STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: February 12, 2014)

DENNIS ISOM	**:**	
	:	
V.	**:**	**C.A. No. PM 2009-1523**
	:	**C.A. No. P2 2004-1079A**
STATE OF RHODE ISLAND	**:**	

DECISION

CARNES, J. Petitioner, Dennis Isom (hereinafter Petitioner), seeks post-conviction relief from his plea of *nolo contendere* to a charge of assault with a dangerous weapon, in violation of G.L. 1956 § 11-5-2. Specifically, Petitioner claims that at the time he entered his plea, the Special Magistrate who accepted his plea did not "possess the requisite Constitutional authority to sentence the defendant or mete out the final judgment" of conviction. (Pet'r's Mem. 2.) Jurisdiction is pursuant to G.L. 1956 § 10-9.1-2. After consideration, and for the reasons set forth in this Decision, Petitioner's application for post-conviction relief is denied.

I

Facts and Travel

A

On April 1, 2005, Petitioner entered a plea of *nolo contendere*[1] to charges of

[1] The plea colloquy has been supplied to and reviewed by this Court. The transcript consists of eleven (11) pages and is identified as Tab 11 of Petitioner's Memorandum and attached materials. According to the transcript, the actual word used to enter the plea was "nolo." The word was used by Petitioner's counsel at the time before the Special

assault with a deadly weapon/domestic in case number P2-2004-1079A. In return for Petitioner's plea, the State's attorney agreed to dismiss both Count 2 (violation of a protective order) and Count 3 (vandalism) of that particular Information. Petitioner was sentenced to a term of twenty (20) years at the ACI, with sixteen (16) years to serve and four (4) years suspended with probation, along with domestic abuse counseling, a no contact with victim order, and restitution, in addition to costs.

The State also agreed to continue Petitioner on the same sentence with respect to two (2) violation proceedings that were pending before the Court at that time. (P1-88-2071A and P2-99-3762A). Both case numbers appear on the transcript of the plea. Prior to his plea on April 1, 2005, Petitioner's violations had been pending before the Special Magistrate on a number of occasions since Petitioner was first presented as a violator on October 17, 2003. (Pet'r's Mem. 2.) Petitioner has produced a number of transcripts of various court proceedings beginning with a transcript of the commencement of a violation hearing before the Special Magistrate on February 18, 2004, where one witness testified. (Tab 1 of Pet'r's Mem. and attached materials). Thereafter, the violation hearing was continued a number of times up to the time of Petitioner's plea on April 1, 2005, almost eighteen (18) months after Petitioner's initial presentment as a violator. (See Tabs 2 through 10 of Pet'r's materials). This Court has reviewed and considered the contents of said transcripts. This Court notes that on March 29, 2005, the Special Magistrate states, "Mr. Isom has filed complaints against me. He has attempted to have me disqualified from this case." (Tr. at Tab 10, 4:24-25). This Court has also reviewed

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Magistrate. It is clear from the transcript that the Special Magistrate had a thorough colloquy with Petitioner directly. The Criminal Docket Sheet Report indicates a plea of *nolo contendere* was entered.

the form complaint filed with the Commission on Judicial Tenure and Discipline against the Special Magistrate initially dated April 13, 2004, as well as Petitioner's handwritten letter to the Superior Court Justice chairing that Commission. (Pet'r's Mem. and supporting materials, Ex. A attached thereto). Notwithstanding, Petitioner entered a plea as described above before the Special Magistrate on April 1, 2005, some three (3) days later.

On March 17, 2009, Petitioner filed an application for post-conviction relief alleging that his conviction and sentence imposed thereon are in violation of the Constitutions of the United States and the State of Rhode Island due to the Special Magistrate's lack of Constitutional authority to mete out final judgments. (Pet'r's Mem. 2). Thereafter, Petitioner amended his application on March 11, 2010, alleging an additional claim of prosecutorial misconduct. Id. The prosecutorial misconduct claim was withdrawn in open court on October 15, 2012. Id.

B

Issues Presented

Petitioner's argument:

In developing his argument, Petitioner begins by correctly asserting that the Special Magistrate who accepted his plea and meted out punishment was appointed as a Special Magistrate pursuant to G.L. 1956 § 8-2-39.1. That statute reads:

> "**§ 8-2-39.1 Special magistrate. –** There is hereby created within the superior court the position of special magistrate, who shall be appointed by the presiding justice of the superior court, with the advice and consent of the senate, for a period of ten (10) years, and until a successor is appointed and qualified. Nothing contained herein shall be construed to prohibit the reappointment of a special magistrate for one or more additional ten (10) year terms, subject to the advice and consent of the senate. The person appointed to serve as special magistrate shall be a

> member of the bar of the state of Rhode Island. The special magistrate shall have the duties, responsibilities, powers and benefits as authorized in § 8-2-39." (emphasis added).

Petitioner goes on to aver that § 8-15-3.1 was also used to vest the Special Magistrate with the authority of a Justice of the Superior Court. That statute, at the time of Petitioner's plea on April 1, 2005, read as follows:

> "**§ 8-15-3.1 Chief Justice – Power to assign judges** The Chief [J]ustice of the [S]upreme [C]ourt has the power to assign any magistrate of the [S]uperior [C]ourt, [F]amily [C]ourt, and/or [D]istrict [C]ourt to any court of the unified judicial system with the consent of the presiding justice and/or chief judge of the relevant courts in the same manner as a judge may be assigned pursuant to chapter 15 of this title. When a magistrate is so assigned, he or she shall be vested, authorized, and empowered with all the powers belonging to the justices and/or magistrates of the court to which he or she is specially assigned." See P.L. 2003, ch. 200, § 1 (enactment July 11, 2003).[2]

Petitioner next asserts that, "at the very least, the sentence imposed [on April 1, 2005] must be vacated because the [Special Magistrate] was without Constitutional authority to preside over his violation hearing." Pet'r's Mem. 4-5. Petitioner refers this Court to the Rhode Island Constitution, article 10, section 4, which specifically provides that:

> "**Section 4**. State court judges -- Judicial selection. -- The governor shall fill any vacancy of any justice of the Rhode Island Supreme Court by nominating, on the basis of merit, a person from a list submitted by an independent non-partisan judicial nominating commission, and by and with the advice and consent of the senate, and by and with the separate advice and consent of the house of representatives, shall appoint said person as a justice of the Rhode Island Supreme Court. The governor shall fill any vacancy of any judge of the Rhode Island Superior Court, Family Court, District, Workers' Compensation Court, Administrative Adjudication Court, or any other state court which the general assembly may from time to time establish by nominating on the basis of merit, a person from a list submitted by the aforesaid judicial nominating

[2] This version of the statute was also in effect at the time Petitioner was presented as a violator on October 17, 2003. Pet'r's Mem. 2, supra.

> commission, and by and with the advice and consent of the senate, shall appoint said person to the court where the vacancy occurs. The powers, duties, and composition of the judicial nominating commission shall be defined by statute."

Petitioner next argues that "throughout the pendency of this matter, [the magistrate] exercised the full powers of a Superior Court Judge despite the fact that he was never appointed to the position of Special Magistrate by the Governor of Rhode Island nor vetted or approved by the Judicial Nominating Commission." Pet'r's Mem. 5. Petitioner avers that the [Special Magistrate] conducted at least a part of a contested violation hearing, took testimony, engaged in pre-trial negotiations, and ultimately, took a plea from Petitioner and imposed a sentence. Id. at 5. Petitioner argues that since the [Special Magistrate's] actions, as described, were "judicial functions," then § 8-15-3.1, as it was written at the time of Petitioner's plea [before the Special Magistrate], was "Constitutionally infirm" because it allowed for "the impermissible creation of a 'de facto judgeship' in violation of article 10, section 4 [of the Rhode Island Constitution]. Id. at 5. Petitioner further argues that the magistrate's appointment as a Special Magistrate "was in clear violation of the Rhode Island Constitution's requirement that the Governor fill any vacancy of any judge of the Rhode Island Superior Court."

Lastly, Petitioner argues and suggests that, "[I]t is significant that [in] the face of previous legal commentary and prior Constitutional challenge to the judicial authority of Superior Court Magistrates, the Rhode Island Legislature, in 2007, opted to amend Rhode Island General Laws § 8-15-3.1." Id. at 6. Petitioner states that said section at the present time now reads:

> "**§ 8-15-3.1 Chief justice – Power to assign magistrates. –** The Chief justice of the supreme court has the power to assign any magistrate of the superior court, family court, district court, or traffic tribunal to any court

> or tribunal of the unified judicial system with the consent of the presiding justice, chief judge, and/or chief magistrate of the relevant courts. When a magistrate is so assigned, he or she shall be vested, authorized, and empowered with all the powers belonging to the magistrates of the court to which he or she is specially assigned." (See P.L. 2007, ch. 73, art. 3, § 10;)

Petitioner argues and suggests that, "[B]y eliminating both the ability of the Presiding Justice to appoint the Magistrates to their (sic) own Courts and eliminating the language [in this section] which, unconstitutionally, granted the full powers of a Judge to sitting Superior Court Magistrates, the Rhode Island legislature acknowledged the Constitutional infirmity that previously existed in R.I.G.L. § 8-15-3.1." Id. at 6.

In closing, Petitioner submits that the sentence imposed upon him [by virtue of his plea on April 1, 2005] was "constitutionally infirm due to the lack of constitutionally granted Judicial authority on the part of the Special Magistrate . . ." and "must be vacated." Id. at 6.

State's argument:

In rejoinder, the State asserts that, "[I]n consideration for Petitioner's plea, the State dismissed Counts 2 and 3 (violation of a NCO [no contact order] and malicious damage) and also agreed to withdraw a Habitual Offender Notification." The State asserts that Petitioner had written the prosecutor a letter in 2004, stating within the letter, "I don't wish to fight any longer is there any way we can come to terms with something other than 18 years to serve." "please" (sic). State's Mem. 1 and n.1 thereof. A copy of what purports to be Petitioner's letter is attached as Exhibit A to the State's Memo.

The State further contends that during Petitioner's plea colloquy with the Special Magistrate on April 1, 2005, he never challenged the magistrate's constitutional authority

to impose the sentence and, therefore, the issue was waived.[3] The State has also supplied a transcript of the plea colloquy. This Court has read the transcript on a number of occasions, and the issue of the constitutional authority of the Special Magistrate was never mentioned on April 1, 2005. Therefore, the State argues that Petitioner's sentence should be allowed to stand, and the application should be dismissed.

II

Standard of Review

Rhode Island General Laws §§ 10-9.1-1 to 10-9.1-9 govern the statutory remedy of post-conviction relief, which is "available to any person who has been convicted of a crime in this state and who thereafter alleges either that the conviction was in violation of the constitution of the United States or the constitution or laws of this state." "[A]n application for post-conviction relief is civil in nature," and the applicant has the burden of proving that "relief is warranted" by a preponderance of the evidence. Ouimette v. Moran, 541 A.2d 855, 856 (R.I. 1988); Mattatall v. State, 947 A.2d 896, 901 n.7 (R.I. 2008).

In this particular case, Petitioner entered a plea of *nolo contendere* on Count 1 of the charges before the Special Magistrate on April 1, 2005. In return for that plea, the State dismissed certain charges (Counts 2 and 3) and withdrew a Notice of Habitual Offender against Petitioner. Rule 11 of the Superior Court Rules of Criminal Procedure specifically provides that a court shall not accept a guilty plea without first "addressing

[3] The State cites the case of State v. Bouffard, 945 A.2d 305 (R.I. 2008). In that case, appellant challenged the same magistrate's constitutional authority to preside over a probation revocation hearing and to declare the defendant to be a violator and impose sentence on the finding of violation. The Rhode Island Supreme Court held that the argument was waived because it was not raised in the Superior Court. (emphasis added).

the defendant personally and determining that the plea is made voluntarily with an understanding of the nature of the charge and the direct consequences of the plea." Super. R. Crim. P. 11; see also State v. Feng, 421 A.2d 1258, 1266 (R.I. 1980). While Rule 11 serves as a safety net "to ensure that there is compliance with constitutional requirements," it is not intended to "serve as a trap for those justices who fail to enumerate each fact relied on to accept such a plea." See Camacho v. State, 58 A.3d 182, 186 (R.I. 2013); State v. Frazar, 822 A.2d 931, 936 (R.I. 2003) (quoting Feng, 421 A.2d at 1269)). In addition, if a petitioner claims that Rule 11 was not satisfied, he must "bear the burden of proving by a preponderance of the evidence that [he] did not intelligently and understandingly waive [his] rights." State v. Figueroa, 639 A.2d 495, 498 (R.I. 1994).

III

Analysis

A

Waiver of Petitioner's Challenge to the Special Magistrate's Authority

The Court has read the eleven (11) transcripts provided by Petitioner. The Court is satisfied by at least a preponderance of the evidence that the Petitioner had filed a complaint against the Special Magistrate with the Commission on Judicial Tenure and Discipline. (Ex. A attached to Pet'r's Memo.) Further, the Special Magistrate appears to acknowledge that on March 29, 2005, the Petitioner sought to have the Special Magistrate disqualified in the case. (See Tr. at Tab 10, 4:24-25). After reading Petitioner's typewritten complaint to the Commission on Judicial Tenure and Discipline, as well as Petitioner's handwritten letter to Justice Pfeiffer, it is clear that Petitioner's

complaints against the Special Magistrate sound in allegations of violations of the Code of Judicial Conduct. The constitutional authority of the Special Magistrate was not mentioned. After reading Petitioner's eleven (11) transcripts and attached exhibits, this Court can nowhere discern any mention of the constitutional authority of the Special Magistrate.

Petitioner's plea:

Putting aside the State's assertion that Petitioner actually handwrote a letter to the prosecutor seeking a way to "come to terms with something other than 18 years to serve," this Court has reviewed Petitioner's thorough plea colloquy at Tab 11 consisting of eleven (11) pages. This Court finds that Petitioner's plea occurred on April 1, 2005, some eighteen (18) months after he was first presented as a violator of other sentences in the Superior Court. The Court further finds that, at that time, Petitioner had been involved in a very contentious litigation of an alleged violation of previous sentences in the Superior Court. As a result, the Court finds Petitioner was represented by a fifth attorney, the previous attorneys all having since withdrawn from active representation of the Petitioner. Petitioner acknowledges to the Special Magistrate on the record that he understands that a plea of *nolo contendere* is the same as a plea of guilty. He further acknowledges that he had reviewed the rights he was giving up by entering his plea and had no questions about those rights. Petitioner acknowledged that his schooling had gone as far as two years of college, that he could read and understand the plea agreement, and also that he had signed the agreement. (Tr. 3-4 at Tab 11.) Petitioner further acknowledged the specific rights he was giving up in discussions with the Special Magistrate. Petitioner acknowledged he was giving up his right to appeal to the Rhode

Island Supreme Court regarding the sentence to be imposed (Tab 11 at 5). The Special Magistrate specifically asked Petitioner, "Anything about what you're doing here you don't understand?" Id. at 6. Petitioner responded, "I understand fully, your Honor." Id.

The Special Magistrate further inquired whether anyone was forcing Petitioner to enter the plea, and Petitioner responded, "No your Honor." The Special Magistrate inquired if Petitioner was doing this (entering his plea) voluntarily and Petitioner responded "yes." Id. The Special Magistrate inquired whether anyone had made any other promises to Petitioner in return for his plea and he responded, "No your Honor." After discussing potential immigration consequences and acknowledging as true all facts which amount to an assault with a dangerous weapon; to wit, a hammer, Petitioner went on to express his sorrow and remorse to his wife (complaining witness). Petitioner further apologized to the Court for the crimes he committed and further stated, "I take full responsibility for my acts." The Petitioner declined to say anything before sentence was imposed. The Special Magistrate made the requisite findings on the record, proceeded to sentence Petitioner and thereafter declare him a violator of the previous sentences, and continued him on the same sentence previously imposed in those cases.

It is abundantly clear to this Court that Petitioner knowingly and voluntarily entered a negotiated plea before the Special Magistrate on April 1, 2005. As a result of said negotiation, this Court finds that the State dismissed Counts 2 and 3 of the Information and withdrew the Habitual Offender Notice. Further, the Court finds that nowhere in the record before this Court has the constitutional authority of the Special Magistrate been questioned or challenged. Superior Court Rule of Criminal Procedure 12 (b)(2), entitled "Defenses and Objections Which Must Be Raised," in pertinent part,

required the Petitioner to raise by motion before trial, ". . . all other defenses and objection based on defects in the institution of the prosecution." The Rule further provides that Petitioner's "[f]ailure to present any such defense or objection as herein provided constitutes a waiver thereof . . ." This Court notes that the instant issue does not allege or involve a lack of jurisdiction of the Superior Court. The Petitioner, by voluntarily entering his plea, has waived any argument regarding the alleged lack of "Constitutional authority" of the Special Magistrate. See Torres v. State, 19 A.3d 71 (R.I. 2011) (waiver of argument relative to defect in indictment relative to State's theory of murder charge); See also Miguel v. State, 774 A.2d 19, 22 (R.I. 2001) ("When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea."). Our Supreme Court has previously indicated that "in the case of a defendant who has pled guilty, "[t]he sole focus of an application for post-conviction relief * * * is 'the nature of counsel's advice concerning the plea and the voluntariness of the plea. If the plea is validly entered, we do not consider any alleged prior constitutional infirmity.'" Torres, supra at 79 (citing Gonder v State, 935 A.2d 82, 87 (R.I. 2007)) and other cases.

Attorney's advice:

While Petitioner has not raised any issue with regard to his attorney's advice regarding his plea, it appears that it is incumbent on this Court to discuss said advice at this juncture. Torres, 19 A.3d at 79. As indicated, Petitioner's dealings with the Special Magistrate spanned some eighteen (18) months from the time he was first presented as a violator of previously imposed sentences to the day of his negotiated plea on April 1,

2005. During that time, it appears that Petitioner received the services of five attorneys, including two members of the Public Defender's office and three Court-appointed attorneys. Petitioner's counsel, who was present, as it appears from the record, on the day of April 1, 2005, actually responded for Petitioner when the Special Magistrate asked how Petitioner wished to plea. The attorney said "nolo." (Tr. 2:24, Tab 11). Thereafter, the Special Magistrate engaged in a plea colloquy with Petitioner as described above. Petitioner's counsel, who assisted at the plea on April 1, 2005, first appears on the record on February 15, 2005. Counsel had indicated to the Special Magistrate on February 15, 2005, that he was not ready to continue with the violation hearing which had begun on February 18, 2004. (Tab 9, line 7). Counsel also indicated on that day that after speaking with Petitioner on February 12, 2005, there was a temporary insanity issue. (Tab 9, 2:18). Counsel made a motion for funds in order to allow Petitioner to hire a doctor to conduct an examination or evaluation of Petitioner. Id. at 2:20-25 & 3:1-25. The Special Magistrate indicated that while he was not "totally convinced" of the need for the expert for the purpose of the violation hearing, he acknowledged that the evaluation "may have to be done for a trial on the underlying charge" and granted the motion and continued the violation hearing. (Tab 9, 5:15-25 & 6:1-2). The results of said evaluation were discussed again by the same counsel at the hearing on March 29, 2005. (Tab 10, 1:18-25 & 2:1-2). Counsel advised the Special Magistrate that there was "nothing in the report to indicate * * * that [Petitioner] was temporarily insane at the time of the incident [giving rise to the violation]." (Id. at 1:21-24). Counsel further indicated that he was unable to proceed due to a letter he received from Petitioner, the need to visit Petitioner at the prison, and to "discuss the contents of that letter to determine the appropriate way, in

[counsel's] opinion, to proceed and to discuss with [Petitioner] [counsel's] views on how to proceed as well as [Petitioner's] views to proceed." (Id. at 2:12-25 & 3:1-16). Counsel indicated he needed to have this conversation with Petitioner away from the cellblock [the courthouse cellblock] and asked to continue the matter so that counsel could "hash out all these issues with [Petitioner] and decide whatever the appropriate way is to proceed." (Id. at 3:1-16). It was during this session that the Special Magistrate discussed that Petitioner had filed complaints against the Special Magistrate and attempted to have the Special Magistrate disqualified from the case. (discussed supra, Tab10, 4:24-25). The Special Magistrate appeared to be concerned that Petitioner was delaying the continuation of the violation hearing. After acknowledging current counsel was "very capable and competent," the Special Magistrate reluctantly agreed to continue the violation hearing to the next coming Friday. Id. at 5:1-23. The next date was Friday, April 1, 2005, and the beginning of the record indicates that it was the Special Magistrate's understanding that the Petitioner would enter a plea on the charge giving rise of the violation hearing. (Tab 11, 1:21-25 & 2:1-2). The plea colloquy has already been discussed herein.

Given all that has been discussed regarding Petitioner's attorney, this Court is satisfied that said counsel, appearing before the Special Magistrate on three (3) occasions as indicated by the record, (Tabs 9, 10, 11) did not rush through the process, expressed a willingness to discuss Petitioner's "views as to how to proceed" with Petitioner in private, and ultimately resolved both the new charges and the violations with both the State's attorney and the Special Magistrate where other counsel had failed in the same endeavor. As such, this Court draws the reasonable inference that the advice Petitioner

received leading to his plea was both competent and capable and in accordance with the standards expected of counsel acting in the capacity described herein.

Petitioner's failure to appeal:

Notwithstanding Petitioner's plea before the Special Magistrate on April 1, 2005, it is significant that Petitioner never appealed his judgment of conviction. The Special Magistrate who accepted Petitioner's plea was appointed pursuant to § 8-2-39.1. That section of law specifically provides, **"**The special magistrate shall have the duties, responsibilities, powers and benefits as authorized in § 8-2-39." Referring to § 8-2-39 (e), that section specifically provides:

> "(e) A party aggrieved by an order entered by the general magistrate shall be entitled to a review of the order by a justice of the relevant court. Unless otherwise provided in the rules of procedure of the court, such review shall be on the record and appellate in nature. The court shall, by rules of procedure, establish procedures for review of orders entered by a general magistrate, and for enforcement of contempt adjudications of a general magistrate."

The Superior Court had enacted Superior Court Administrative Order 94-12 providing for an appeal from an order of the Special Magistrate. The Administrative Order specifically provided, in relevant part: "Pursuant to 8-2-39 (e) * * * of the General Laws of Rhode Island, as amended, the following procedure is adopted by the Superior Court." The order contained a number of subsections, (a) through (h), which have all evolved, essentially verbatim, into Superior Court Rules of Practice, Rule 2.9, and especially subsection (h) which specifically provides:

> "**(h) Review.** The Superior Court Justice shall make a de novo determination of those portions to which the appeal is directed and may accept, reject or modify, in whole or in part, the judgment, order or decree of the Master. The justice, however, need not formally conduct a new hearing and may consider the record developed before the Master, making his or her own determination based on that record whether there is

> competent evidence upon which the Master's judgment, order or decree rests. The justice may also receive further evidence, recall witnesses or recommit the matter with instructions."

The Petitioner never filed any motion to withdraw his plea and, furthermore, never undertook such an appeal relative to withdrawing his plea which was accepted by the Special Magistrate on the record and duly incorporated into a judgment of conviction signed by the Special Magistrate on May 9, 2005.

Some uncertainty regarding waiver:

While this Court is satisfied as to the nature of counsel's advice to Petitioner and also with the voluntariness of Petitioner's plea, the Rhode Island Supreme Court in Torres, added a sentence that gives this Court pause regarding the precise matter before this Court relative to the State's argument that Petitioner has waived his challenge to the constitutional authority of the Special Magistrate. As discussed above, the Rhode Island Supreme Court held that "[t]he sole focus of an application for post-conviction relief * * * is 'the nature of counsel's advice concerning the plea and the voluntariness of the plea. If the plea is validly entered, we do not consider any alleged prior constitutional infirmity.'" Torres, 19 A.3d at 79, supra (citing Gonder v State, 935 A.2d 82, 87 (R.I. 2007)) (other citations omitted). However, immediately following that line, the Supreme Court went on to state:

> "That said, although the general rule is that "a plea of guilty waives all nonjurisdictional defects, * * * [it] does not bar appeal of claims that the applicable statute is unconstitutional or that the indictment fails to state an offense." United States v. Broncheau, 597 F.2d 1260, 1262 n.1 (9th Cir. 1979) (emphasis added) (other citations omitted). See Torres, 19 A.3d at 79.

This Court notes that Petitioner does make the argument and allegation that § 8-15-3.1 is "Constitutionally infirm" and that it "allowed for the impermissible creation of a 'de

facto judgeship' in violation of article 10, section 4 [of the Rhode Island Constitution]." However, the statute in question does not enact a substantive crime, it is more of an operational vehicle by which the work within the Superior Court is accomplished. Regarding the Bouffard case, dealing with the issue of waiver in the Supreme Court notwithstanding, this Court finds, based on Petitioner's failure to make a Rule 12(b)(2) motion pursuant to the Superior Court Rules of Criminal Procedure related to the alleged lack of authority of the Special Magistrate; based upon Petitioner's failure to file a motion to withdraw his plea and his failure to appeal from the Special Magistrate's acceptance of his plea and the resulting judgment of conviction, and further based on this Court's satisfaction with the nature of counsel's advice and the voluntariness of Petitioner's plea, that Petitioner's argument about the Special Magistrate appears to be an afterthought, and as such, this Court further finds that Petitioner has waived this argument and denies Petitioner's application for post-conviction relief.

B

Constitutional Authority of a Special Magistrate

Notwithstanding this Court's discussion and findings in Part A above, should this Court's findings relative to Petitioner's waiver of his challenge to the Special Magistrate's authority be later deemed erroneous, a word on said authority is in order at this juncture.

1

"Constitutional authority" and Judicial Power

Petitioner has couched his arguments here in terms of the lack of "Constitutional authority" of the Special Magistrate to engage in and perform the functions described

herein, especially resulting in the sentencing of Petitioner. While Petitioner uses the term "Constitutional authority," Petitioner is really speaking about the "Judicial Power" of the Special Magistrate to engage in the actions that are described herein. The word "authority" means "the right or permission to act legally on another's behalf; esp., the power of one person to affect another's legal relations by acts done in accordance with the other's manifestations of assent; the power delegated by a principal to an agent." Black's Law Dictionary 142 (8th ed. 2004). The context of the definition makes it clear that the word "authority" is mostly used when discussing an agent's authority to act on behalf of the agent's principal. The definition refers to "agency" and cites cases on principal and agent. In contrast, the term "Judicial Power" is defined as, "[T]he authority vested in courts and judges to hear and decide cases and to make binding judgments on them; the power to construe and apply the law when controversies arise over what has been done or not done under it." Black's Law Dictionary 864 (8th ed. 2004).

Under the Rhode Island Constitution, the Judicial Power of the State is vested in the Courts. See article 10, section 1: "**Section 1**. Power vested in court. -- The judicial power of this state shall be vested in one supreme court, and in such inferior courts as the general assembly may, from time to time, ordain and establish." (emphasis added).

2

The Superior Court

The Superior Court is created by chapter 8-2 of the R.I. General Laws, as amended. The chapter contains a number of different sections relating to scope, makeup, jurisdiction and other topics worthy of legislative address. Section 8-2-1 entitled, "Composition" provides: "There shall be a superior court which shall consist of a

presiding justice and twenty-one (21) associate justices." The chapter also includes a section providing for the appointment of a Special Magistrate, § 8-2-39.1, set forth in full, supra. The section specifically provides that "[t]here is hereby created within the superior court the position of special magistrate, who shall be appointed by the presiding justice of the [S]uperior [C]ourt who shall be appointed by the [P]residing [J]ustice of the [S]uperior [C]ourt." (emphasis added). The section further provides that "[t]he special magistrate shall have the duties, responsibilities, powers and benefits as authorized in § 8-2-39."

Section 8-2-39 specifically provides insofar as the "duties, responsibilities, and powers" of the Special Magistrate are concerned:

> "(b) The general magistrate shall assist the court in:
>
> "(i) The determination of, monitoring, collection, and payment of restitution and court ordered fines, fees, and costs or the ordering of community service in lieu of or in addition to the payment of restitution, fines, fees, and costs, consistent with other provisions of the general laws;
>
> "(ii) The determination and payment of claims under the violent crimes indemnity fund for the Criminal Injuries Compensation Act of 1972, chapter 25 of title 12;
>
> "(iii) The determination and payment of claims from the Criminal Royalties Distribution Act of 1983, chapter 25.1 of title 12; and
>
> "(iv) Such other matters as the presiding justice of the superior court determines are necessary.
>
> "(2) The chief justice of the supreme court, with the consent of the presiding justice and, if applicable, the chief judge of a particular court, may assign the general magistrate to serve as a magistrate in any court of the unified system. When the general magistrate is so assigned he or she shall be vested, authorized, and empowered with all the powers belonging to the magistrate position to which he or she is specially assigned.
>
> "(c) The general magistrate will be empowered to hear all motions, pretrial conferences, arraignments, probable cause hearings, bail hearings,

bail and probation revocation hearings, and to review all such matters including, but not limited to the above, and to modify the terms and conditions of probation and other court-ordered monetary payments including, but not limited to, the extension of time for probation and court-ordered monetary payments as provided by law. The general magistrate shall have the power to take testimony in connection with all matters set forth herein.

"(d) The general magistrate may be authorized:

"(1) To regulate all proceedings before him or her;

"(2) To do all acts and take all measures necessary or proper for the efficient performance of his or her duties;

"(3) To require the production before him or her of books, papers, vouchers, documents, and writings;

"(4) To rule upon the admissibility of evidence;

"(5) To issue subpoenas for the appearance of witnesses, to put witnesses on oath, to examine them, and to call parties to the proceeding and examine them upon oath;

"(6) To adjudicate a person in contempt and to order him or her imprisoned for not more than seventy-two (72) hours, pending review by a justice of the relevant court, for failure to appear in response to a summons or for refusal to answer questions or produce evidence or for behavior disrupting a proceeding;

"(7) To adjudicate a party in contempt and to order him or her imprisoned for not more than seventy-two (72) hours, pending review by a justice of the relevant court, for failure to comply with a pending order to provide payment or to perform any other act; and

"(8) To issue a capias and/or body attachment upon the failure of a party or witness to appear after having been properly served and, should the court not be in session, the person apprehended may be detained at the adult correctional institutions, if an adult, or at the Rhode Island training school for youth, if a child, until the next session of the court.

"(e) A party aggrieved by an order entered by the general magistrate shall be entitled to a review of the order by a justice of the relevant court. Unless otherwise provided in the rules of procedure of the court, such review shall be on the record and appellate in nature. The court shall, by rules of procedure, establish procedures for review of orders entered by a

general magistrate, and for enforcement of contempt adjudications of a general magistrate.

"(f) Final orders of the superior or family court entered in a proceeding to review an order of a general magistrate may be appealed to the supreme court. Final orders of the district court entered in a proceeding to review an order of the general magistrate may be appealed to the superior court.

"(g) The general magistrate shall:

"(1) Receive all credits and retirement allowances as afforded justices under chapter 3 of this title and any other applicable law, including without limitation, § 8-3-16;

"(2) Receive a salary equivalent to that of a district court judge;

"(3) Be governed by the commission on judicial tenure and discipline, chapter 16, of this title, in the same manner as justices and judges;

"(4) Be subject to all provisions of the canons of judicial ethics or code of judicial conduct;

"(5) Be subject to all criminal laws relative to judges by virtue of §§ 11-7-1 and 11-7-2.

"(h) The provisions of this section shall be afforded liberal construction.

"(i) The presiding justice of the superior court shall initially appoint such support staff as may be necessary, relating to preparation, investigation, and implementation of the general magistrate's functions. Effective November 15, 1993, the support staff shall be placed under the supervision and management of the superior court, and new appointments or personnel changes in the support staff shall be subject to the directions and approval of the superior court, consistent with any applicable collective bargaining agreements. The general magistrate shall have the power and authority to issue subpoenas and to compel the attendance of witnesses at any place within the state, to administer oaths and to require testimony under oath. The general magistrate, or his or her designee, may serve his or her process or notices in a manner provided for the service of process and notice in civil or criminal actions in accordance with the rules of court."

Although the words "plea" and "sentence" do not appear within the text of the statute, based upon the plain meaning of the words used and the liberal construction

required by subsection (h), this Court construes the statute as allowing the Special Magistrate to preside over and accept a defendant's plea and thereafter impose a sentence on a defendant. The precise wording of § 8-15-3.1**,** set forth in full above**,** provided for the assignment of a magistrate to any court of the unified judicial system and when a magistrate was so assigned, said magistrate would be "vested, authorized, and empowered with all the powers belonging to the justices and/or magistrates of the court to which he or she is specially assigned." (emphasis added). As previously noted in footnote 2, supra, this particular version was in effect at the time Petitioner was presented as a violator and at the time Petitioner entered his plea on April 1, 2005. The section was not amended until June 21, 2007. (See P.L. 2007, ch. 73, art. 3, § 10).

Based on all of the above, this Court finds that the Special Magistrate who acted as described in this matter relating to the Petitioner was clearly a part of the Superior Court and was exercising judicial power at all times relevant hereto.

3

Power to Appoint Judges and Magistrates

Petitioner correctly points out that only the Governor of the State of Rhode Island has the power to appoint judges. (R.I. Const. article 10, § 4). However, nothing in the Rhode Island Constitution prohibits the appointment of magistrates by the Presiding Justice of the Superior Court. This Court has already found that the Special Magistrate is a part of the Superior Court and that said Special Magistrate was exercising judicial powers at all times relevant hereto. The General Assembly has enacted a statute which allows for the Presiding Justice to appoint a Special Magistrate. Notwithstanding lack of a prohibition, the Rhode Island Constitution contains an express provision allowing for

the appointment of certain officers by someone other than the Governor. Specifically, article 9 of the Rhode Island Constitution, entitled "Of the Executive Power" at section 5 provides:

> "Section 5. Powers of appointment. -- The governor shall, by and with the advice and consent of the senate, appoint all officers of the state whose appointment is not herein otherwise provided for and all members of any board, commission or other state or quasi-public entity which exercises executive power under the laws of this state; but the general assembly may by law vest the appointment of such inferior officers,[4] as they deem proper, in the governor, or within their respective departments in the other general officers, the judiciary or in the heads of departments." (emphasis added).

This particular section of the Rhode Island Constitution came into existence when the majority of the Rhode Island electorate approved the separation of powers amendment to the Rhode Island Constitution in a statewide referendum on November 2, 2004, and the result was certified by the Board of Elections on November 23, 2004. The change occurred prior to Petitioner's plea dated April 1, 2005 (emphasis added). Prior to the November 2, 2004 election, the Rhode Island Constitution did not expressly contain or otherwise provide the text under article 9, section 5 or under any other section or heading.

[4] As discussed infra, the word "inferior" is a term of art used in both the Federal and State Constitutions. The word is also used in certain statutes of the General Laws of this State duly enacted by the General Assembly. The specific use of this word is not meant to impugn or assail the competence and capabilities of any individual, past or presently employed, who on a daily basis, provides the honorable and necessary services upon which the courts and tribunals of the Rhode Island Unified Judicial System rely in maintaining the integrity of the respective courts and tribunals. To reiterate, no slight or denigration to any individual is intended by the discussion herein.

The relevant language used in article 9, section 5 was taken almost verbatim from the United States Constitution article 2, section 2 (known as the appointments clause) which provides in relevant part:

> "The President * * * shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." (emphasis added).

"Inferior officers":

At the time of Petitioner's plea, on April 1, 2005, the Rhode Island Constitution expressly provided for appointment of certain officers by someone other than the Governor. With regard to defining an "inferior officer," the Court begins by referring to Black's Law Dictionary (8th ed. 2004). There are three (3) entries under the word "inferior." "Inferior court," (not applicable here); "Inferior judge" – see judge; and "Inferior officer" – see officer. Black's Law Dictionary 793 (8th ed. 2004). Moving to page 1117, under the broad heading of "officer," several different kinds of officers are listed. On page 1118, "Inferior officer" is defined as "1. An officer who is subordinate to another officer. 2. A United States officer appointed by the President, by a court, or by the head of a federal department. Senate confirmation is not required." Next listed is a "judicial officer" – "1. A judge or a magistrate. * * * A person, usu.(sic) an attorney who serves in an appointive capacity at the pleasure of an appointing judge, and whose actions and decisions are reviewed by that judge. – Also termed magistrate, referee, special master, commissioner, hearing officer."

Notwithstanding Black's Law Dictionary, the task of defining the term in jurisprudence is more elusive than it first appears. In Free Enterprise Fund v. Public Co. Accounting Oversight Board, 130 S. Ct. 3138 (U.S. 2010), the United States Supreme Court ruled that certain members of Respondent, the Public Company Accounting Oversight Board, which was created as part of a series of accounting reforms under the Sarbanes–Oxley Act of 2002, and composed of five members appointed by the Securities and Exchange Commission, were "inferior officers" whose appointment was consistent with the Appointments Clause of the United States Constitution. Id. at 3143. The Supreme Court held that "inferior officers" "are officers whose work is directed and supervised at some level" by superiors appointed by the President with the Senate's consent. Edmond v. United States, 520 U.S. 651, 662–63, 117 S. Ct. 1573, 137 L.Ed. 2d 917 (U.S. 1997). In Edmond, the Supreme Court held that a Judge of the Coast Guard Court of Criminal Appeals was an "inferior officer" for purposes of the appointments clause, by reason of supervision over their work exercised by General Counsel of Department of Transportation, in his capacity as Judge Advocate General, and by Court of Appeals for the Armed Forces, and thus, the statutory grant of authority to appoint judges of Court of Criminal Appeals to Secretary of Transportation did not violate the appointments clause. The Supreme Court went on to elaborate that the exercise of significant authority pursuant to laws of the United States marks, not the line between principal and inferior officer, for purposes of appointments clause, but rather, the line between an officer and non-officer. (emphasis added). The Supreme Court explained that an "Inferior officer," for purposes of the appointments clause, generally connotes a relationship with some higher ranking officer or officers below the President; whether

one is an "inferior" officer depends on whether he has a superior, and it is not enough that other officers may be identified who formally maintain higher rank or possess responsibilities of greater magnitude. "Inferior officers," for purposes of appointments clause, are officers whose work is directed and supervised at some level by others who were appointed by presidential nomination with advice and consent of the Senate. Edmond, 520 U.S. at 661-63; 117 S. Ct. at 1580-81, 137 L.Ed. 2d 917.

Notwithstanding the majority's reliance on Edmond for its holding in Free Enterprise Fund, Justice Breyer wrote a dissenting opinion in which three (3) other justices joined. Objecting to the majority's failure to create a bright line rule (Dissent, Part D, 130 S. Ct. at 3177), Justice Breyer wrote:

> "Courts and scholars have struggled for more than a century to define the constitutional term "inferior officers," without much success. See 2 J. Story, Commentaries on the Constitution § 1536, pp. 397–398 (3d ed.1858) ("[T]here does not seem to have been any exact line drawn, who are and who are not to be deemed *inferior* officers, in the sense of the constitution"); Edmond v. United States, 520 U.S. 651, 661, 117 S. Ct. 1573, 137 L.Ed. 2d 917 (1997) ("Our cases have not set forth an exclusive criterion for [defining] inferior officers"); Memorandum from Steven G. Bradbury, Acting Assistant Attorney General, Office of Legal Counsel, to the General Counsels of the Executive Branch: Officers of the United States Within the Meaning of the Appointments Clause, p. 3 (Apr. 16, 2007) (hereinafter OLC Memo), online at http:// www. justice. gov/ olc/ 2007/ appointments clause 10. pdf ("[T]he Supreme Court has not articulated the precise scope and application of the [Inferior Officer] Clause's requirements"); Konecke, The Appointments Clause and Military Judges: Inferior Appointment to a Principal Office, 5 Seton Hall Const. L. J. 489, 492 (1995) (same); Burkoff, Appointment and Removal Under the Federal Constitution: The Impact of Buckley v. Valeo, 22 Wayne L.Rev. 1335, 1347, 1364 (1976) (describing our early precedent as "circular" and our later law as "not particularly useful"). The Court does not clarify the concept. But without defining who is an inferior officer, to whom the majority's new rule applies, we cannot know the scope or the coherence of the legal rule that the Court creates. I understand the virtues of a common-law case-by-case approach. But here that kind of approach (when applied without more specificity than I can find in the Court's opinion) threatens serious harm.

"The problem is not simply that the term "inferior officer" is indefinite but also that efforts to define it inevitably conclude that the term's sweep is unusually broad. Consider the Court's definitions: Inferior officers *3179 are, *inter alia,* (1) those charged with "the administration and enforcement of the public law," *Buckley,* 424 U.S., at 139, 96 S. Ct. 612; *ante,* at 3147; (2) those granted "significant authority," 424 U.S., at 126, 96 S. Ct. 612; *ante,* at 3159 – 3160; (3) those with "responsibility for conducting civil litigation in the courts of the United States," 424 U.S., at 140, 96 S. Ct. 612; and (4) those "who can be said to hold an office," United States v. Germaine, 99 U.S. 508, 510, 25 L.Ed. 482 (1879), that has been created either by "regulations" or by "statute," United States v. Mouat, 124 U.S. 303, 307–308, 23 Ct.Cl. 490, 8 S. Ct. 505, 31 L.Ed. 463 (1888).

Consider the definitional conclusion that the Department of Justice more recently reached: An "inferior officer" is anyone who holds a "continuing" position and who is "invested by legal authority with a portion of the sovereign powers of the federal Government," including, *inter alia,* the power to "arrest criminals," "seize persons or property," "issue regulations," "issue ... authoritative legal opinions," "conduc[t] civil litigation," "collec[t] revenue," represent "the United States to foreign nations," "command" military force, or enter into "contracts" on behalf "of the nation." OLC Memo 1, 4, 12–13, 15–16 (internal quotation marks omitted; emphasis added).

"And consider the fact that those whom this Court has held to be "officers" include: (1) a district court clerk, Hennen, 13 Pet., at 258; (2) "thousands of clerks in the Departments of the Treasury, Interior and the othe[r]" departments, Germaine, *supra,* at 511, who are responsible for "the records, books, and papers appertaining to the office," Hennen, supra, at 259; (3) a clerk to "the assistant treasurer" stationed "at Boston," United States v. Hartwell, 73 U.S. 385, 6 Wall. 385, 392, 18 L.Ed. 830 (1868); (4 & 5) an "assistant-surgeon" and a "cadet-engineer" appointed by the Secretary of the Navy, United States v. Moore, 95 U.S. 760, 762, 24 L.Ed. 588 (1878); Perkins, 116 U.S., at 484, 6 S. Ct. 449; (6) election monitors, Ex parte Siebold, 100 U.S. 371, 397–399, 25 L.Ed. 717 (1880); (7) United States attorneys, Myers, supra, at 159, 47 S. Ct. 21; (8) federal marshals, Siebold, supra, at 397; Morrison, 487 U.S. at 676, 108 S. Ct. 2597; (9) military judges, Weiss v. United States, 510 U.S., 163, 170, 114 S. Ct. 752, 127 L.Ed. 2d 1 (1994); (10) judges in Article I courts, Freytag, 501 U.S. at 878, 111 S. Ct. 2631; and (11) the general counsel of the Department of Transportation, Edmond v. United States, 520 U.S. 651, 117 S. Ct. 1573, 137 L.Ed. 2d 917 (1997). Individual Members of the Court would add to the list the Federal Communication Commission's managing director, the Federal Trade Commission's "secretary," the general counsel of the Commodity Futures Trading Commission, and

> more generally, bureau chiefs, general counsels, and administrative law judges, see Freytag, supra, at 918–920, 111 S. Ct. 2631 (SCALIA, J., concurring in part and concurring in judgment), as well as "ordinary commissioned military officers," Weiss, supra, at 182, 114 S. Ct. 752 (Souter, J., concurring)." Free Enterprise, 130 S. Ct. at 3178-79.

Federal Court: United States District Court for the District of Rhode Island:

Given that the instant case does not involve the broad federal scope giving rise to Justice Breyer's concerns, this Court looks to the practice involving magistrates in the Federal Court for the District of Rhode Island. United States magistrate judges (hereinafter USMJ) in any Federal Court are appointed by the respective judges of each particular United States District Court. See 28 U.S.C. § 631. USMJs are generally governed by 28 U.S.C. § 636. This section of the United States Code provides a broad scope of powers for a USMJ. It is clear that a portion of the statute provides for an appeal of findings and recommendations of the USMJ. In particular, subsection (b)(1)(C) provides:

> "[T]he magistrate judge shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties. Within fourteen days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions."

The wording of this section is substantially similar to the wording of Rule 2.9(h) of the Superior Court Rules of Practice, discussed earlier herein. USMJ's authority and appellate proceedings are also provided for in Local Rule 72 of the Local Rules of the U.S. District Court for the District of Rhode Island for civil cases. Local Rule 57.2

provides for authority and appellate proceedings relative to a USMJ for criminal cases. Local Rule 73 allows a USMJ to conduct a jury or non-jury trial in a civil case if all parties consent. (There is no such provision at the present time within the Superior Court.) It is clear to the Court that USMJs are used extensively with the Federal Court system. In both the Superior Court and the Federal Courts, there is an appellate process allowing litigants in both civil and criminal cases to appeal decisions of a magistrate to judges sitting on the same court as the magistrate.

4

Petitioner's Constitutional Challenge

As set forth above and in Petitioner's Memorandum of Law in Support of [his] Motion for Post-Conviction Relief, Petitioner argues that § 8-15-3.1, as it was written at the time of Petitioner's plea [before the Special Magistrate], was "Constitutionally infirm" because it allowed for "the impermissible creation of a 'de facto judgeship' in violation of article 10, section 4 [of the Rhode Island Constitution]." Pet'r's Mem. 5. Petitioner further argues and suggests that, "[I]t is significant that [in] the face of previous legal commentary and prior Constitutional challenge to the judicial authority of Superior Court Magistrates, the Rhode Island Legislature, in 2007, opted to amend Rhode Island General Laws § 8-15-3.1." Id. at 6, supra.

Examination of the legislative changes:

The precise changes to the particular section of the law, as they appear in the legislation, are as follows:

> "SECTION 10. Section 8-15-3.1 of the General Laws in Chapter 8-15 entitled "Court Administration" is hereby amended to read as follows:
>
> "**8-15-3.1. ~~Chief justice -- Power to assign judges. --~~ Chief justice – Power to assign magistrates. --** The Chief justice of the supreme court

> has the power to assign any magistrate of the superior court, family court, and/or district court to any court of the unified judicial system with the consent of the presiding justice and/or chief judge of the relevant courts. ~~in the same manner as a judge may be assigned pursuant to chapter 15 of this title.~~ When a magistrate is so assigned, he or she shall be vested, authorized, and empowered with all the powers belonging to the ~~justices and/or~~ magistrates of the court to which he or she is specially assigned." P.L. 2007, ch. 73, art. 3, § 10.

Given the plain meaning of the words used in the legislation, as well as the legislative intent to be inferred from the portions stricken (represented as strikethrough text), the General Assembly is taking the words "judges" and "justices" out of the particular section.

Notwithstanding the changes apparent in the above section, this Court is somewhat skeptical of Petitioner's singular claim that, "[I]t is significant that [in] the face of previous legal commentary and prior Constitutional challenge to the judicial authority of Superior Court Magistrates, the Rhode Island Legislature, in 2007, opted to amend Rhode Island General Laws § 8-15-3.1." The Court notes that the changes to this section are prospective only, as set forth in section 16 of article 3. (emphasis added). That section reads "SECTION 16.- Section 8 of this article shall take effect August 1, 2007. The remainder of this article shall take effect upon passage." The enactment date is June 21, 2007. The absence of any express language, or implicit indication that the statutory amendment should be applied retroactively, indicates an intent toward prospective application only. State v. Morrice, 58 A.3d 156, 162 (R.I. 2013) and cases cited therein. The changes are clearly subsequent to Petitioner's plea on April 1, 2005.

Furthermore, the amendment to said section was made as a part of the budget for that fiscal year. See P.L. 2007, ch. 73 entitled, "AN ACT MAKING APPROPRIATIONS FOR THE SUPPORT OF THE STATE FOR THE FISCAL YEAR

ENDING JUNE 30, 2008." The legislation was originally introduced on February 1, 2007 in bill number 2007 - H 5300. The Act contains some forty-four (44) different articles. Article 3, entitled "RELATING TO GOVERNMENT REORGANIZATION" contains sixteen (16) sections and is the article where the changes to § 8-15-3.1 were proposed and enacted. Of the sixteen (16) sections of article 3, seven (7) sections deal with statutes involving magistrates. Significantly, section 4 indicates:

> "SECTION 4. It is the intent of the general assembly to reform and make uniform the process of the selection of magistrates and the terms and conditions under which they shall serve. The provisions in this act which establish a ten (10) year term, shall apply to any vacancy which occurs after the date of passage and shall also apply to any magistrate position which completes its statutory term after the date of passage of this act. Any magistrate in service as of the effective date of this act who was appointed to his or her position with life tenure or for a term of years shall continue to serve in accordance with the terms of that appointment. It is the intent of the general assembly that this act shall determine the rights and duties of court magistrates superseding any act or rule in conflict with the provisions of this act."

Sections 5 and 6 deal with Superior Court magistrates, section 7 deals with District Court magistrates, section 8 deals with magistrates of the Traffic Tribunal, section 9 deals with magistrates in the Family Court and section 10 deals with the above-described amendments to § 8-15-3.1. The provision providing for a ten (10) year term for all of the magistrates described in the legislation appears to be a central focus of the bill.

The Power of the General Assembly:

The Rhode Island Supreme Court has stated on a number of occasions that the power of the General Assembly is "broad" and "plenary." See East Bay Cmty. Dev. Corp. v. Zoning Bd. of Review of Barrington, 901 A.2d 1136, 1150 (R.I. 2006). That case involved a municipal appeal from a decision of the State Housing Appeals Board

(SHAB) that would have allowed for certain construction within that municipality. The municipality's zoning board had issued a decision denying the proposed construction before that decision was reversed by SHAB. During the course of the appeal, the municipality challenged the Low and Moderate Income Housing Act embodied in the General Laws. The Rhode Island Supreme Court, in its opinion, stated:

> "Faced with a challenge to the constitutional validity of an act of the General Assembly, we begin our analysis with the presumption that the legislative enactment is constitutional." Gem Plumbing & Heating Co. v. Rossi, 867 A.2d 796, 808 (R.I. 2005). The General Assembly possesses the broad and plenary power to make and enact law, "save for the textual limitations * * * that are specified in the Federal or State Constitutions." Cherenzia v. Lynch, 847 A.2d 818, 822 (R.I. 2004) (quoting City of Pawtucket v. Sundlun, 662 A.2d 40, 44 (R.I. 1995)). As such, this Court will not invalidate a statute on constitutional grounds "unless the challenging party can prove beyond a reasonable doubt that the statute at issue is repugnant to a provision of the Rhode Island Constitution." Ruggiero v. City of Providence, 889 A.2d 691, 697 (R.I. 2005). Further, "this [C]ourt will make every reasonable intendment in favor of the constitutionality of a legislative act, and so far as any presumption exists it is in favor of so holding." State v. Garnetto, 75 R.I. 86, 93, 63 A.2d 777, 781 (1949). East Bay Cmty. Dev. Corp., 901 A.2d at 1149-50.

The case of Cherenzia, 847 A.2d 818[5] involved an attack on the constitutionality of a statute barring any person from using a self-contained underwater breathing

[5] Cherenzia was decided on March 15, 2004. The opinion refers to cases that recount some of the history of and the extent of the legislative power in Rhode Island, most notably as contained within the "Continuation of previous powers" clause then embodied in article VI (Of the Legislation Power) at section 10 of the Rhode Island Constitution. Such plenary power had its roots in the Royal Charter given to the State by King James II on July 8, 1663, wherein from the time of independence, the Legislature had the combined powers of the crown and Parliament, which included all attributes of sovereign authority. See Kass v. Retirement Bd. of Emps. Ret. Sys. of R.I., 567 A.2d 358, 360-61 (R.I. 1989) for the detailed history. Subsequent to the Supreme Court's reference to the broad and plenary power of the General Assembly in its March 2004 opinion in Cherenzia, the "Continuation of previous powers" clause, (art. VI, sec. 10), was repealed when the majority of the electorate approved the separation of powers amendment in a statewide referendum on November 2, 2004, and the result was certified by the Board of Elections on November 23, 2004.

apparatus (SCUBA) equipment to harvest shellfish at four named coastal ponds in the state. After the plaintiffs were awarded summary judgment finding that the statute was unconstitutional, the Rhode Island Supreme Court vacated the ruling and held that the statute did not violate the state constitutional guarantee of equal protection under law, and further, that the statute did not violate the due-process protections of the state constitution. The Supreme Court explained:

> "This Court frequently has held that the power of the General Assembly to make and enact laws is broad and plenary, "save for the textual limitations * * * that are specified in the Federal or State Constitutions." City of Pawtucket v. Sundlun, 662 A.2d 40, 44 (R.I. 1995) (citing Kass v. Ret. Bd. of the Emps.' Ret. Sys. of R.I., 567 A.2d 358, 360 (R.I. 1989)). Because of the broad legislative power of the General Assembly, we presume the constitutional validity of legislative enactments. See, e.g., Sundlun, 662 A.2d at 45; In re Advisory Op. to the Governor, R.I. Depositors Econ. Prot. Corp. v. Brown, 659 A.2d 95, 100 (R.I. 1995); Kennedy v. State, 654 A.2d 708, 712 (R.I. 1995); Kass, 567 A.2d at 360; In re Advisory Op. to the House of Representatives, 485 A.2d 550, 552 (R.I. 1984). Cherenzia, 847 A.2d at 822.
>
> The Supreme Court further noted: "In passing on the constitutionality of a statute, the Court exercises its power to do so "with the greatest possible caution." Gorham v. Robinson, 57 R.I. 1, 7, 186 A. 832, 837 (1936)." Cherenzia, 847 A.2d at 822. (emphasis added).

Proceeding with the "greatest possible caution," (Gorham v. Robinson, 57 R.I.1, 186 A. 832), in light of the "reasonable intendments in favor of the constitutionality" (East Bay Cmty. Dev., 901 A.2d at 1150, supra.) of the pre-2007 version of § 8-15-3.1; the changes to said section by virtue of the overhaul of the statutes related to magistrates as set forth in article 3 of the budget legislation in 2007; and the relevant burden on Petitioner, this Court is not inclined to declare that the pre-2007 version of § 8-15-3.1 was unconstitutional. But even if this Court were to make such a declaration, this Court's earlier discussions herein relative to "Judicial Power" being vested in the courts created

by the General Assembly under the Rhode Island Constitution; the fact that the statute creating the Special Magistrate clearly provides that such a position is "created within the [S]uperior [C]ourt"; and the fact that the powers of the Special Magistrate to act within the Superior Court have been enumerated as heretofore described lead this Court to conclude that even if the pre-2007 version of § 8-15-3.1 was unconstitutional, the acts of the Special Magistrate would still be constitutional, given the opportunity to appeal said actions to a judge within the Superior Court as discussed herein.

5

Presumption of Regularity

As a final comment is in order regarding the Petitioner's claims, which affect the public's perception of all of the courts of this state, as well as their confidence in same, this Court notes that there is a presumption of regularity that applies to the final judgments of conviction in this state. See State v. Ramirez, 936 A.2d 1254, 1271 (R.I. 2007) and cases cited therein, especially quoting Johnson v. Zerbst, 304 U.S. 458, 464, 468, 58 S. Ct. 1019, 82 L.Ed. 1461 (1938) ("A presumption deeply routed in our jurisprudence is "the 'presumption of regularity' that attaches to final judgments, even when the question is waiver of constitutional rights."). Ramirez, 936 A.2d at 1271.

The presumption of regularity "supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." United States v. Chemical Foundation, Inc., 272 U.S. 1, 14-15, 47 S. Ct. 1, 6, 71 L.Ed. 131 (1926). See also Champlin's Realty Assocs. v. Tikoian, 989 A.2d 427, 452 (R.I. 2010) (Justice Robinson concurring in part and

dissenting in part) for a thorough discussion replete with examples and further case citations.

After a review of the Court file and after reading the eleven (11) transcripts supplied by the Petitioner, as well as all exhibits attached thereto, this Court finds that the Special Magistrate has properly discharged his official duties and has proceeded with patience and diligence through a period of over eighteen (18) months in dealing with Petitioner. Applying the doctrine to the instant case, this Court will deny Petitioner's application for post-conviction relief.

IV

Conclusion

For all the reasons stated herein, the Court denies Petitioner's application on the grounds set forth by Petitioner.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**Isom v. State of Rhode Island**
CASE NO:	**PM 2009-1523** **P2 2004-1079A**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**February 12, 2014**
JUSTICE/MAGISTRATE:	**Carnes, J.**
ATTORNEYS:	
For Plaintiff:	**Matthew S. Dawson, Esq.**
For Defendant:	**Shannon G. Signore, Esq.**