THE STATE OF NEW HAMPSHIRE

SUPREME COURT

NO. 94-774

1995 TERM

JULY SESSION

STATE OF NEW HAMPSHIRE

v.

ZETA CHI FRATERNITY

RULE 7 APPEAL FROM FINAL DECISION OF SUPERIOR COURT

BRIEF OF APPELLANT/DEFENDANT, ZETA CHI FRATERNITY

By:

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QUESTIONS PRESENTED

QUESTION 1:

Was there sufficient evidence to find that the Defendant, beyond a reasonable doubt, committed the crime of illegal sale of alcohol in that the Defendant elected to not provide alcohol, advertised the event as BYOB, took pains to remove alcohol from the location of the gathering, had no control over the premises in which the alleged sales occurred, and had no knowledge that sales or conditions leading up to them had allegedly occurred?

QUESTION 2:

Was there sufficient evidence to find that the Defendant, beyond a reasonable doubt, committed the crime of prostitution in that the State did not present any evidence of penetration, that money was not passed for sex, and that the Defendant took reasonable measures to prevent sexual contact such that prostitution was not knowingly permitted by the Defendant?

QUESTION 3:

Insofar as the crimes with which the Defendant is charged occurred, may the Defendant be held criminally liable for those crimes, when the State failed to produce evidence tending to show an agency relationship between the defendant and the defendant's alleged agents or that the alleged agents acted within the scope of agency?

QUESTION 4:

Did the court err in admitting into evidence minutes which were created a year before the alleged crime, and which contain an abundance of facts which are prejudicial to the Defendant but which are not probative of the impeachment for which it was purportedly allowed into evidence.

QUESTION 5:

Did the court err in sentencing the Defendant to conditions of probation which are unconstitutional in that they do not

fit the crime for which the Defendant was convicted, allows capricious searches without a determination of cause or announcement and allows police to search.

STATEMENT OF FACTS AND STATEMENT OF THE CASE

Zeta Chi Fraternity is a New Hampshire corporation which rents a house near the campus of the University of New Hampshire in Durham. On the evening of February 21, 1994, Zeta Chi held a "rush" to attract new members. Prior to the rush, which attracted 150 people, the Zeta Chi brothers voted to not provide alcohol and to make the rush a bring-your-own-beverage (BYOB) event. Accordingly, the brothers moved their soda machine, which contained cans of beer, into a private apartment located in the fraternity house. Nonetheless, one man under the age of 21 claimed he was able to purchase several cans of beer from the machine.

To attract new members, the fraternity hired two female strippers. At the beginning of the strippers' act, the fraternity announced that the strippers would accept money, and that the more they collected the longer they would continue dancing. Several of those attending gave the strippers money. During the course of their act, one of the strippers spontaneously pulled men's faces between her legs to simulate cunnilingus. As part of their act, the two women also simulated oral sex between themselves.

A jury trial was held in Strafford County Superior court (Mohl, J.) on one count of illegal sale of alcohol, a felony, and one count of prostitution, a misdemeanor. During trial the state

entered into evidence meeting minutes of the fraternity taken up to a year before the events relevant here. While the minutes are prejudicial to the Defendant, they contain almost no information probative of the impeachment for which they were offered.

Following conviction, the Court sentenced the fraternity. For the conviction of illegal sale of alcohol, the Defendant was fined $50,000, suspended upon the condition that the fraternity perform 2,500 house of community services and that the fraternity not allow consumption of alcoholic beverages on its premises for two years; and placed on probation for two years, which includes being subject to unannounced searches. For the conviction of prostitution the Defendant was fined $10,000.

This appeal followed.

SUMMARY OF ARGUMENT

The Defendant first argues that the evidence on which it was convicted for illegal sale of alcohol was insufficient because the state offered no corroboration of the actions of a single witness who claimed he bought beer, and no evidence that the Defendant was in control of the sale.

The Defendant next argues that the evidence on which it was convicted for prostitution was insufficient because the State offered no evidence of penetration, no proof of consideration, and no evidence that the Defendant knowingly permitted the acts.

Third, the Defendant argues that it is not criminally liable because there was no agency relationship between the fraternity and persons who may have committed crimes, and because the state neglected to offer any evidence of such a relationship.

Fourth, the Defendant argues that the fraternity's minutes book was erroneously allowed into evidence. The witnesses which the State sought to impeach made no statements that were impeachable with evidence in the book. Also, the probative value of the book was slight for the impeachment purposes for which it was purportedly offered, while its prejudicial value was great.

Finally, the Defendant argues that its sentence is unconstitutional in that it allows capricious and unannounced searches by the police, bears little relationship to the crime, and prevents lawful activity.

ARGUMENT

I. The State did not Present Sufficient Evidence to Convict Zeta Chi Fraternity of Illegal Sale of Alcohol

In New Hampshire, "[n]o . . . person, shall sell or . . . cause or allow . . . to be sold . . . any liquor or beverage to a person under the age of 21 . . . ." RSA 179:5. In addition, the indictment charging Zeta Chi with felony sale of alcohol alleged the mental state of "recklessly."

In this case, the State failed to prove, beyond a reasonable doubt, that Zeta Chi Fraternity caused or allowed beer to be sold, and that it did so recklessly.

A. The State Failed to Prove that Mr. Strachan Bought Beer from Zeta Chi Fraternity

At trial, there was uncontroverted evidence that Zeta Chi Fraternity had a policy that its "Stinger Rush" would be a bring-your-own-beverage (BYOB) event. In two separate elections held before rush, the officers and the members of the fraternity voted unanimously to not provide alcohol. Transcript 1:133, 1:135, 1:147, 1:148-9, 2:32-33, 2:45, 2:59, 2:60.[1] Both votes were recorded in the fraternity's record book which was entered into evidence. Transcript 1:133-135; State v. Pinardville Athletic Club, 134 N.H. 462, 465 (1991). It is also uncontroverted that

[1]There were two days of trial. The stenographer has labeled the transcript of the first day Jury Trial - Day 1, and the second day as Jury Trial - Day 2. References to these transcripts are denoted in this brief with the day of trial, colon, page number.

beer was not generally made available, as from a common keg, transcript 1:61; that at no time were guests told they could buy beer from the soda machine, transcript 1:157; and that fraternity members who were monitoring the entrance saw people bring alcoholic beverages with them to the rush in accordance with the event having been advertised as BYOB, transcript 2:60-61.

Although approximately 150 people attended Zeta Chi's rush, transcript 1:110, 2:82, the state produced just one person who claimed beer was sold. Andrew Strachan, a 19-year old student, transcript 1:81, claimed that although he was never told by anyone that beer was for sale, he assumed beer was available at the rush. Transcript 1:74, 1:107. He "learned, at some point, that there was [] beer that you could get from a beer-dispensing machine." Transcript 1:79. Strachan then testified that he "managed somehow, over the course of the night ,to find my way to it." Transcript 1:79,80. Strachan said there was a back-room with the machine in it. He "assumed, since I was in the actual house and able to get back there, that it was part of the fraternity house." Transcript 1:80.

Strachan testified that there were three or four people in line to get beer at the machine, that there was someone providing change for it, transcript 1:81, and that he needed change, transcript 1:83. Strachan said that he believed he bought three or four or five beers from the machine, transcript 1:82; that he

made a second trip to the machine for additional beer, transcript 1:82; and that his first visit to the machine was very early in the evening "before the entertainment arrived," transcript 1:84-85.

Virtually none of Mr. Strachan's testimony, except for the existence of the machine, was corroborated. Two men, who attended the rush with Mr. Strachan, as well as Strachan himself, testified that Mr. Strachan had been drinking before they went to the rush. Transcript 1:109, 2:87, 2:104. The two men, who were sitting with Strachan, did not see him come back to his seat with three or four beers in his hands, transcript 2:89, 2:105; did not see any beer sold at the rush in a vending machine or otherwise, transcript 2:87-88, 2:104; nor heard of it happening, transcript 2:87-88, 2:104.

Strachan did not tell the police when he was interviewed by them a month after the alleged crime that there were others buying beer, that he had to stand in line, or that there was a person present to make change at the machine. Transcript 2:33-34. No other witness knew of change being made at the machine. Transcript 1:141. Although Strachan testified that the line at the machine was four deep, the state did not produce any evidence to corroborate Strachan's statement that even a single beer was sold from the machine.

Strachan was not asked to corroborate his own testimony by

providing such details as the color or layout of the apartment in which the machine was located. On the one detail Strachan did provide, that the machine had beer in each of its six sleeves, transcript 1:82, he was mistaken; the machine had beer in only one of its six sleeves, transcript 1:149, 2:73-74, and that sleeve was mostly empty, transcript 1:149-150.[2]

Finally, Strachan said he bought beer from the machine before the entertainment arrived. Transcript 1:84-85. The time is important to the state's case because by Mr. Strachan's words, his opportunity was short. In two days of testimony, the state didn't ask a single question about the time, or make any other attempt to establish what time Mr. Strachan allegedly made his purchase. It is unknown, for instance, what time Mr. Strachan and his friends arrived, what time the rush began, what time the entertainment arrived, what time the entertainment began, or what time Mr. Strachan allegedly visited the machine. What is known is that each of the nine witnesses who testified said that the entertainment began shortly after they arrived, and that the man who lived in the apartment, Todd Boulanger, said he locked it when he left at dinner time and found it open when he returned

[2]The machine had six sleeves, each of which could hold 36 cans. Transcript 2:73-74. Thus, when completely full, the machine held 216 cans. It is not reasonable to suppose that a fraternity which intended intended to sell beer, and which advertised dancing nude girls to draw a large crowd and indeed drew 150 people, would have on hand less than 1½ beers per person.

from work at midnight. Transcript 2:67. Thus, it is likely that either Mr. Strachan is mistaken about buying the beer at Zeta Chi Fraternity rather than at some other location, or that he did not buy beer at Zeta Chi Fraternity on that evening rather than on some other occasion.

B. If Mr. Strachan Bought Beer, the State Failed to Prove that Zeta Chi Fraternity Sold it

Even if Mr. Strachan bought beer from the vending machine, the statute requires that for a conviction the state must show that the fraternity "caused" it to be sold. Cause requires control over the premises in which the sale took place. Richardson v. Palmer, 38 N.H. 212 (1859).

It is undisputed that the vending machine was in a back apartment, and that it was moved there from a more accessible place before the rush by members of the fraternity for the specific purpose of making it inaccessible to those attending the rush because the fraternity had previously decided it would not provide beer at the event. Transcript 1:133, 1:140, 2:63, 2:68. While the apartment is physically a part of the building in which the fraternity is housed, it is approximately 100 feet from the function room where the rush was taking place, and may be accessed only by a circuitous route through the building. Transcript 1:153.

The room into which the machine was moved was an apartment

with its own bathroom and kitchen, which had been made legally separate from the fraternity long before the rush. Transcript 1:131, 1:139. The apartment had been leased to tenants, who kept it separate, locked it, and did not give any person permission to go there. Transcript 1:146, 147. There was no public access to the apartment, and only the tenants had keys. Transcript 2:44, 2:77. People with apartments in the building habitually kept their doors locked because there had been thefts. Transcript 2:82.

The fraternity had no control over the apartment and over other rooms in the building in which people other than fraternity members (including women) lived. Transcript 1:147. The fraternity, nor its officers had access to the apartment. Transcript 1:151, 2:44, 2:73. None of the tenants of the apartment were members of the board of directors of the fraternity. Transcript 2:69. While the fraternity may believe it technically had the power to take over the apartment, transcript 2:77-78, it is probably wrong as a matter of landlord-tenant law. Evans v. Watkins, 76 N.H. 433 (1912).

Overall, the apartment was physically and legally separate from the fraternity. Transcript 2:68-69.

One of the tenants testified that he had locked the apartment door at dinnertime, and that when he returned at midnight the door was unlocked and his roommates were there.

Transcript 2:67. There was no testimony that the fraternity had any role in unlocking the door, or knew that it was unlocked or that the public had access.

If Mr. Strachan bought beer, the fraternity had no control over the premises on which the beer was sold, and therefore cannot be liable. If anyone is liable, it is those roommates who unlocked the door and revealed the machine which the fraternity had so carefully concealed.

C. The State Failed to Prove that Zeta Chi Fraternity Acted Recklessly

The indictment charged Zeta Chi with the mental state of "recklessly," which is defined by statute:

> "A person acts recklessly with respect to a material element of an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such nature and degree that, considering the circumstances known to him, its disregard constitutes a gross deviation from the conduct that a law-abiding person should observe in the situation."

RSA 626:2, II (c).

The state fell far short of proving Zeta Chi Fraternity acted recklessly.

The State presented no testimony showing that the fraternity was aware that beer was being sold, or that conditions created a risk that beer could be sold. While those in charge of the event were generally keeping tabs on what was going on, transcript 1:156, some of them were occupied with running the event and

interviewing men who were interested in joining the fraternity, transcript 1:151-152, 2:33, 2:43. None were aware that people were able to buy, or were buying, beer from the machine. Transcript 1:136, 2:4, 2:30, 2:43. They testified that they probably would have known about it if beer sales were taking place. Transcript 1:157, 2:5-8. Members first learned of the alleged alcohol sales from the newspaper several weeks after the rush, transcript 1:160, and know of no people other than Mr. Strachan who claim to have bought beer, transcript 1:157.

The state likewise did not prove a conscious disregard of a risk that beer sales were occurring. Members testified that if they had known, they would have stopped it. Transcript 1:151. The fraternity had taken reasonable precautions that the dispensing machine was inaccessible, and did not know that the room it had been moved to may have been opened. Thus, the fraternity did not have knowledge of any risk which they could have consciously disregarded.

II. The State did not Present Sufficient Evidence to Convict Zeta Chi Fraternity of Prostitution

Prostitution is defined by statute. It is a misdemeanor for a person to "knowingly permit[] a place under his control to be used for" "solicit[ing] or engag[ing] in sexual penetration . . . in return for consideration. RSA 645:2(a),(e). Sexual penetration is defined by the rape statute as "cunnilingus [or] any intrusion, however slight, of any part of the actor's body

. . . into genital . . . openings of the victim's body [or] any intrusion, however slight, of any part of the victim's body into genital . . . openings of the actor's body." RSA 632-A:1, V.

A. The State did not Present Sufficient Evidence that Sexual Penetration Occurred

In order to convict Zeta Chi Fraternity of prostitution, the state must show that sexual penetration took place. Specifically, the state must show that another person performed cunnilingus on the strip-tease dancer. State v. Demmons, 137 N.H. 716 (1993).

It is well established that mere touching of sexual organs is not sufficient for a conviction. See e.g., State v. Arris, __ N.H. ___, 656 A.2d 828 (1995); State v. Chamberlain, 137 N.H. 414 (1993); Mullins v. State, 225 S.W. 164 (Tex. 1920).

It is conceivable, but rare, that sexual penetration can be shown by circumstantial evidence alone. State v. Godwin, 178 P.2d 584 (N.M. 1974) (evidence that shortly after act, rape defendant had redness on his penis, and his pants were unbuttoned). Generally some other evidence is present. Penetration may be proved by expert testimony of physical evidence alone. See e.g. State v. Kirk, 211 N.W.2d 757 (ND 1973) (examination of girl soon after alleged rape revealed damage to sexual organs). Penetration may proved by circumstantial evidence corroborated by physical evidence. Bloodworth v. State, 118 S.E.2d 374 (GA 1961) (rape defendant's testimony that he

"tried" to have intercourse not sufficient itself, but sufficient when combined with expert testimony regarding ripped hymen and dilated vaginal canal).

Without the testimony of at least the prosecutrix, proof of penetration requires an extraordinary amount of circumstantial evidence. See e.g., State v. Welch, 41 P. 808 (Or. 1902) (jury could infer penetration from fact that woman had been a prostitute for two years prior to alleged offense and was the mother of two children, that defendant and woman shared a room with just one bed for five weeks, and defendant had told landlady that woman was his wife). Without such evidence, penetration is rarely found. See What Constitutes Penetration in Prosecution for Rape or Statutory Rape, 76 A.L.R. 3d 163 §44.

Moreover, when a fact is based solely on circumstantial evidence, the burden is on the state to disprove all other reasonable explanations.

> "[F]rom the circumstantial evidence, if it is rational to arrive at two conclusions, one consistent with guilt and one consistent with innocence, then you must choose the rational conclusion consistent with innocence."

NH Criminal Jury Instructions, Instruction 1.09, citing State v. O'Malley, 120 N.H. 507 (1980) and State v. Bird, 122 N.H. 10 (1982).

In this case, there was no physical evidence of penetration, there was no testimony by the prosecutrix to establish penetration, and there was no witness who could testify that

penetration occurred. The state sought to prove penetration on circumstantial evidence alone, yet failed to prove that it was not more than mere contact.

A number of witnesses saw one of the female dancers in very close proximity to men. However, not a single witness could establish that there was penetration. A number of witnesses believed what they saw was simulated sex acts. Transcript 2:65, 2:107, 2:110, 2:113. And a number of witnesses believed they saw contact, but no penetration. Transcript 1:41, 1:45-46, 1:54-59, 1:67, 1:113, 2:47. There was no evidence of penetration even during the simulated sex between the two women. Transcript 1:101. One witness was sure there was no penetration. Transcript 2:51.

Several witnesses testified that they could not believe it was real sex because of the reactions of the men whose faces were in the woman's crotch. One man appeared to not be embarrassed, causing the witness to believe that the sex was simulated. Transcript 2:47. Another witness called it "too farcical" to be real. Transcript 2:107.

Illustrative of the paltry condition of the State's evidence is the cross examination of Andrew Strachan, a State's witness:

> Q: And as you sit here today, you don't know, do you, whether or not there was any penetration that night?
>
> A: Correct.
>
> Q: And, as a matter of fact, at one time that night, you

gave money and one of the strippers took you up to the mattress, burying your head in her crotch, isn't that correct?

A: No, she didn't take me to the mattress, no.

Q: You went to the mattress with her?

A: No, I was just sitting in my seat, and she came up to me.

Q: Okay. And she buried your head in her crotch?

A: Correct.

Q: And you stuck your tongue out?

A: Correct.

Q: And she pulled away from you, didn't she?

A: Yes, she did.

Q: And you don't know, as you sit here today, whether anybody that night had oral sex with those girls, do you?

A: It appeared so to me, but -- I mean, from -- you know, from my point of view, it looked like they were, but . . . (Stopped talking)

Q: It appeared to you because it gave the appearance to you, not because you saw tongues being inserted into the vagina, did it?

A: Correct.

Q: You don't know whether they closed their legs in a fashion that would prevent tongue contact, do you?

A: No, I don't.

Transcript 1:98-100.

It appears that by the end of the trial, even the state was convinced that there was no penetration. Wrapping it up, the

last question of the trial was asked by the State; Aaron Camerman, a defense witness testified:

> Q: But you don't know if there was penetration that night, do you?
>
> A: I don't know.

Transcript 2:115.

At most, the State proved that there was touching, which is not sufficient for a conviction. There was a roomful of witnesses -- 150 by several accounts -- and the state produced not a single one who even thought there was penetration. There were also four or five men who allegedly penetrated, two of whom testified; both of them said they didn't penetrate. Significantly, the state also failed to produce the woman; a witness who, if there were penetration, would surely help the prosecution.

There is less evidence of penetration here than the Court found in State v. Chamberlain, 137 N.H. 414 (1993). In that rape case, the prosecutrix testified that the defendant put his finger "[o]n the sides of [her] opening." The court found that testimony insufficient for a finding of penetration. In the present case, the State presented no evidence that any object went even as far as the sides of the woman's opening.

B. If There was Penetration, the State Failed to Prove it was for Consideration

Even if the State has proved that sexual penetration

occurred, the State tendered no evidence that it was in return for consideration. The State must prove that money changed hands in return for the proscribed conduct. State v. Steer, 128 N.H. 490, 492-93 (1986).

The State's own witness, as well as others, testified that he was told that any money given to the women was for the purpose of making them stay and dance longer. Transcript 1:52, 2:105. Other witnesses testified that the payment arrangement for the strippers was for the crowd to tip them, transcript 1:155, 156, and that the money was given to cause the dancers to come over and dance in front of the tipper, transcript 2:46. No witness knew of money being given for the purpose of sex. Transcript 2:45-46, 2:63, 2:89, 2:110.

The State's witness on the matter testified:

> Q: And when I asked you about the five dollars or the one dollar or if it was ten dollars, is it my understanding from your testimony, as you sit here today, that it was not your understanding that night that if you gave money, you could have sex?
>
> A: Correct.

Transcript 1:67.

Several witnesses testified that the women were out of control and didn't care about the money. Transcript 1:43, 1:61, 1:108, 2:55. To the extent that sexual penetration occurred, it was not for consideration, but initiated by the women for their own intrinsic pleasure or for other purposes. Accordingly, it

does not constitute prostitution.

C. If There was Penetration, and it was for Consideration, the State Failed to Prove it was Knowingly Permitted by the Fraternity

"A person acts knowingly with respect to conduct or to a circumstance that is a material element of an offense when he is aware that his conduct is of such nature or that such circumstances exist." RSA 626:2, II(b).

The State must prove awareness. The material element to which the mental state refers is permission. The question in this case is when the Defendant became aware of circumstances that constitute permission to use its premises for prostitution.

If the fraternity became aware at the time of the act, such that the awareness and the sex act were simultaneous, there is no *mens rea* for the crime. Permission implies a grant of leave to do an act. That grant of leave must necessarily come before the act. Therefore, the statute requires an awareness at some time before the *actus reas* of the crime.

Moreover, the awareness cannot come just a split-second before the act. There must be time to stop the actor or to make known to the actor that permission does not exist. There must be enough time between the awareness and the act such that the person allegedly granting permission could have stopped it or made known there was no permission. See Ives v. Manchester Subaru, Inc., 126 N.H. 796, 803 (1985) ("'knowingly permit'"

requires proof of a voluntary act proceeding neither from mistake nor inadvertence").

How much time depends on whether the law requires an objective or subjective standard for permission. If an objective standard is used, there must be enough time for the defendant to take steps which a reasonable person would interpret as a lack of permission. If a subjective standard is used, then there must be enough time for the defendant to take steps which the actor her/himself understood to be a lack of permission. In the subjective case, an inquiry into the state of mind of the actor may be necessary.

Whether the act was successfully halted is not relevant. The material element to which knowingly applies is permission. The defendant must take steps to stop the action or make known to the actor that permission has not been granted. If the actor acts without regard to the presence or absence of permission, that has no bearing on whether permission was granted in the first instance.

In Commonwealth v. Bucaulis, 373 N.E.2d 221 (Mass. App. 1978), cert. den., 439 U.S. 827, the Court found that there was sufficient evidence for a finding of permitting prostitution when a female employed in a lounge responded to a barmaid's summons wearing a white negligee, accepted $50 from a male customer, turned the money over to the barmaid, and then engaged in sex

with the customer in a back room. The Court found that the owner of the lounge knew what was going on, had plenty of time to stop it, but tolerated it.

In People v. Freaney, 488 N.Y.S.2d 759 (1985), the owner of a catering business was convicted of permitting prostitution in that prostitution was regular part of her business and that she had a bed on the premises maintained for the purpose. Moreover, the New York Permitting Prostitution statute, PL §230.40, recognizes the issues regarding the relationship between the time of knowledge and the time of the act: "A person is guilty of permitting prostitution when, having possession or control of premises which he knows are being used for prostitution purposes, he fails to make reasonable effort to halt or abate such use." See People v. Behncke, 534 N.Y.S.2d 79 (1988).

Assuming that there was sex-for-hire at the Stinger Rush, it took the fraternity by surprise as much as it did anyone else. When the members did learn of it, they immediately tried to stop it.

At the beginning of the rush, the fraternity told the guests that sexual relations would not be permitted, and that their function was to dance and strip. Transcript 1:37, 1:52, 1:60, 1:71, 1:85-86, 1:107, 1:138, 2:107. The fraternity did not know beforehand that any sexual contact was going to occur. Transcript 1:40, 1:54, 1:138-139, 1:155-160, 2:4-11, 2:33-34,

2:45-47, 2:62, 2:89-91, 2:96.

When the fraternity did learn about it, the members immediately tried to control it. If the strippers stayed too long with one person, the fraternity brothers moved them along. Transcript 2:46. In several instances, brothers separated one of the women from a guest. Transcript 2:46, 2:53-54. According to the State's witness, one of the women was "out of control." Transcript 1:60. "[S]he would be pulled off the rushees, and -- but she would just go right back." Transcript 1:60.

> Q: And when the young girl got out of control, brothers had her move on, didn't they?
>
> A: Yes.

Transcript 1:61. Several witnesses testified that had they known about any sexual contact, they would have stopped it. Transcript 1:156, 2:63-64.

It is apparent from this testimony that the fraternity was conscientiously trying to stay within the law, and not knowingly permitting its violation.

III. The Defendant, Zeta Chi Fraternity, is not Criminally Liable for Acts of Persons who do not Have Authority to Act for the Fraternity

A. Law of Agency

Even if crimes were committed, with the appropriate mental states, by persons present at the time alleged, Zeta Chi Fraternity is not criminally liable for them because those persons did not act with the authority of the fraternity.

Whether Zeta Chi is liable turns on the law of principal and agent. State v. Pinardville Athletic Club, 134 N.H. 462, 465 (1991).

> "Agency is the relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by others to so act."

Petition of Contoocook Valley Paper Co., 129 N.H. 528, 532 (1987) (quoting Dugas v. Nashua, 62 F.Supp 846, 850 (D.N.H. 1945) appeal dismissed, 154 F.2d 655 (1st Cir. 1946)). Authority is determined by the facts of the case. Cohen v. Frank Developers, Inc., 118 N.H. 512 (1978). The act of the agent must be within the scope of authority no matter what the source of the authority. Castonguay v. Acme Knitting Machine & Needle Co., 83 N.H. 1 (1927).

A principal is liable for the acts of an agent when the agent has express, implied, or apparent authority. Demetracopoulos v. Strafford Guidance Center, 130 N.H. 209 (1987).

"Express authority arises when the principal . . . explicitly manifests its authorization of the actions of its agent." Demetracopoulos, 130 N.H. at 213.

Implied authority arises either incident to the terms of express authority, or from acquiescence by the principal in a course of dealing by the agent, Sinclair v. Town of Bow, 125 N.H. 388, 393 (1984). The court focuses on the agent's understanding

of the authority when determining whether implied authority exists. Id.

Apparent authority exists when a principal behaves in a way to cause a third party to reasonably believe that the agent is authorized. Horseshoe Fish & Game Club v. Merrimack Village Dist., 112 N.H. 94 (1972). Apparent authority is:

> "that authority which a reasonably prudent man, induced by the principal's acts or conduct, and in the exercise of reasonable diligence and sound discretion, under similar circumstances with the party dealing with the agent, and with like knowledge, would naturally suppose the agent to have."

Demetracopoulos, 130 N.H. at 213, quoting, Atto v. Saunders, 77 N.H. 527, 529 (1915).

The State did not present evidence to prove an express, implied, or apparent agency relationship between the persons who committed the alleged crimes and the fraternity it was seeking to hold criminally liable.

B. State did not Prove Agency Relationship Regarding the Sale of Alcohol Charge

Regarding the salw of alcohol charge, the State made no attempt to show that there was express authority arising from an explicit manifestation of authority vested in the unknown person who unlocked and opened the door to the apartment containing the dispensing machine. All testimony presented was to the contrary. The fraternity expressly voted to not provide alcohol, transcript 1:133, 1:135, 1:147, 1:148-9, 2:32-33, 2:45, 2:59, 2:60, and took

action to enforce that policy. The fraternity moved the machine into a back apartment, transcript 1:133, 1:140, 2:63, and locked the door, transcript 1:146, 147. It is not known how the apartment became unlocked; the State did not present any evidence that tended to show it was opened by the express authority of the fraternity. If the machine was made available by an express agent, the State made no attempt to show that it was done within the scope of agency.

Similarly, the State made no attempt to show that there was implied authority either incident to express authority or arising from a course of dealing. To show implied authority, the State would have had to enter evidence focusing on the alleged agent's understanding of the authority. No agent who allegedly allowed the beer sale testified, and no other witness testified as to that alleged agent's state of mind. If the machine was made available by an implied agent, the State made no attempt to show that it was done within the scope of agency.

The State also did not produce any evidence on the issue of apparent authority. The State made no attempt to show that there were circumstances that would lead a reasonable person to believe that beer was for sale by the fraternity. The extent of the State's evidence was one person's uncorroborated testimony that there were several people lined up to buy beer at the machine, and that a person was making change for that purpose. The State

did not attempt to show, for example, that there was a steady flow of traffic to the machine, that it was commonly known that beer was for sale, that there was an ample supply of beer for the 150 people in attendance, or even that the people allegedly selling the beer were fraternity members. If the machine was made available by an apparent agent, the State made no attempt to show that it was done within the scope of agency.

C. State did not Prove Agency Relationship Regarding the Prostitution Charge

Regarding the prostitution charge, the State made no attempt to show that there was express authority arising from an explicit manifestation of authority vested in the persons who allegedly permitted prostitution. In fact, the testimony showed the opposite. It was uncontroverted that members of the fraternity announced at the beginning of the evening that sexual relations would not be permitted, and that their function was to dance and strip. Transcript 1:37, 1:52, 1:60, 1:71, 1:85-86, 1:107, 1:138, 2:107. The State did not attempt to counter the testimony that the fraternity did not know beforehand that any sexual contact was going to occur. Transcript 1:40, 1:54, 1:138-139, 1:155-160, 2:4-11, 2:33-34, 2:45-47, 2:62, 2:89-91, 2:96. If prostitution was permitted, the State made no attempt to show that it was done within the scope of agency.

As with the sale of alcohol charge, the State made no attempt to show that there was implied authority either incident

to express authority or arising from a course of dealing. To show implied authority, the State would have had to enter evidence focusing on the alleged agent's understanding of the authority. The members of the fraternity who allegedly allowed the prostitution testified that when a woman lingered too long, they moved her along. Transcript 2:46, 2:53-54. No testimony was offered by the state contradicting the members' state of mind. If prostitution was allowed to occur, the State made no attempt to show that it was done within the scope of agency.

Finally, the State also did not produce any evidence on the issue of apparent authority. The State made no attempt to show that there were circumstances that would lead a reasonable person to believe that prostitution would be permitted. The announcements and the conduct of the marshals in moving the women along would lead a reasonable person in similar circumstances to believe that the women were there just to dance. Entertainment featuring female dancers is not uncommon; in fact the Zeta Chi Fraternity hosted them in previous semesters. Transcript 1:46. There were no facts asserted by the state tending to show that the fraternity intended this event to feature anything more than that. If prostitution was permitted, the State made no attempt to show that it was done within the scope of agency.

D. State Neglected to Offer Evidence of Agency

From this review of the evidence, it is apparent that the

State simply neglected to enter evidence to prove an agency relationship between the defendant fraternity and those who allegedly did the crimes. A prohibition-era case shows that it has happened before. In Pitts v. Atlanta, 81 S.E. 249 (Ga. 1914), the proprietor of social club was found in violation of an ordinance prohibiting the keeping of intoxicating liquors for unlawful sale. A witness testified that on several occasions he went there and bought some whiskey. The Court found:

> "In this case it does not even appear that the alleged sale of liquor was made by permission or in conformity with the rules and regulations of the club, or by the actual or implied consent of any of its officers or members, nor (what is more important) does it appear that either of the sales testified to by the sole witness for the prosecution was made in the presence or by consent, or with the knowledge, of the defendant, or that he ratified or approved the sale in any way; and, so far as the record discloses, the sales were made by parties unconnected with the club."

Pitts v. Atlanta, 81 S.E. at 250.

IV. The Court Erred in Admitting into Evidence the Fraternity's 1993 Organizational Meeting Minutes Book

A. Admission of the Evidence Violated Rule 608

Three fraternity brothers who testified at trial were questioned about Zeta Chi Fraternity's policies concerning the provision of beer at fraternity parties. Two of the three, David Flanders, the fraternity's president, and Kendall Holland, the fraternity's marshall, testified that it was their understanding that it was the fraternity's policy to not serve alcohol to people under 21 and that the rush would be a BYOB event.

Transcript 2:15, 2:45. The third witness, Todd Boulanger, the resident of the back apartment, was not asked any such question before being impeached. See Transcript 2:66-86.

At that point in the testimony of the Flanders and Holland, and spontaneously in the case of the Boulanger, the State confronted the witnesses with a record book which was the fraternity secretary's minutes of fraternity meetings during 1993. Counsel objected to the book. Transcript 2:16.

As the questions and answers reveal, there was no grounds on which to confront the witnesses regarding their veracity. None of the three admitted to any knowledge that was capable of being contradicted by the evidence contained in the record book, and thus there was no basis for confronting the witnesses with extrinsic evidence in the form of the record book. N.H. R.Ev. 608(b) ("Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility . . . may not be proved by extrinsic evidence."). The witnesses essentially were confronted with evidence which assumes they had knowledge which they did not have. As the testimony below reveals, at every instance, all three told the jury they were not privy to the information upon which they were impeached.

David Flanders

"Q: However, you have been advised of the alcohol laws relative to Title 13 by members of the Durham Police Department, isn't that correct?

A: Um, I do not remember that.

Q: Well, hadn't you attended the -- the free seminars given by the police department on the alcohol laws?

[Question withdrawn]

Q: You're aware you're not supposed to sell alcohol to people under 21, right?

A: Yes.

Q: Okay. And you've testified that it's your official policy not to do that, isn't that correct?

A: That's correct.

Q: As a matter of fact, haven't you, as an organization, made efforts to circumvent that law?

[bench conference]

. . .

Q: As an organization, your organization has officially attempted to get around the alcohol laws, isn't that correct?

A: I'm not sure . . .

. . .

Q: But you have a minutes book for spring and fall semester of 1993, isn't that correct?

A: Yes.

Q: Let me just show you something. Do you recognize that?

A: Yes.

Q: And that's your minute book for the year 1993, right?

A: Uh, yes.

Q: And in that you keep notes of your meetings and things that you've been involved in, right?

A: Yes

Q: And isn't it true that at an official meeting it was discussed that you had to be very careful in serving alcohol because the police were using informants to make alcohol arrests, isn't that right?

A: I'm not aware.

Q: Let me see if I can refresh your memory. . . . Let me show you a section of your minutes book -- and this is from January of 1993 -- and I have outlined a -- a section. Why don't you read it to yourself?

A: Okay.

Q: Does that refresh your memory?

A: Um . . .

Q: Well, without answering the question that I've asked before, does that refresh your memory?

A: Um, can I -- can I answer this -- I'm . . .

Q: Does it refresh your memory?

. . .

A: Okay. I was not in office then. I was -- I just became a brother then. I'm not -- I do not remember that.

Q: But you in fact were a member, weren't you?

A: Yes.

Q: All right. In fact, your name is in this book, isn't it?

A: Uh, it should be.

Q: It should be. And in fact, at that meeting, it was discussed that you had to be careful to charge for alcohol beforehand because the police were using informants, isn't that right?

A: Um, I'm not sure.

Q: Isn't that what that says?

A: It says something about five girls going around. Could I please resee it?

Q: Absolutely.

A: I'm really not sure what this is. I did not take these minutes, I don't -- that was over a year and a half ago.

Q: But you will agree that this is your -- a reproduction of your official record book. You've already identified that . . .

A: Yeah.

Q: . . . isn't that correct? Yes?

A: Yes.

Q: And in fact, it seems to say here that, '. . . used a back entrance, charging done beforehand by five girls because the police are using informants,' isn't that right?

A: I -- that's what it looks like, but I really do not remember that.

Q: That's what it looks like, though, doesn't it?

A: I -- I do not remember that.

Q: That seems to suggest that you were avoiding the police detective and you were selling alcohol, isn't that right?

A: I'm not sure because, like I said, I do not . . .

Q: Does it seem to suggest that?

A: I do not know. I was no -- I -- I was not a member -- I was -- I was a member then; I was not an officer then, I don't know what was going on.

Q: Sure. Okay. Let me ask you this: You had another meeting in February, isn't that correct?

A: I'm sure we did

. . .

[after bench conference, limiting instruction read to jury]

Q: February 1993, fraternity meeting, right; that's where we are?

A: Um-hum.

Q: And, once again, you're planning a party where you explicitly plan to sell beer to people under 21, isn't that right?

A: I do not know.

Q: You weren't a member back then?

A: I was, but I don't remember, 'cause, like I said, it was over a year and a half ago.

. . .

Q: Now, Mr. Flanders, isn't it true that at that meeting you explicitly, your organization actually made plans to sell liquor to people under 21?

A: That -- that -- like, that statement's not -- those minutes say that, but, like I said, I do not remember that. That was a year and a half -- I was not an officer then.

Q: Those minutes say that, don't they?

A: Yes.

Q: I mean, it wasn't just a, 'Oh, look out for the police.' It was, 'This is how we're going to do it,' right?

A: That's what it looks like.

Q: Okay. And the way you're going to do it is to -- and this comes under what's labeled 'Fund Raiser,' right?

A: Yeah, that's what it was under.

Q: This is how you're raising funds and doing your social project or your community project, right?

A: I do not remember.

Q: And this is how you're going to raise funds; it says you're going to have a party again this semester, right?

A: That's what it says.

Q: And that you're going to recruit as many guests as you can, right?

A: Yeah.

Q: And you get three dollars up front from each guest, right?

A: Yep.

Q: And you're going to tell these people they're going to get beer for that night?

A: That's what it says, yeah.

Q: And the cover charge doesn't include the price of beer, does it?

A: Um, no.

Q: And what you're going to do is you're going to designate times to give money to people over 21, right?

A: Yes.

Q: Go and get beer and then give it to these people away from your house, right?

A: That's what it says.

Q: And 'away from the house' is underlined, isn't it?

A: Um, yep, it was. But like a I said, I was not an officer then. That was a year and a half ago; I don't even remember it."

Transcript 2:14-2:26 (objections, bench conferences, limiting instruction, some questions and answers, omitted).

Kendall Holland

"Q: Mr. Holland, you were also a member in 1993, were you not?

A: Uh, yes. I was not an active member; I withdrew from school for a semester.

Q: Well, you were telling him you were elected marshal, wasn't it?

A: It was the end of that semester.

Q: Sure. And I'm sure you know and can identify, like Mr. Flanders, as the old record book . . .

A: Yes.

Q: . . . do you remember that?

A: I would assume so, by the title on it. I have not seen that before.

Q: You've never seen this before?

A: No, I have not."

Transcript 2:48.

Todd Boulanger

"Q: Okay. And you were a member back in 1993, right?

A: Yes.

Q: Were you present at the -- at the meeting where the official fraternity policies were discussed relative to deceiving the police?

[objection, question rephrased]

Q: Were you present in January of 1993, the meeting where the official policy was to prevent the police from receiving information about underage drinking?

A: I can't remember.

Q: Were you present in the February meeting when the

organization conspired to sell alcohol to people under 21?

A: I can't remember.

Q: So, -- but you were a member then, right?

A: Oh, yes, I was.

Q: Okay. You don't remember that? You don't remember that?

A: No. I don't remember that.

Q: Do you recognize this?

A: Yes I do.

Q: Okay. And what is this?

A: That's a -- is a minutes manual.

Q: For what?

A: For house meetings.

Q: Whose house meetings?

A: Zeta Chi fraternity."

Transcript 2:78-2:81 (objections, bench conference, offer of book into evidence, limiting instruction, omitted).

As this testimony reveals, none of the witnesses ever said that the specific instances of conduct which were then being alleged by the state -- that is, a scheme to circumvent the liquor laws -- did not occur. Thus, there was no grounds for impeachment with the record book under Rule 608(b) in the first instance. The specific harm Rule 608(b) is designed to prevent -- a trial within a trial -- is precisely what the above

testimony is. State v. Hopkins, 136 N.H. 272 (1992).

B. Admission of the Evidence Violated Rule 403

Even if the testimony passes Rule 608(b) muster, it violates Rule 403. The rule directs that:

> "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ."

N.H. R.Ev. 403.

In deciding Rule 403 cases, this Court normally gives wide discretion to the trial court to determine whether evidence is prejudicial, because the trial judge was hearing the evidence and is in the best role to judge it impact. State v. Lemire, 130 N.H. 552, 555 (1988) ("The prejudicial impact, if any, of particular testimony . . can best be gauged by the trial court judge."). However, in this case, because the prejudicial evidence is a writing, and not testimonial, the trial court was in no better position than this court to judge its impact. Thus, this court has more latitude to reverse on Rule 403 grounds than in Lemire.

Defendant's Counsel argued to the Court that using the Record Book was designed to "inflame" the jury, transcript 2:15, and that it was "prejudicial," transcript 2:21.

While two limiting instructions were given, they were insufficient. In its second limiting instruction, the Court said merely, "Members of the jury, that's as I indicated earlier,

limited to impeachment only." Transcript 2:81. The first instruction, while more complete, was ineffective. N.H. R.Ev. 105.

> "Before we go any further, members of the jury, let me just give you what we -- you've probably heard before as a cautionary instruction. This evidence with respect to the organizational minutes that [the prosecutor] is referring to, I'm allowing it only for purposes of the impeachment of this witness's testimony concerning the policies of the organization. If you believe that, based on this evidence, the organization has allowed individuals under 21 years of age to consume alcoholic beverages on the premises, you may not use that evidence to find that they probably did that on the occasion alleged in this indictment. The evidence is only admissible for purposes of impeachment.

Transcript 2:23-24 (emphasis added). The first instruction mentions only the fact that the evidence is to be used for impeachment, but neglects to mention what the evidence cannot be used for -- the truth of the matters stated in the Record Book. The second instruction is fine so far as it pertains to the use of the evidence for impeachment in the first, second, and fourth sentence.

However, the third sentence -- the only limiting instruction the court gave on what the evidence cannot be used for -- is so garbled as to be incomprehensible. With the sentence reduced to writing for purposes of appeal, several readings, and a law degree, it is possible to eke out its meaning. However, to a lay jury hearing it just once, the sentence is insufficient to properly warn the jury for what purposes the evidence can and

cannot be used.

Moreover, the State explicitly argued the substantive value -- not just the impeachment value -- in its closing.

> "The fact is the evidence is uncontroverted that his notebook was generated by these guys. In fact, you read the last two pages, you're going to see every single officer listed in this notebook, every single one. Don't be fooled. The words in these notebook (sic) are the official party line of these guys. . . .
>
> "So when he sits up there and says, 'You know, what we do is, really, we're just -- we're big brothers to eight-year-olds, and we -- we do nothing but clean up the campus, and, you know, we -- we give to Goodwill,' that's all baloney. Okay? What they're also doing is generating fundraisers by selling alcohol to minors, if necessary. And they will do it any way they can: collect the money first, sneak around the corner. . . .
>
> "And what was really interesting was as you read this, you're going to find that they're full of ingenious ideas of how to keep criminal liability off of themselves. You'll see that another keen idea about selling alcohol to minors is to get the money ahead of time, buy the beer and go outside the house, down the street, and then make the big transfer. That was another way to get it. Okay?"

Transcript 2:132-134. All of the facts in the notebook are argued by the State for the truth of what was contained in the notebook. In the first and second paragraph quoted above, the State surrounded its statements about the notebook with language that makes it sound like impeachment, but the state did not limit its argument about the book to impeachment purposes.

In the third paragraph quoted above, the State abandoned its attempt to make its argument even sound like impeachment. The

third paragraph is a forthright argument regarding the facts to be found in the notebook. The State straightforwardly asks the jury to convict the Defendant on the basis of a sale of alcohol that is not alleged in the indictment, and the facts of which are only available in the inadmissible notebook.

C. The Probative value of the Evidence Contained in the Record Book for Purposes of Impeachment is Minuscule Compared to its Prejudice to the Defendant

The record book was entered into evidence supposedly for the purpose of impeachment. There is very little in the book that is probative of impeachment, but a great amount that is prejudicial to the Defendant.

The material probative for the purpose of impeachment on this issue is limited to the following four lines:

- The fraternity knew that there were "5 girls - police are using as informants." Record Book 31[3].
- Referring to an alleged scheme, which is not detailed in the book, to sell alcohol to minors, the book says: "charging done beforehand." Record Book 31.
- Presumably referring to the same scheme, the fraternity planned to "give out stickers -- they can prepay or pay here but don't tell them" Record Book 32.
- Finally, there is an admonition to members to "buy beer and give to friends away from house. Record Book 33 (emphasis in original).

On the other hand, there is a large amount of material in

[3]Citations to the Record Book will be to the page numbers that appear in bottom right corner of each page. It is unknown why the first page is numbered page 29.

the book that is prejudicial to the Defendant. First, it must be pointed out that the date of the alleged crime in the indictment is February 21, 1994. The cover of the record book is labeled "Spring 93 - Fall 93." The first meeting recorded in the book is "January 18," presumably in 1993. Record Book 29. The last meeting recorded is "December 6," again presumably in 1993. Record Book 47. All four of the lines quoted above that arguably are probative occurred during the first two meetings recorded in the book. That is, they took place on either January 18, 1993, or February 14. 1993. Record Book 29, 31. Thus, none of the recordings quoted above are contemporaneous with the events alleged in the indictment; all of them are over a year beforehand.

The prejudicial statements recorded in the book can be broken into categories.

1. Unseemly focus on fundraising

Virtually every page of the book expresses the fraternity's need for money, so much so that it makes the fraternity appear desperate for funds. This lends credence to the prosecution's claim that the fraternity would do anything -- including selling alcohol to minors -- for a buck. Because the book was admitted only for the purpose of impeachment, the inference is impermissible but impossible to avoid.

The opening line of the book concerns attracting sophomores

to live in the fraternity house in order to lower dues, the level of the pledge fee, and the possibility of instituting a weekly dues system. Record Book 29. Later in the book, it is determined that dues will be $250 per semester if a member lives out of the house, but $50 less if he lives in the in house.

There are incessant reports of the state of the treasury and warnings of needing more money, Record Book 29, 34 ("If we get everything S 88.60 in black."), 35, 37 ("went over what everyone owed. We owe about $450 to Jesse."), 47 ("People owe $10,000."); threats if members don't pay, Record Book 34 ("If your not paid in full, you won't live here over summer or next yr."), 35 ("no dues by friday - you don't go."); and of bills about to come due, Record Book 40 ("Rent due friday. $1200 short on rent."), 46 ("Need $7,100 by tomorrow."). There are many mentions of generic fundraising events, Record Book 30, 31, 33, 34, 36, and many ideas of how to raise money. Record Book 32 (alumni payments), 29 (find a way for people to pay debts).

Some of the fundraising ideas were poorly conceived. The book suggests several times that the reason for attracting more brothers to the fraternity is not for the joy and meaning of brotherhood, but because the fraternity needs the money new recruits can bring. Record Book 29 ("We're not going to have the money we planned to have last semester. We need 40 actives or dues will go up. Without at least 30 we won't be here next

semester."), 45 ("People who are borderline about moving in house, move in. We need money."). The Vice President suggested "having other people live here and charging them extra so brothers can live here free." Record Book 34

Most damaging is that it appears that the fraternity considers even the most guileless activities opportunities to raise money. The fraternity planned a bingo fundraiser, Record Book 35, proposed gambling on the "superbowl and & NCAA tourney," and even suggested holding an arm wrestling contest to raise money, Record Book 47.

2. Alarming Amount of Drinking

Another theme running throughout the book is the constant and heavy consumption of alcohol. Because allegations of sale of alcohol are at the center of the State's felony case, the book's constant reference to alcohol makes the State's claim much more plausible. It has nothing to do however, with the purposes for which the book was admitted -- impeachment with regard to witnesses knowledge of a prior scheme to sell alcohol.

The fraternity, at some unknown function, decided that it would be better to "start with kegs - switch to cans to back up kegs." Record Book 32. The President of the fraternity complained about the "problem" of people "drinking off kegs," Record Book 31, and admonished brothers to keep their friends' drinking at bay. Record Book 31.

Drinking appears in future party plans, Record Book 31, and in retrospect, Record Book 32 ("cocktail was cool"). For one function the brothers decided "no punch - too dangerous," Record Book 31, and that another would be "bring your own - a must," Record Book 31. At one party the members were to "encourage people to drink here and not beforehand," Record Book 40, at another to get your "own drinks" for people, Record Book 46, and at a third to "pay money, go to cocktail, have fun," Record Book 47.

In planning for a house clean-up session, brothers were reminded that there was a "Clean up party Sunday - bring money for keg," Record Book 38, indicating that even clean-up chores are heavy-drinking events. The book is evidence that drinking is such a central part of the fraternity that when one person was sober for a day, the fraternity found it worthy of comment in the official records. Record Book 35 ("Mark Quist. Failed 4 wks in a row - sober on Friday.").

3. Non-stop Parties

In the same vein, it appears from the book that the fraternity brothers do little but attend parties: "party tonight" Record Book 30; crackdown on thursday parties, Record Book 31; reviewing party security plans, Record Book 30; putting end to wide open parties, Record Book 32; party next saturday, Record Book 32; trying to make the party as big as possible by

"giv[ing] a list of everyone you know on campus," Record Book 33; "great party," Record Book 34; announcement of a beach party, Record Book 35; recollection that the party on "Friday was great" Record Book 37; decision to have "proportional parties - 10 people to a brother," Record Book 40; warning to "come to meeting or no party," Record Book 40; deciding who had "Sober Duty," Record Book 40; noting that the "cookout was great," Record Book 41; announcement of a "P-Party on Sat, Oct 2," Record Book 41; in reference to a party particular party there would be "7 girls = 3 guys," Record Book 41; an angry: "What the hell was happening Friday? If you invite people for an informal party, be here. We don't know your friends and can't control without brothers." Record Book 41; and another angry: "If you have a room party, clean the fucking mess." Record Book 42; "come to parties earlier; invite people to parties," Record Book 42; "Party went pretty well," Record Book 44; Cocktail Dec. 10," Record Book 44; and finally, "Want more girls to party." Record Book 45.

The brothers expressed a thanks "for helping w/ situation at party," Record Book 45, and an admonition to "try to stay awake long enough to see people leave," at another. Record Book 41. Ideas for future parties were a casino night, a stripper, and sumo wrestling. Record Book 43.

4. Irresponsible Mess and Noise

The record book gives a sense that the condition of the

fraternity house was not next to godliness. The general mess and noise leads one to conclude that while there were efforts to act responsibly, almost anything would be tolerated. The State's case on both the alcohol and prostitution charges is that the fraternity would knowingly tolerate adverse conditions. Thus, the book is highly prejudicial to the Defendant while containing little probative of the impeachment for which it was intended.

The book is replete with admonitions to keep the house clean. Record Book 32 (must "Clean HOUSE !!!") (emphasis in original); Record Book 37 ("need to have a house clean up before we leave for summer); Record Book 38 ("Clean up party Sunday"); Record Book 39 ("clean house before people move in"); Record Book 35 (house manager complaint that house was "Not clean this weekend."); Record Book 40, 42 ("Clean house because its our house not only because it's RUSH. If you have a room party, clean the fucking mess.").

The fraternity at one meeting decided to "cover up holes in TV room," Record Book 40. At another there was a plea of "whoever took down light covers, put them back, Record Book 36, and at a third of "someone was pulling up tiles on roof. Anyone caught up there will get [illegible] and ZX loses the house," Record Book 43.

At one point it was suggested that brothers "SHAVE TOMORROW." Record Book 41 (emphasis in original). For that

purpose it was announced that "Grinch will have extra razor for anyone who needs. Look respectable." Record Book 42. Apparently the fraternity was loud as well, with complaints of "people hollering." Record Book 31.

Along with a dirty house, the fraternity in the privacy of their brotherhood, at times used dirty words: "If you have a room party, clean the fucking mess." Record Book 42; "Thank you if you helped set up or and work [at some function]. Fuck you if you didn't." Record Book 37; Zoo's report was simply "all fucking lame S no report." Record Book 31.

5. Ugly Nick-Names

It appears from the meeting minutes that the brothers gave themselves nicknames. None sound flattering, and without a familiarity with fraternal lightheartedness, could cause the jury to view them as a lack of maturity and good intent: B-shit, Record Book 36; Con-man, Record Book 39; Dick Weaz Sloth, Record Book 35 (not clear if this refers to one or three people); Grinch, Record Book p. 35, 42; Jaws, Record Book 39; Krusty, Record Book 47; Lax, Record Book 47; Lucky, Record Book 32; Mole, Record Book 42; Rat, Record Book 34; Roach, Record Book 39; Shack, Record Book 48; Slag, Record Book 36; Sloth, Record Book 43; Stretch, Record Book 35; Weasel, Record Book 39; Weed, Record Book 37; Wild Bill, Record Book 29; and Yak, Record Book 47.

6. Problems with University Authorities and Others

The book contains evidence that the fraternity had on-going disputes with University authorities. The book was admitted into evidence for the sole purpose of impeaching witnesses on their knowledge of a specific event. However, the problems with the University could give the impression of a general lack of respect for authority, and by implication, the law. As such, it is prejudicial to the Defendant while having no bearing on the purposes for which it was admitted.

At one meeting, brothers were told: "don't mouth off to U officials," Record Book 34, and to "try not to bash other [fraternity] houses," Record Book 39. At one point the brothers worried they might get a fire citation, Record Book 34, and at another that their membership may be tainted: the fraternity "might have a problem -- [University] requires all rushees to go to every house, Record Book 32. Regarding an unknown dispute, the fraternity felt heartened that other named fraternities "are still supporting us, even though University told them not to be involved." Record Book 35. According to the book, it was announced that because the fraternity owes money to the Catholic Student Center, the Center would not allow the fraternity to use the Center's chairs. Record Book 32.

D. The Court Could have Cured the Problem

Overall, out of 20 pages of small longhand notes, there are four lines that are probative for the purposes of impeachment on

the witnesses' knowledge about a specific instance to sell beer to minors. Some of the meeting notes are innocuous. However, much of the book is prejudicial. It makes the fraternity out to be a grubby, drunk, messy set of irresponsible underachievers. It is not relevant whether the picture is accurate or not. But the jury cannot but be prejudiced by the impression.

Accordingly, the probative value of the evidence contained in the Record Book minuscule compared to its prejudice to the Defendant. There is little doubt that the jury treated the Record Book as inadmissible Rule 404(b) evidence, despite the limiting instructions given by the Court.

Rather than admitting the Record Book into evidence, the Court could have cured the problem the Book poses in any number of ways. First, the Court could have refused the State permission to put the Book into evidence. Short of that, the Court could have allowed the Book to have been characterized by the witnesses, or could have allowed sections to be read. However, letting the entire Book into evidence was so prejudicial that its admission constitutes reversible error.

V. The Court Erred in Sentencing the Defendant to Probation Conditions that Include Unannounced Searches and Forbids the Presence of Alcohol on Defendant's Premises.

Upon conviction, Zeta Chi Fraternity was sentenced to *inter alia*, probation for two years, with the condition that:

> "the defendant shall not allow the consumption of alcoholic beverages on its premises in Durham, New

> Hampshire, and the defendant's premises shall be subject to unannounced searches by the Department of Corrections, or the Durham Police Department, to determine compliance with [condition not allowing alcoholic beverages on its premises] and any condition of probation."

Sentencing Order, see Defendant's Motion to Amend Notice of Appeal, at 4-5.

A. Probation Condition of Unannounced Searches Violates State and Federal Constitutions

Although generally probationers rights are restricted as compared with those not on probation, a probationer does not forfeit all constitutional rights. Morrissey v. Brewer, 408 U.S. 471 (1972); Stapleford v. Perrin, 122 N.H. 1083 (1982); People v. Peterson, 233 N.W.2d 250 (Mich. 1975) Among those rights not forfeited are a probationer's right against unreasonable searches and seizures protected by the federal and state constitutions. "A probationer's home, like anyone else's is protected by the Fourth Amendment's requirement that searches be 'reasonable.'" Griffin v. Wisconsin, 483 U.S. 868, 873 (1987).

The conditions of probation must be related to the crime. People v. Mason, 97 Cal. Rptr. 302, 488 P.2d 630 (1971) cert. den., 405 U.S. 1016 (narcotics offense; probationer could not be subject to warrantless searches). A probation condition giving blanket permission for any law enforcement officer to conduct an unannounced search is unconstitutional. Smith v. State, 383 So. 2d 991 (Fla). Any search must be carried out with regard to the

"legitimate demands" of the probation, and not for law-enforcement purposes. Tamez v. State, 534 S.W.2d 686 (Tex. 1976). Searches may be conducted if the State has reasonable grounds to believe there is contraband on the site. Griffin v. Wisconsin, supra; United State v. Consuelo-Gonzalez, 521 F.2d 259 (9th Cir. 1975); People v. Suttell, 492 N.Y.S.2d 192 (1985) (requires a prior judicial finding, absent exigency, of reasonable cause). Because police exist to enforce the law, but a probation officer's job is to advance the rehabilitation of the defendant, it is constitutional for a probation officer to conduct a search, but not a police officer. Griffin v. Wisconsin, supra; United State v. Consuelo-Gonzalez, supra; State v. Fields, 686 P.2d 1379 (1984); Jessee v. State, 375 So. 2d 881 (Fla. 1979). Unannounced searches are unconstitutional if they are construed to waive the Defendant's right to knock and announce. People v. Freund, 119 Cal. Rptr. 762 (1975); State v. Mitchell, 207 S.E.2d 263 (N.C. 1974) (notice required).

In the case of Zeta Chi Fraternity, the court's order violates the constitution in several respects. First, the order clearly serves the impermissible purposes of law enforcement, and allows the police as well as the probation department to search. Second, the permission to search is not related to the crime; the Defendant was convicted of illegal sale of alcohol, not illegal possession of alcohol. Third, the order allows searches

capriciously, without a judicial finding of reasonable cause to suspect that illegal sales may be occurring. Fourth, the order purports to allow searches without notice or announcement. Accordingly, the sentencing order is unconstitutional.

B. Probation Condition Forbidding Alcohol on Defendant's Premises Violates State and Federal Constitutions

As above, to pass constitutional scrutiny, the conditions of probation must narrowly fit the crime.

In Grate v. State, 623 So. 2d 591 (Fla. 1993), the court found that a person convicted for sale of cocaine could not be constitutionally subject to a condition of probation forbidding the defendant from entering a bar or consuming alcohol because the probation order obstructed otherwise lawful activity, and was not reasonably related to preventing future crime by the Defendant.

On the other hand, in Lansing v. State, 669 P.2d 923 (Wyo. 1983), the court upheld a probation condition requiring the probationer to abstain from alcohol even though the defendant's crime was possessing a firearm with intent to threaten the life of a police officer. In Lansing, however, the defendant had admitted to being an alcoholic, had been frequently arrested for public drunkenness, had been arrested three times for driving under the influence of alcohol, and the sentencing court found that substance abuse counselling had not helped the defendant's alcohol problems.

State v. Parramore, 768 P.2d 530 (Wash 1989), shows that the probation condition must fit the crime for which the defendant was convicted narrowly. In Parramore, the court found that a probationer convicted of selling marijuana could be subject to urinanalysis to detect marijuana, but could not be subject to a breathalyzer to detect alcohol.

In the present case, the court has forbid any possession of alcohol, even though the conviction was for selling and not possessing alcohol, and for some brothers possessing alcohol is a lawful activity. As such, the order is unconstitutional.

CONCLUSION

Based on the forgoing, Zeta Chi Fraternity requests that this Honorable Court reverse its convictions, and take any other action which justice requires.

Respectfully submitted,
Zeta Chi Fraternity
By its Attorney,

Dated: July 31, 1995

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Dated: July 31, 1995

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REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Counsel for Zeta Chi Fraternity requests that Attorney James P. Nadeau be allowed 15 minutes for oral argument.

I hereby certify on this 31st day of December 2000, a copy of the foregoing is being forwarded to the Attorney General.

Dated: July 31, 1995

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