's name and address, driver's license number, the registration number of the vehicle and the name and address of each occupant. If by reason of injury, absence or removal from the place of the accident, or other cause, such injured person, or driver of such other vehicle, or owner of the property damaged, or any of them, is unable to understand or receive the information required in this section, such information shall be given to any uniformed police officer arriving at the scene of the accident or immediately to a police officer at the nearest police station. Any person driving a vehicle which is in any manner involved in an accident or any person who owns a vehicle which was illegally parked when it was involved in an accident shall within 15 days after such accident report in writing to the division the facts required hereunder together with a statement of the circumstances if any person is injured or killed, or if damage to property is in excess of $1,000, unless the accident is investigated by a police officer, in which case a report filed by such officer shall satisfy the requirements of this section; provided, however, that any person not otherwise required by this paragraph to file a report, who owns a vehicle which was involved in an accident, may file a report as provided by this paragraph. Voluntary intoxication shall not constitute a defense in the matter of knowledge under the provisions of this section. All reports, filed as required in this paragraph, shall be in the form prescribed by the director and shall contain information to enable the division to determine whether the requirements for the deposit of security under RSA 264:3 are inapplicable by reason of the existence of insurance or other exceptions specified in that chapter. If such driver is physically or mentally incapable of making such report, the owner of the vehicle involved in such accident or the owner's representative shall, after learning of the accident, forthwith make such report. The driver or the owner shall furnish such additional relevant information as the division shall require. The provisions of this section shall be

of general application and shall not be restricted to a way as defined in RSA 259.

II. No report required under paragraph I, nor any certificate issued by the director under the authority provided by this paragraph, may be used as evidence in any criminal trial arising out of a reported accident where the reporting party is a defendant except that:

(a) The director may use such report in connection with the director's duties under RSA 264:3.

(b) The director may furnish upon demand of any party to a trial, or upon demand of any court or law enforcement agency, a certificate showing that a specified report has or has not been filed with the director, and, if such report has been made, the date, time and location of the accident, the names and addresses of the drivers and owners of the vehicles involved and the investigating officers if known.

III. This section shall not prevent the prosecution of any charges brought under RSA 264:28 or RSA 264:29.

New Hampshire RSA 264:29

264:29 Penalty. -

Whoever fails to comply with the foregoing requirements relating to injury to property, or relating to the report to be made to the division, shall be guilty of a misdemeanor if a natural person, or guilty of a felony if any other person. Whoever fails to comply with the foregoing requirements when death or personal injury results, or whoever gives information required knowing or having reason to believe that such information is false, or fails to comply with any of the other requirements thereof shall be guilty of a class B felony.

QUESTION PRESENTED

I. Whether the trial court erred in denying the defendant's motion to dismiss for prosecutorial vindictiveness.

Issue preserved by the defendant's motion to dismiss, the pre-trial hearing on the matter, and the trial court's ruling. A. 25-33, 48-58; MH. 3-34.*

* Citations to the record are as follows:
"MH." refers to the transcript of the motion hearing held on March 4, 2009;
"T." refers to the consecutively-paginated transcript of the trial proceedings, held on July 23, 2009;
"A." refers to the Appendix filed with this brief.

STATEMENT OF THE CASE

Melanie Deschene was charged in the Manchester District Court with one class A misdemeanor count of conduct after an accident. A. 2. Upon being found guilty of the charge, Deschene requested a trial *de novo* in the Hillsborough County Superior Court—Northern District. A. 26; MH. 4-5.

Prior to trial in the superior court, the State *nolle prosequi* the district court complaint and in its place secured an indictment alleging the class B felony offense of conduct after an accident. A. 3-4. Deschene moved to dismiss the indictment for prosecutorial vindictiveness. A. 25-33. After a hearing, the trial court denied Deschene's motion. A. 48-58; MH. 3-34. Following a one-day trial, the jury convicted Deschene as charged in the indictment. T. 1, 133-34; A. 5.

The trial court (Mangones, J.) sentenced Deschene to sixty days in the House of Corrections, deferred for one year, then suspended for a year on the condition of good behavior, and to a $1,000.00 fine with all but $700.00 deferred for one year. A. 5.

STATEMENT OF THE FACTS

On October 3, 2007, Melanie Deschene was involved in an automobile accident on Interstate-293 (I-293) in Manchester. T. 94-96. As Deschene approached Exit 2 while in the middle lane of the three-lane highway, she attempted to pass a car being driven by Michael Messina. T. 16. Messina was also operating his car in the middle lane. T. 16. Deschene attempted to pass Messina by merging into the right-hand lane of traffic. T. 16. However, upon doing so, Deschene found herself behind a car being driven by Danielle LaChance. T. 16-18, 61. Deschene attempted to return to the middle lane of traffic in front of Messina. T. 16, 18. As she attempted to do so, the front of Deschene's car hit the left-rear side of LaChance's car. T. 16, 18-19, 61-62.

LaChance's car hit the guardrail on the right side of I-293, then crossed the roadway, hit the guardrail on the left side of the highway, and came to a stop. T. 19, 40, 61-62. Her car sustained damage to the front and back ends and to the right side. T. 63-68, 82. LaChance experienced some bruising and whiplash. T. 68-71.

LaChance did not see what happened to the car that had hit hers. T. 72. Messina, however, followed Deschene off of I-293 at the Brown Avenue exit (Exit 2) and witnessed Deschene turn right onto Brown Avenue before coming to a stop at the

intersection of Brown and Bosse, where she waited for the police. T. 20-21, 26, 49. The distance between the location of the accident and where Deschene stopped was estimated to be three-quarters of a mile to one mile. T. 22, 28, 32, 83, 88.

Approximately thirty to forty-five minutes after Deschene stopped, police officers arrived at her location. T. 26, 49. Deschene's car appeared to have sustained some front-end damage, and smoke was coming from that area of her car. T. 23, 44, 46, 95.

Trooper Francesco Campo testified that Deschene approached him, told him that she was driving the car, and implied that the accident was her fault. T. 95. When he specifically asked whether she knew that she had been in an accident, Deschene responded in the affirmative. T. 95. She indicated that she had not immediately stopped her car after the accident because she was concerned for her baby, who was with her at the time of the accident. T. 95-98. After passing the horizontal gaze nystagmus test, Deschene was arrested and charged with conduct after an accident. T. 100.

The State Police filed a class A misdemeanor complaint against Deschene in the Manchester District Court alleging conduct after an accident. A. 2, 8, 13-14, 25-26, 35-36, 50; MH. 4. The complaint specifically alleged that Deschene did:

> knowingly drive a motor vehicle upon a way, to wit, Interstate 293 [northbound] in the City of Manchester, knowing or should have known she was involved in an accident which resulted in personal injury to one Danielle LaChance did absent herself from the scene of said accident without giving to said, Danielle LaChance, her name, address and driver's license number and the name of the address of each occupant thereof, or if unable to locate or because of injury or death was unable to give information to the owner of the damaged property and did fail to go immediately to the nearest police station or police officer to report the accident.

A. 2. Following a finding of guilty, Deschene noted her appeal to the Hillsborough County Superior Court—Northern District for a trial *de novo*. A. 8, 14, 26, 35-36, 50; MH. 4-5.

Thereafter, the State notified the defense that should the State prevail in the superior court, it would seek a harsher sentence. A. 6, 37; MH. 6. Two days later, the State contacted defense counsel to inquire as to whether Deschene intended on remanding the case to the district court. A. 27; 38-39; MH. 6. The State indicated that it was considering bringing a felony-level conduct after an accident charge in the event that Deschene chose to proceed with the trial *de novo*. A. 27; MH. 6.

At the final pretrial conference, the defense informed the State that Deschene intended to exercise her right to a trial *de novo*. A. 15, 27, 39; MH. 6-7. The State reiterated that it was considering the possibility of bringing forward a felony

indictment. A. 15, 27, 39. Later that day the State told defense counsel that in addition to the possibility of charging Deschene with a felony-level conduct after an accident charge, the State would be moving to amend the district court complaint to clarify that only property damage was being alleged. A. 7-11.

In a subsequent email, the State maintained that not only did it intend to proceed to trial on the amended complaint alleging property damage, but also, that it would seek a felony indictment alleging personal injury. A. 12, 16; MH. 8.

In response to the State's motion to amend and based upon the aforementioned communications with the State, Deschene filed an objection and a motion to dismiss asserting a claim of prosecutorial vindictiveness. A. 13-23. On the date that Deschene filed her objection, the State *nolle prosequi* the district court complaint. A. 4, 24; MH. 8-9. Eight days later, the State obtained a felony indictment against Deschene alleging the offense of conduct after an accident resulting in personal injury. A. 3; MH. 9.

On November 26, 2008, Deschene filed a motion to dismiss the indictment. A. 25-33. Deschene asserted that the State's charging decisions were the result of prosecutorial vindictiveness for exercising her due process right to a trial *de novo*. A. 25-33; MH.3-34. The State objected, arguing that

its actions were the result of a belief that the district court complaint was defective. A. 34-47. The State asserted that the body of the district court complaint alleged felony conduct, but was charged as a misdemeanor. A. 38. The State contended that this defect resulted in an illegal sentence imposed by the district court, which would not have had jurisdiction over the complaint. A. 41.

After a hearing, the trial court concluded that the district court complaint did not adequately track the language of RSA 264:25, resulting in an ambiguity as to whether the complaint alleged a felony or a misdemeanor. A. 54-55; MH. 3-34. Furthermore, the court ruled that the State had overcome the rebuttable presumption of prosecutorial vindictiveness in three ways: first, it was legally impermissible for the State to proceed with the complaint as originally brought; second, the State was attempting to correct a facially defective complaint; and third, Deschene's right to seek a trial *de novo* was not chilled by permitting the State to proceed with a felony because Deschene did not have a right to maintain an unlawful charge. A. 55-58.

SUMMARY OF THE ARGUMENT

The State's charging decision to *nolle prosequi* the original misdemeanor complaint in favor of proceeding with an indictment after Deschene asserted her right to a trial *de novo* constituted prosecutorial vindictiveness and violated Deschene's right to due process. The presumption of prosecutorial vindictiveness was raised by the State's decision to substitute an increased charge only after Deschene maintained her right to a trial *de novo*. The State failed to provide a new reason for the increased charge that did not previously exist at the time Deschene was originally charged. The State's sole argument to the trial court that the original complaint was defective does not constitute a "sufficiently objective" reason for the increased charge. The trial court's reliance on any ambiguity in the complaint as grounds for finding that the State had rebutted the presumption was error. This Court must vacate Deschene's felony conviction and remand the case back to the trial court for further proceedings consistent with such a holding.

ARGUMENT

THE TRIAL COURT ERRED BY RULING THAT ANY AMBIGUITY IN THE DISTRICT COURT COMPLAINT CONSTITUTED A SUFFICIENTLY OBJECTIVE REASON TO REBUT THE PRESUMPTION OF PROSECUTORIAL VINDICTIVENESS IN FAVOR OF THE INCREASED CHARGE.

The State charged Deschene with conduct after an accident as a class A misdemeanor in district court. After she appealed for a trial *de novo* and after she insisted on exercising this right, the State indicted her with a felony for the alleged conduct under the rationale that the indictment was necessary to correct a defective complaint. Assuming *arguendo* that the complaint was defective, an indictment was not necessary to correct it. The State's conduct in bringing the increased charge after Deschene asserted her right to a trial *de novo* was clearly vindictive. The State failed to rebut the presumption of vindictiveness attaching to its charging decision. Consequently, this Court must reverse.

By litigating this issue, Deschene adequately presented to the trial court the substance of the argument on which the prosecutorial vindictiveness claim depends. See State v. Ayer, 150 N.H. 14, 21 (2003) (citing State v. Fortier, 146 N.H. 784, 788 (2001) (stating that the Court's "preservation rule requires that issues be raised at the trial court to preserve them for appellate review"). In this appeal, Deschene alleges error in the trial court's determination that the State presented any

sufficiently objective reason to rebut the presumption of prosecutorial vindictiveness.

The State's actions, and the trial court's denial of Deschene's motion to dismiss, constitute a violation of her due process rights under Part I, Article 15 of the New Hampshire Constitution and the Sixth and Fourteenth Amendments of the United States Constitution. A. 29, 49. See State v. Ericson, __ N.H. __ (Nov. 17, 2009) (noting that the Court has previously held that a defendant has preserved a constitutional claim for appellate review even though a specific constitutional provision was never cited in the trial court) (internal citations omitted). This Court reviews a constitutional due process claim asserted under both the State and Federal Constitutions by first examining the State claim. See State v. Bruce, 147 N.H. 37, 40 (2001) (citing State v. Ball, 124 N.H. 226, 232 (1983)). Because Part I, Article 15 of the New Hampshire Constitution is at least as protective as the federal Constitution in this context, this Court need not conduct a separate federal analysis. See id. (citing State v. Giordano, 138 N.H. 90, 96 (1993)); see also State v. Marti, 143 N.H. 608, 611 (1999) (internal citations omitted). However, this Court looks to federal cases for guidance. See State v. Joyce, __ N.H. __ (Dec. 4, 2009).

A. A Rebuttable Presumption Of Prosecutorial Vindictiveness Exists.

As the State conceded below, by electing to pursue a felony version of the charge, the presumption of prosecutorial vindictiveness arose. A defendant's right to due process, which in this instance includes a right to a trial *de novo*, "requires that any increased . . . charge imposed on retrial not be the result of . . . prosecutorial vindictiveness." State v. Goding, 128 N.H. 267, 271 (1986). Furthermore, this Court has held that "[p]rosecutorial vindictiveness . . . is presumed in a case . . . where the defendant, who is faced with a harsher charge at a *de novo* trial, alleges a due process violation." Id. (citing Blackledge v. Perry, 417 U.S. 21 (1974); Thigpen v. Roberts, 468 U.S. 27 (1984)). "'[A] prosecutor may not exercise his or her discretion to bring a criminal charge with the aim of punishing a lawful exercise of the right to appeal.'" State v. Marti, 143 N.H. 608, 611 (1999) (quoting State v. Gallant, 133 N.H. 138, 148 (1990)).

The United States Supreme Court addressed the due process concern in Blackledge, with respect to the State's charging decision to substitute an increased charge just prior to a trial *de novo*:

> A prosecutor clearly has a considerable stake in discouraging convicted misdemeanants from appealing and thus obtaining a trial *de novo* in the Superior

> Court, since such an appeal will clearly require increased expenditures of prosecutorial resources before the defendant's conviction becomes final, and may even result in a formerly convicted defendant's going free. And if the prosecutor has the means readily at hand to discourage such appeals -- by "upping the ante" through a felony indictment whenever a convicted misdemeanant pursues his statutory appellate remedy -- the State can insure that only the most hardy defendants will brave the hazards of a *de novo* trial.
>
> . . . A person convicted of an offense is entitled to pursue his statutory right to a trial *de novo*, without apprehension that the State will retaliate by substituting a more serious charge for the original one, thus subjecting him to a significantly increased potential period of incarceration.

Blackledge, 417 U.S. at 27-28. The Blackledge Court stated that "it was not constitutionally permissible for the State to respond to [the defendant's] invocation of his statutory right to appeal by bringing a more serious charge against [the defendant] prior to the trial *de novo*." Id. at 28-29.

With respect to proving prosecutorial vindictiveness, this Court has previously stated:

> [B]ecause [m]otives are complex and difficult to prove, and because the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal, we do not require proof of actual vindictiveness on the part of the prosecutor when the prosecutor's charging decision raises a realistic likelihood of vindictiveness.

Marti, 143 N.H. at 612 (internal citations and quotations omitted). Rather, once "the circumstances demonstrate a 'realistic likelihood of vindictiveness,' . . . the burden is on the State to show that the increased charges are not the product of vindictiveness." Id. (citing Goding, 128 N.H. at 272). The fact that the State does not seek a harsher sentence to go along with the increased charge does not negate the presumption of prosecutorial vindictiveness. Id. at 612-13. Merely subjecting the defendant to the possibility of a significantly increased sentence is enough to raise the presumption. Id. at 613.

In the present case, the State's decision to *nolle prosequi* the district court complaint in favor of proceeding on the more serious felony charge raises the presumption of prosecutorial vindictiveness. The State agreed, and the trial court ruled, that the presumption existed. A. 43-46, 56, 58; MH. 24. The issue, therefore, is whether the trial court erred in finding that the State rebutted the presumption.

B. The State Did Not Present Any New Sufficiently Objective Reasoning For The Increased Charge To Overcome The Presumption.

To rebut the presumption of prosecutorial vindictiveness, the State "must show objective reasons for the new charge[] that were not present when the prosecutor initially charged the defendant." Marti, 143 N.H. at 614 (citing Goding, 128 N.H. 267). Requiring new, objective reasons for the increased charge

balances the parties' respective interests. See id. (noting that "[t]his standard adequately balances the defendant's interest in appealing 'without apprehension that the State will retaliate' at a retrial, . . . and the State's interest in exercising its prosecutorial discretion when the circumstances of the case have changed") (internal citations omitted). These objective reasons must firmly establish a legitimate basis for the increased charge that were not present at the time the State initially charged the defendant. Id. at 613. Once the presumption of prosecutorial vindictiveness has been raised, it is the State's burden to prove that the increased charge is not the product of vindictiveness. See id.; see also Goding, 128 N.H. at 272.

In Goding, this Court found that while the presumption of prosecutorial vindictiveness existed, the facts and procedural history of the case served to rebut the presumption. Goding, 128 N.H. at 272. The defendant had been charged with the more serious offense of driving while intoxicated-second offense (DWI-second) and had prepared for trial based upon this charge. Id. at 269. Before trial, the State declined to prosecute this offense because it did not have the necessary proof of a prior offense. Id. It instead proceeded to trial on the lesser charge of driving while intoxicated-first offense (DWI-first).

Id. The defendant was found guilty and exercised his right to a trial *de novo* in the superior court. Id.

Prior to his trial *de novo*, the State acquired the necessary proof to proceed with the more serious charge, entered a *nolle prosequi* with respect to the DWI-first complaint, and charged the defendant with DWI-second. Id. The defendant was found guilty and appealed, contending that the State's decision to re-charge him with the more serious offense violated his due process rights. Id. 269-70.

This Court found that the State had rebutted the presumption of prosecutorial vindictiveness because (1) the more serious DWI-second offense was the original charging decision; (2) the defendant had initially prepared his trial strategy for the more serious DWI-second offense; (3) there was no evidence of prosecutorial statements indicating vindictiveness or a motive to chill the defendant's right to a trial *de novo*; and (4) it was only a matter of fortuity that the State had not proceeded with the more serious DWI-second offense initially. Id. at 272-73. The Court cautioned, however, that "absent such exceptional circumstances, the situation of an increased charge against a defendant who has exercised his right to a trial *de novo* would violate the federal due process clause." Id. at 273.

In Marti, 143 N.H. 608 (1999), the defendant was originally charged with three counts of aggravated felonious sexual

assault. Id. at 609. After being found guilty, the defendant successfully appealed his convictions to this Court, which were remanded for a new trial. Id. Prior to the retrial, the State replaced one of the original indictments with one-hundred-and-four new indictments alleging each of the previously uncharged acts that this Court had deemed improperly admitted during the course of the defendant's first trial. Id. at 609-10. The defendant moved to dismiss or quash the new indictments on the grounds of prosecutorial vindictiveness, which was denied. Id. at 610.

In Marti, unlike in Goding, this Court found that the State had failed to rebut the presumption. Id. at 611, 615. First, the State contended that because it did not seek an enhanced sentence after the retrial, the presumption was unwarranted. Id. at 612. In rejecting this argument the Marti Court noted:

> We have never stated . . . that the prosecutor must seek a harsher sentence before a presumption of vindictiveness will arise. . . . Accordingly, the actual punishment that a prosecutor purports to seek ordinarily will not diminish a realistic likelihood of vindictiveness that is otherwise demonstrated by the circumstances of a case.

Id. at 612-13.

Second, the State asserted that its charging decision was not meant to punish Marti for appealing, but was merely an attempt to hold him fully accountable for his actions. Id. at

613. As a means of supporting its contention, the State argued that it was not until after the first trial that the prosecutor learned that the victim meant that she was being sexually abused on a weekly basis. Id. at 614. Notwithstanding this allegedly new fact, this Court found the State's "reasons insufficient to rebut the presumption of vindictiveness under the circumstances of this case." Id.

For a number of reasons, the present case is distinguishable from the facts and circumstances of Goding and analogous to those in Marti. First, as distinct from Goding, the record in the present case indicates that the State did not attempt to charge Deschene with the increased felony offense until after she exercised her right to a trial *de novo*. Deschene was charged in the district court with a complaint that had the "class A misdemeanor" box checked off. A. 2. Furthermore, this complaint was the only complaint brought by the State. Unlike in Goding where the State first attempted to charge the defendant in the district court with a more serious offense only to opt for a lesser offense because of an inability to prove a prior driving while intoxicated conviction, Goding, 128 N.H. at 269, here the State never argued to the trial court that it originally had the intention of charging Deschene with the more serious felony offense. More specifically, the State never argued to the trial court as a justification for the

increased charge that it had lacked the ability to prove LaChance suffered personal injury from the accident at the time of the district court trial.

Second, unlike in Goding, the State here made numerous statements to Deschene's counsel indicating vindictiveness or at least a motive to chill her right to a trial *de novo*. First, the State indicated to defense counsel that should it prevail at trial, it would seek a harsher sentence. A. 6. At this point in time, there was no reference by the State that it considered the complaint to be defective or that the district court sentence was somehow illegal. A. 6.

Second, the State later contacted the defense to inquire as to whether Deschene intended to remand the case. A. 27, 38-39; MH. 6. The State also indicated that it was considering bringing a felony charge in the event that Deschene proceeded with the trial *de novo*. A. 27; MH. 6. Again, there was no mention by the State that it viewed the complaint as being defective.

Third, several days later, during the final pretrial conference, the State learned that Deschene intended on exercising her right to a trial *de novo*. A. 39. The prosecutor reiterated that she was considering the possibility of bringing forward a felony charge. A. 15, 27, 39. Fourth, the State filed a motion seeking to amend the district court complaint to

clarify that only property damage was being alleged. A. 7-11. This action underscored the State's intention to seek a felony indictment. This position was reaffirmed in an October 7, 2008 email from the State to Deschene's counsel. A. 12, 16; MH. 8. Neither the State's motion nor the October 7, 2008 email mentioned the purported illegality of the complaint or sentence.

Fifth, with the potential of now being prosecuted for both a felony offense and a misdemeanor offense only after exercising her right to a trial *de novo*, Deschene objected to the State's motion. A. 13-23. Without waiting for a ruling on its motion, the State chose to *nolle prosequi* the district court complaint and to procure an indictment against Deschene alleging the offense of conduct after an accident resulting in personal injury. A. 3-4, 24; MH. 8-9. These statements, and the actions taken by the State, are direct evidence of the State's intention to chill Deschene's due process right to a trial *de novo*.

Here, Deschene argued that Goding set forth a four-part test for analyzing whether the State's decision to increase the charge upon a trial *de novo* constituted prosecutorial vindictiveness. A. 30-32; MH. 12, 14-17. Deschene asserted that the four-part test consisted of determining: (1) whether the increased charge was in fact the original charge; (2) whether the defendant had already prepared for the increased charge at the district court stage of litigation; (3) whether

there was evidence of prosecutorial statements indicating vindictiveness or a motive to chill the defendant's right to appeal; and (4) whether it was only a matter of fortuity that the defendant was not initially tried for the increased charge. MH. 14-17; see also Goding, 128 N.H. at 272-73 (identifying how the State successfully rebutted the presumption of prosecutorial vindictiveness).

In suggesting that this Court did not set forth a four-part test in Goding, the State asserted that the facts here are analogous to those in Goding and distinguishable from those in Marti. A. 44-46; MH. 23. The State argued that it possessed an objective reason for the increased charge against Deschene, namely, that the original district court complaint was defective for alleging a felony-level offense of conduct after an accident. A. 44-46; MH. 19-20. As a result of this perceived defect, the State argued that its decision to bring an increased charge was justified. A. 44-46; MH. 20-22, 32-33.

The trial court found that the State had presented sufficient reasoning to rebut the presumption. A. 56, 58. The court found that the district court complaint was ambiguous as to whether Deschene was being charged with a misdemeanor offense of conduct after an accident resulting in property damage, or a felony offense alleging personal injury. A. 54 (citing 1 R. McNamara, New Hampshire Practice, Criminal Practice and

Procedure, § 15.09 at 317 (2003)); see also A. 2 (referencing both "personal injury to one Danielle LaChance" and "owner of the damaged property" within the body of the complaint). The court noted that upon being convicted of this charge in the district court, Deschene could have sought to have the sentence quashed as a result of the ambiguity. A. 54 (citing State v. Webster, 105 N.H. 415, 417-18 (1964)).

Importantly, the trial court never articulated either during the motion hearing or in its written decision why the State's decision to proceed with a felony charge instead of an amended misdemeanor charge alleging only property damage was not prosecutorial vindictiveness. Assuming, *arguendo*, that the body of the original complaint was ambiguous, the State failed to articulate to the trial court why a felony charge was justified, other than to say that the complaint was defective. A finding by the trial court that the original complaint was ambiguous does not meet this Court's standard in Marti, that the State "must show objective reasons for the new charge[] that were not present when the prosecutor initially charged the defendant." Marti, 143 N.H. at 614 (citing Goding, 128 N.H. at 272-73) (emphasis added).

Neither Goding, 128 N.H. 267, nor Marti, 143 N.H. 608, support the State's reasoning that a defective district court complaint alone can justify an increased charge at a trial *de*

novo. Any ambiguity in the district court complaint could have been remedied by amending the complaint to clarify that only property damage was being alleged. Subjecting Deschene to the possibility of a substantially increased punishment resulting from the increased charge simply because the original charging document—brought by the State—was later deemed defective by the State was purely vindictive. If permitted, the words and actions of the State in making its charging decisions with respect to Deschene's case will have a chilling effect on all future misdemeanor defendants that are faced with the decision of whether to exercise their due process right to a jury trial.

Because the exceptional circumstances that existed in Goding do not exist here, the State's substitution of an increased charge against Deschene only after she chose to exercise her right to a trial *de novo* violates the State and Federal due process clauses. See Goding, 128 N.H. at 273 (1986). As the United States Supreme Court has stated:

> To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort, and for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is "patently unconstitutional."

Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978) (internal citation omitted) (quoting Chaffin v. Stynchcombe, 412 U.S. 17, 32-33, n. 20 (1973)). "For while an individual certainly may be

penalized for violating the law, he just as certainly may not be punished for exercising a protected statutory right or constitutional right." United States v. Goodwin, 457 U.S. 368, 372 (1982). This Court must reverse.

CONCLUSION

WHEREFORE, Ms. Deschene respectfully requests that this Court reverse the trial court's order denying her Motion to Dismiss the felony indictment charging her with conduct after an accident on the grounds of prosecutorial vindictiveness, vacate her felony conviction, and remand the case back to the trial court for further proceedings consistent with such a holding.

Undersigned defense counsel respectfully requests oral argument before a full panel.

Respectfully submitted,

By

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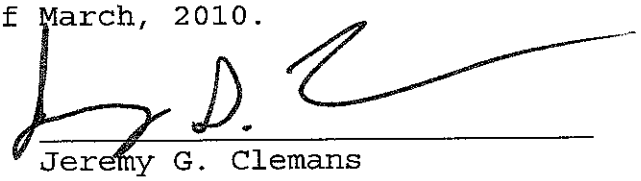
CERTIFICATE OF SERVICE

I, Jeremy G. Clemans, hereby certify that two copies of the foregoing Brief have been mailed, postage prepaid, to the Office of the Attorney General, 33 Capital Street, Concord, New Hampshire 03301, this tenth day of March, 2010.



Jeremy G. Clemans

Dated: March 10, 2010