STATE OF RHODE ISLAND

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: March 26, 2024)

JOSEPH BOTELHO	**:**	
	:	
v.	**:**	**PM-2021-01044**
	:	**PM-2023-01503**
STATE OF RHODE ISLAND	**:**	

DECISION

CARNES, J. Joseph Botelho, (hereinafter Petitioner or Botelho) brings two separate and distinct applications for postconviction relief before this Court. Petitioner's first Application for Post-Conviction Relief (hereinafter simply Application) challenges his sentence as a violator after a violation hearing with witnesses before this Court. Petitioner's second application seeks to "reinstate [Petitioner's] lost good time . . . approximately 1308 days" and "implement *Morris* Rules." An evidentiary hearing was held on January 8, 2024. Counsel for both parties and Petitioner agreed on the record that the Court would take the matter under advisement and issue a written Decision addressing both applications based upon the papers filed and the arguments and evidence presented at the January 8, 2024 evidentiary hearing. This Court will address each application separately within the instant Decision. Both matters are before this Court pursuant to G.L. 1956 chapter 9.1 of title 10 and jurisdiction lies pursuant to that chapter.

PM-2021-01044

Application to Terminate Sentence and Vacate Finding(s) of Violation

Petitioner implores the Court to enter an order terminating his sentence in case P1-2001-3183A, as well as to vacate this Court's finding of and declaration of violation in P1-2001-3183A

and of certain other sentences Petitioner was serving at the time of the violation hearing.[1] Petitioner was continued on the same sentence in each of the certain other sentences. Pursuant to the filing of this application, counsel was appointed for Petitioner on February 22, 2021

I

Facts and Travel

The salient underlying facts in the instant matter are not in dispute. They are readily ascertained by referring to Petitioner's First Amended Petition for Post-Conviction Relief (Amended Petition) filed by his appointed counsel on or about June 9, 2021. Further corroboration of such underlying facts may be gleaned from the docket sheets associated with the cases described herein. Further facts are set forth herein as taken from the pleadings, papers, or written record of the case.

By virtue of his Amended Petition, Petitioner seeks relief from his sentence(s) as a violator in cases P1-2001-3183A, P2-2010-0804A, and K2-2010-0524A.

In case P1-2001-3183A, Petitioner was indicted on four counts on October 17, 2001. The charges included Domestic Violence – Burglary under G.L. 1956 §§ 11-8-1 and 12-29-2(a)(13)

[1] Those "other" sentences where Petitioner was found and declared to be a violator on August 29, 2012 by this Court after a violation hearing with witnesses are cases P2-2010-0804A and K2-2010-0524A. As a result of the finding of and declaration of violation in each case, Petitioner was continued on the same sentence in each case. Case P2-2010-0804A involved a plea of nolo contendere on October 21, 2010 before a magistrate of the superior court to a charge of domestic simple assault, having been charged as a third offense, and resulting in a sentence of eight years, with one year to serve and seven years suspended with probation. Case K2-2010-0524A involved a plea before the same magistrate on the same date to a charge of violating a protective order – charged as a domestic third offense and resulting in a sentence of eight years, with one year to serve and seven years suspended with probation. Both matters were heard before this Court, along with P1-2001-3183A when the violation hearing with witnesses occurred. The respective docket sheets in each case reflect this travel and such events. See Memorandum of Law in Support of Petitioner's First Amended Petition for Post-Conviction Relief (hereinafter Pet'r's Mem.) at 6-8. Petitioner has also filed plea forms entitled "Request to Enter a Plea of Nolo Contendere or Guilty" and certain judgments of convictions for the cases involved, attached to Pet'r's Mem.

(Count 1), Domestic Violence - Assault with Intent to Commit Specified Felonies under G.L. 1956 §§ 11-5-1 and 12-29-2(a)(2) (Count 2), Resisting a Legal or Illegal Arrest under G.L. 1956 § 12-7-10 (Count 3), and Felony Assault under G.L. 1956 § 11-5-2 (a) (Count 4). Am. Pet. ¶ 5. Thereafter, on or about October 10, 2002, another justice of the superior court accepted the Petitioner's plea of nolo contendere to Counts 1, 2, and 4 of said indictment. Count 3 was dismissed in consideration of Petitioner's plea to said counts. Petitioner was sentenced to a twenty-five year full sentence with six years to serve and nineteen years suspended on Count 1, along with a twenty year sentence with six years to serve and fourteen years suspended on Count 2, as well as a twenty year sentence with six years to serve and fourteen years suspended on Count 4. Sentences on all Counts were to run concurrently. *Id*. ¶¶ 6–9. *See also* Pet'r's Mem. at 4-6

On September 28, 2011, Petitioner was brought before the Sixth Division District Court[2] on new charges. Those charges included Felony Assault-Domestic under G.L. 1956 §§ 11-5-2(b) and 12-29-2(a)(2) (Count 1), Simple Assault-Domestic under G.L. 1956 §§ 11-5-3(b) and 12-29-2(a)(1) (Count 2), Simple Assault-Domestic under G.L. 1956 §§ 11-5-3(b) and 12-29-2 (a)(1) (Count 3), and Resisting Arrest under G.L. 1956 § 12-7-10 (Count 4). *Id.* ¶ 10. Additionally, on September 28, 2011, the Office of the Attorney General filed and presented Petitioner with a Rule 32(f) of the Superior Court Rules of Criminal Procedure notice to revoke his probation in case P1-2001-3183A.[3] *Id*. ¶ 11. *See also* Pet'r's Mem. at 8-9 and Ex. 6 (Rule 32(f) Notice of Violation).

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[2] District Court case number 62-2011-13421.

[3] Rule 32(f) of the Superior Court Rules of Criminal Procedure specifically provides:

> "**Revocation of Probation.** The court shall not revoke probation or revoke a suspension of sentence or impose a sentence previously deferred except after a hearing at which the defendant shall be afforded the opportunity to be present and apprised of the grounds on which such action is proposed. The defendant may be admitted to bail pending such hearing. Prior to the hearing the State shall furnish the defendant and the court with a written statement specifying the grounds upon

On or about August 29, 2012, this Court declared Petitioner to be a violator of his probationary sentence in case P1-2001-3183A following a violation hearing with witnesses. *Id*. ¶ 14. *See also* Pet'r's Mem. at 9 and Ex. 8 (Transcript of Violation Hearing). The Court also declared Petitioner to be a violator in P2-2010-0804A and K2-2010-0524A. Pet'r's Mem. at 9, *see also* n.1 *supra*. Thereafter, on or about August 29, 2012, in case P1-2001-3183A, this Court modified Petitioner's original nineteen-year suspended sentence on Count 1 charging Domestic Violence – Burglary to a seventeen-year term of incarceration followed by a two-year suspended sentence. Am. Pet. ¶ 15, Pet'r's Mem. at 9 and Ex. 8.

On or about December 15, 2011, prior to the violation hearing with witnesses described above, the Office of the Attorney General issued a Criminal Information in case P2-2011-3378ADV charging Petitioner with four counts relative to the September 28, 2011 conduct described above and contained within the contents of District Court case number 62-2011-13421 described above. The four counts of said Criminal Information were identical to those charged in the District Court. Am. Pet. ¶ 16. Thereafter, on or about February 24, 2014, the Office of the Attorney General moved to dismiss all four counts of P2-2011-3378ADV pursuant Rule 48(a) of the Superior Court Rules of Criminal Procedure.[4] Petitioner alleges this dismissal "effectively

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> which action is sought under this subdivision. No revocation shall occur unless the State establishes by a fair preponderance of the evidence that the defendant breached a condition of the defendant's probation or deferred sentence or failed to keep the peace or remain on good behavior." Rule 32(f) was amended effective November 21, 2016. At the time of said presentment, Rule 32(f) provided that no revocation shall occur unless the State established to the reasonable satisfaction of the court that the defendant breached a condition of the defendant's probation or deferred sentence or failed to keep the peace or remain on good behavior." *See* Committee Notes for 2016 Amendment and text and cases cited therein.

[4] Rule 48(a) of the Superior Court Rules of Criminal Procedure, entitled Rule 48 Dismissal, provides: "*By Attorney for State.* The attorney for the State may file a dismissal of an indictment, information, or complaint and the prosecution shall thereupon terminate. Such dismissal may not

conclude[ed] the matter." *Id*. ¶ 17. *See also* Pet'r's Mem. at 10 and Ex. 9 (Rule 48(a) dismissal form).

Petitioner thus brings a host of claims in his Application relative to the sentence he is currently serving as a violator, as well as this Court's finding(s) of and declaration(s) of violation as described above.

II

Standard of Review - Postconviction Relief

"'[T]he remedy of postconviction relief is available to any person who has been convicted of a crime and who thereafter alleges either that the *conviction violated the applicant's constitutional rights* or that the existence of newly discovered material facts requires vacation of the conviction in the interest of justice.'" *DeCiantis v. State*, 24 A.3d 557, 569 (R.I. 2011) (quoting *Page v. State*, 995 A.2d 934, 942 (R.I. 2010)) (further citation omitted) (emphasis added); *see also* § 10-9.1-1. "An applicant for such relief bears '[t]he burden of proving, by a preponderance of the evidence, that such relief is warranted' in his or her case." *Brown v. State*, 32 A.3d 901, 907 (R.I. 2011) (quoting *State v. Laurence*, 18 A.3d 512, 521 (R.I. 2011)). Postconviction relief motions are civil in nature and thus governed by all the applicable rules and statutes governing civil cases. *Ferrell v. Wall*, 889 A.2d 177, 184 (R.I. 2005). In accordance with the statute, "[t]he court shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented." Section 10-9.1-7.

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be filed during the trial without consent of the defendant." Super. R. Crim. P. 48(a) (emphasis added).

III

Petitioner's Claims

A

Overview of Petitioner's Claims

While an evidentiary hearing occurred on January 8, 2024 on Petitioner's consolidated claims, Petitioner did not present any evidence on this particular petition. Petitioner, through counsel, did make and amplify his arguments previously set forth in Petitioner's comprehensive memorandum, described in n. 1 *supra*, at the final argument after the evidentiary hearing on January 8, 2024.

Petitioner asserts a number of arguments in support of his petition to vacate his sentence(s) and overturn the findings of violation articulated by this Court against Petitioner on August 29, 2012. In both Petitioner's Mem., described herein and at n. 1, *supra*, and at oral argument on January 8, 2024, Petitioner sets forth a comprehensive and multi-pronged attack on his adjudicated violations, as well as the probation violation system as it presently exists within the criminal justice system in this state. Petitioner alleges that the process for adjudicating probation violations almost "guarantee[s]" that a probationer will be found to be a violator. *See* oral argument[5] and Pet'r's Mem. at 12 § 4.1. Petitioner further alleges that the legal burden of proof that the Court applied at the violation hearing was uncertain and unreasonably low. (Oral argument and Pet'r's Mem. at 14, § 4.1.1.) At the time, the burden of proof at a violation hearing was for the court to make a determination, based upon the evidence and testimony, and after assessing credibility and

[5] Any reference to oral argument in the context of this section relating to an overview of Petitioner's claims is meant to refer to that argument that occurred after the evidentiary hearing on January 8, 2024.

weighing evidence, as to whether the court was *reasonably satisfied*[6] that petitioner has engaged in conduct that amounted to failure to keep the peace and remain of good behavior. Petitioner also alleges that the term "fail[ure] to keep the peace and to remain on good behavior" is problematic at best and fundamentally inconsistent in application. (Oral argument and Pet'r's Mem. at 16, § 4.1.2.)

Petitioner asserts that "despite being *essentially* on trial for a new crime, [Petitioner] was not afforded the rights due to a defendant in a criminal proceeding." (Oral argument and Pet'r's Mem. at 21, § 4.2.) (Emphasis added.) Petitioner continues to allege that the violation hearing process utilized in this jurisdiction allows the state to use a "proxy trial" as a substitute for Petitioner's criminal trial. (Oral argument and Pet'r's Mem. at 23, § 4.3.)

Petitioner next alleges that his violation sentence was excessive. (Pet'r's Mem. at 25, § 4.4.) Petitioner additionally asserts that the "failed to keep the peace and to remain on good behavior" factual standard violates the void for vagueness doctrine, and furthermore that this standard lacks "sufficient definiteness," as well as encourages arbitrary enforcement. (Oral argument and Pet'r's Mem. at 26-31, §§ 4.5, 4.5.1, 4.5.2, and 4.5.3.)

Petitioner also maintains that the failed to "keep the peace and be of good behavior" factual standard violates first amendment freedoms and freedom of association, is unconstitutionally overbroad, and criminalizes a substantial amount of protected expressive activity. (Oral argument and Pet'r's Mem. at 31-38, §§ 4.5.4, 4.6, and 4.6.2.)

Taken in the aggregate, Petitioner implores this Court to terminate its sentence(s) and vacate its findings of violation based upon the premise that the criminal justice system and

[6] As of June 21, 2016 that burden was changed to proof by a fair preponderance of the evidence. *See* Super. R. Crim. P. 32 (f).

mechanisms, taken as a whole, is flawed to the extent that any adjudication of violation and resulting imprisonment is *unconstitutional*.

B

State's Response

Respondent, State of Rhode Island, filed a written Objection in this matter. *See* State's Objection and Supporting Memorandum Opposing the Petition for Post-Conviction Relief (hereinafter simply State's Objection). The State chose to divide its arguments and associated material into four[7] categories and responded accordingly in the remainder of its reply. The State's first assertion was that "the violation hearing standard applied in this matter was both constitutional and protected the [Petitioner's] due process rights." (State's Obj. at 4.) The State next asserts that the "Petitioner was afforded all of the due process rights owed to an alleged probation violator." *Id*. at 5. The State next asseverates that "the Petitioner's obligation as a probationer to keep the peace and be of good behavior is objectively clear and discernable to any reasonable person." *Id*. at 6. Lastly, the State maintains that "Petitioner's sentence was not excessive." *Id*. at 8.

[7] State's Objection initially suggested three categories but immediately outlined four categories. *See* State's Obj. at 3.

IV

Analysis

A

Probation

1

The Purpose of Probation

In order to properly address Petitioner's claims, it is first necessary to understand the purpose of probation. General Laws 1956 § 12-19-8 specifically allows a court to "impose a sentence and suspend the execution of the sentence, in whole or in part, or place the defendant on probation without the imposition of a suspended sentence." Furthermore, the suspension of time to serve in prison shall place the defendant on probation for the time of probation that the court may fix and pursuant to the terms and conditions set by § 12-19-8.1. That section delineates the "basic" conditions of probation. They are:

> **"§ 12-19-8.1. Conditions of probation.**
>
> "(a) The following shall constitute basic conditions of probation applicable to all defendants upon whom a period of probation has been imposed:
>
> > "(1) Obey all laws;
> >
> > "(2) Report to the probation officer and parole officer as directed;
> >
> > "(3) Remain within the state of Rhode Island except with the prior approval, specifically or as an agreed routine, of the probation and parole office;
> >
> > "(4) Notify the probation and parole officer immediately of any change of address, telephone number, or employment;
> >
> > "(5) Make every effort to keep steadily employed or attend school or vocational training;

> "(6) Waive extradition from anywhere in the United States to Rhode Island, if required to appear in any Rhode Island court;
>
> "(7) Provide a DNA sample if required by §§ 12-1.5-7 and 12-1.5-8;
>
> "(8) Pay restitution, court costs, and fines, if assessed, in one or several sums, based on the defendant's ability to pay; and
>
> "(9) Submit to a risk and needs assessment." Section 12-19.8.1(a).

The statute further allows imposition of special conditions of probation and the ability to modify a defendant's basic or special conditions.

> "(b) Special probation conditions related to community service, computer restrictions, no contact orders, or any other conditions deemed just and reasonable may be imposed at the discretion of the court." *Id*. at (b).

The statute further provides that the "[f]ailure of the defendant to comply with modified conditions of probation constitutes a violation." *Id*. at (d).

In the case of *Tillinghast v. Howard*, 109 R.I. 497, 287 A.2d 749 (1972), the Rhode Island Supreme Court wrote about the *purpose of probation*. The Court specifically stated:

> "Commencing with the obvious, it is to be noted that suspending the execution of sentence, as well as deferring sentencing, are judicial functions which do not come up for consideration until all questions of guilt have been resolved against the accused. This is to say that when such function is exercised, it comes at a moment when the accused could be sentenced to the maximum penalty provided for the offense of which the accused stands convicted. Moreover, they are functions to which the convicted accused has no recourse as a matter of right. Rather, they are acts of grace. . . . . *Indeed, it is for the purpose of giving a convicted accused the opportunity of rehabilitation that he retains his liberty and is placed on probation* . . . .When, however, there exists reason to believe that one at liberty on probation has not complied with the terms of that probation, it is within the discretion of the court to impose sentence and order that it be served if the probationer is on a deferred sentence, or vacate the suspension of execution of a sentence previously imposed." *Tillinghast*, 109 R.I. at 501-02, 287 A.2d at751-52 (internal citations omitted) (emphasis added).

2

Violations of Probation

Violations of probation are addressed by statute and Rule of Court. Section 12-19-9, entitled "Violation of terms of probation—Notice to attorney general—Revocation or continuation of suspension," provides in pertinent part:

> "(a) Whenever any person who has been placed on probation pursuant to § 12-19-8 violates the terms and conditions of his or her probation as fixed by the court, the police or the probation authority shall inform the attorney general of the violation, and the attorney general shall cause the defendant to appear before the court. The department of corrections division of rehabilitative services shall promptly render a report relative to the conduct of the defendant, and the information contained in any report under § 12-13-24.1. The division of rehabilitative services may recommend that the time served up to that point is a sufficient response to a violation that is not a new alleged crime. The court may order the defendant held without bail for a period not exceeding ten (10) days, excluding Saturdays, Sundays, and holidays.
>
> "(b) The court shall conduct a hearing within thirty (30) days of arrest unless waived by the defendant to determine whether the defendant has violated the terms and conditions of his or her probation, at which hearing the defendant shall have the opportunity to be present and to respond. Upon a determination by a fair preponderance of the evidence that the defendant has violated the terms and conditions of his or her probation, the court, in open court and in the presence of the defendant, may:
>
> > "(1) Remove the suspension and order the defendant committed on the sentence previously imposed, or on a lesser sentence;
> >
> > "(2) Impose a sentence if one has not been previously imposed;
> >
> > "(3) Stay all or a portion of the sentence imposed after removal of the suspension;
> >
> > "(4) Continue the suspension of a sentence previously imposed; or
> >
> > "(5) Convert a sentence of probation without incarceration to a suspended sentence."

Furthermore, § 12-19-14, entitled, "Violation of terms of probation–Notice to court – Revocation or continuation of suspension," provides in pertinent part:

"(a) Whenever any person who has been placed on probation by virtue of the suspension of execution of his or her sentence pursuant to § 12-19-13 violates the terms and conditions of his or her probation as fixed by the court by being formally charged with committing a new criminal offense, the police or department of corrections division of rehabilitative services shall cause the defendant to appear before the court. The department of corrections division of rehabilitative services shall determine when a technical violation of the terms and conditions of probation as fixed by the court that does not constitute a new criminal offense has occurred and shall cause the defendant to appear before the court. For technical violations, the division of rehabilitative services shall promptly render a written report relative to the conduct of the defendant, including, as applicable, a description of the clear and articulable public safety risk posed by a defendant accused of a technical violation, and, as available, the information contained in any report under § 12-13-24.1. The division of rehabilitative services may recommend that the time served up to that point is a sufficient response to a violation that is not a new, alleged crime. The court may order the defendant held without bail for a period not exceeding ten (10) days excluding Saturdays, Sundays, and holidays if the new criminal charge(s) constitutes a violent crime as defined in the Rhode Island General Laws, a domestic violence crime, or a crime involving driving under the influence or if the court determines in its discretion that public safety concerns and/or concerns regarding the defendant's likelihood to appear before the court warrant holding the defendant without bail.

"(b) The court shall conduct a hearing within thirty (30) days of arrest, unless waived by the defendant, to determine whether the defendant has violated the terms and conditions of his or her probation, at which hearing the defendant shall have the opportunity to be present and to respond. Upon a determination by a fair preponderance of the evidence that the defendant has violated the terms and conditions of his or her probation, the court, in open court and in the presence of the defendant, may as to the court may seem just and proper:

> "(1) Revoke the suspension and order the defendant committed on the sentence previously imposed, or on a lesser sentence;
> "(2) Impose a sentence if one has not been previously imposed;
> "(3) Stay all or a portion of the sentence imposed after removal of the suspension;
> "(4) Continue the suspension of a sentence previously imposed; or
> "(5) Convert a sentence of probation without incarceration to a suspended sentence."

Rule 32(f) of the Superior Court Rules of Criminal Procedure also governs Court action relative to alleged probation violators. The Rule provides, in pertinent part:

"(f) Revocation of Probation. The court shall not revoke probation or revoke a suspension of sentence or impose a sentence previously deferred except after a

> hearing at which the defendant shall be afforded the opportunity to be present and apprised of the grounds on which such action is proposed. The defendant may be admitted to bail pending such hearing. Prior to the hearing the State shall furnish the defendant and the court with a written statement specifying the grounds upon which action is sought under this subdivision. No revocation shall occur unless the State establishes by a fair preponderance of the evidence that the defendant breached a condition of the defendant's probation or deferred sentence or failed to keep the peace or remain on good behavior."

This particular section was amended June 21, 2016, increasing the State's burden of proof.[8] The new burden of proof for a violation was proof to a fair preponderance of the evidence, up from the previous standard of proof whereby the State was obligated to prove to the "reasonable satisfaction of the hearing justice" that a defendant breached a condition of his or her probation or failed to keep the peace or remain of good behavior. At the time of Petitioner's violation hearing, the older "reasonable satisfaction" standard was in place. As to the purpose of a violation hearing, at the time of the June 21, 2016 amendment, the Committee Notes for the 2016 amendment are instructive. The Notes state:

> "*In addition, the amendment reflects and recites the Rhode Island Supreme Court's settled rule that revocation should not be determined by whether the defendant violated any offense which may form the basis of the violation allegation; rather, the 'sole purpose of a probation violation hearing is for the trial justice to determine whether the conditions of probation'--'[k]eeping the peace and remaining on good behavior--have been violated.' State v. Hazard, 68 A.3d 479, 499 (R.I. 2013), citing State v. Gromkiewicz, 43 A.3d 45, 48 (R.I. 2012)) (quoting State v. Waite, 813 A.2d 982, 985 (R.I. 2003)). State v. Znosko, 755 A.2d 832, 835 (R.I. 2000) (holding that 'the appropriate role of the hearing justice was to determine 'only whether in [the hearing justice's] discretion [the defendant's] conduct on the day in question had been lacking in the required good behavior expected and required by his probationary status') (quoting State v. Godette, 741 A.2d 742, 745 (R.I. 2000)). It is the consensus of the committee that the amendment should operate prospectively from the time of its adoption, not retroactively."* Committee Notes; Super. R. Crim. P. 32 (emphasis added).

[8] Petitioner acknowledges this in Pet'r's Mem. at 9, n.11.

Additionally, the Rhode Island Supreme Court has ruled that probation violation proceedings are civil in nature and are not criminal proceedings. *State v. Pinney*, 672 A.2d 870, 871 (R.I. 1996). The law further provides that the filing of a Rule 32(f) violation notice to a probationary defendant and the scheduling of hearings thereon is within the discretion of the Department of the Attorney General. Therefore, it is not necessary to have a trial with defendant on the new criminal acts before the State may proceed against a defendant as a violator. *LaChappelle v. State*, 686 A.2d 924, 927 (R.I. 1996). ("[I]t was not within [Defense counsel's] ability to prevent a violation hearing to be scheduled before a trial on the underlying charges. The law does not provide, as the applicant argues, that a defendant who commits criminal acts while on probation must first be tried for the new criminal acts before he can be proceeded against and tried as a violator of existing probation. The filing of a Rule 32(f) violation notice to a probationary defendant and the scheduling of hearings thereon is within the discretion of the Department of the Attorney General.").

B

Petitioner's Claims

1

Process for Adjudicating Violations and Burden of Proof

At the outset, it should be noted that in Petitioner's comprehensive memorandum, he has cited some 119 footnotes. A great deal of those footnotes cite to an opinion of the Rhode Island Supreme Court that either expressly or impliedly approves the process, or procedure, or flaw that Petitioner complains about. Petitioner acknowledges that "while some [defendants] complete [their] probationary term without an issue, others find themselves before the Court again." Pet'r's Mem. at 12. Petitioner also acknowledges that "the sole purpose of a probation violation hearing

is for the trial justice to determine whether the conditions of probation – [k]eeping the peace and remaining on good behavior – have been violated[; and t]he issue, therefore, is not the probationer's guilt with respect to the new charges, but rather whether the probationer's 'conduct on the day in question had been lacking in the required good behavior expected and required by his probationary status." See Pet'r's Mem. at 13 (citing *State v. Mosley*, 173 A.3d 872 (R.I. 2017) and *State v. Brown*, 915 A.2d 1279 (R.I. 2007) (quoting *Znosko*, 755 A.2d at 834) and n.26 and n.27, respectively). Petitioner further acknowledges that under § 12-19-9, discussed *supra*, "[i]f a hearing justice is reasonably satisfied[9] that the probationer failed to keep the peace and be of good behavior, the probationer can be sentenced to any portion of a suspended sentence." Pet'r's Mem. at 13. Petitioner acknowledges that a violation hearing "is not a criminal hearing [but rather] a civil hearing [and that] despite [a probationer's] liberty [being] at risk, 'the defendant is not entitled to 'the full panoply of rights' inherent in a criminal trial."' Pet'r's Mem. at p14 and n.31 (citing *State v. Campbell*, 833 A.2d 1228, 1233 (R.I. 2003) (quoting *State v. Mendez*, 788 A.2d 1145, 1147-48 (R.I. 2002)). All of this appears consistent with the purpose espoused in *Tillinghast v. Howard*, *supra*, "*of giving a convicted accused the opportunity of rehabilitation that he retains his liberty and is placed on probation" Tillinghast*, 109 R.I. at 501, 287 A.2d at 752 (emphasis added). It is that particular policy[10] that is behind the suspension of a sentence with a commensurate term of probation. Once a probationer runs afoul of his obligations, it is time to determine the

[9] To reiterate, this burden has since changed. While the "reasonably satisfied" burden existed at the time of the violation, the statute now reads in pertinent part: "Upon a determination *by a fair preponderance of the evidence* that the defendant has violated the terms and conditions of his or her probation, the court, in open court and in the presence of the defendant, may. . ." Section 12-19-9 (emphasis added).

[10] "[T]he acts of the legislature practically determine the policy of the state." *State v. Foster*, 46 A 833, 836 (1900).

appropriate steps to take in serving the remaining portion of his sentence. There are hosts of other cases beyond those cited by Petitioner where the Rhode Island Supreme Court has approved such principles.

Petitioner complains that the "reasonably satisfied"[11] burden of proof is uncertain and unfairly low. Pet'r's Mem. at 14. Thus, Petitioner asserts that this allows a hearing justice "to take away [a probationer's] freedom based on facts asserted by the State *that can be more probably false than true*." *Id.* (emphasis added). What Petitioner has failed to insert here is that to determine whether a defendant has committed a violation, the hearing justice "weighs the evidence and assesses the credibility of witnesses[.]" *State v. Pena*, 791 A.2d 484, 485 (R.I. 2002). While the Supreme Court will give a hearing justice's assessment of the credibility of witnesses "great deference," *State v. Christodal*, 946 A.2d 811, 816 (R.I. 2008), that deference is not unlimited. The Rhode Island Supreme Court reviews a hearing justice's decision to find a defendant to be a violator and makes a determination of '"whether the hearing justice acted arbitrarily or capriciously in finding a violation.'" *State v. Sylvia*, 871 A.2d 954, 957 (R.I. 2005) (quoting *State v. Rioux*, 708 A.2d 895, 897 (R.I. 1998). *See also State v. English*, 21 A.3d 403, 407 (R.I. 2011). The Rhode Island Supreme Court has further held, '"[w]hen a probation-violation inquiry turns on a determination of credibility, * * * and the hearing justice, after considering all the evidence, accepts one version of events for plausible reasons stated and rationally rejects another version, we can safely conclude that the hearing justice did not act unreasonably or arbitrarily in finding that a probation violation has occurred."' *Sylvia,* 871 A.2d at 957 (quoting *Rioux,* 708 A.2d at 898). The Supreme Court will review the record of a violation hearing justice's findings to

[11] As discussed supra, the burden of proof in a violation hearing has changed as of June 21, 2016 increasing to proof by a "fair preponderance of the evidence."

determine whether the hearing justice "carefully weighed the evidence presented and acted well within [the justice's] discretion when [assessing] the credibility of the testifying witnesses." *See State v. Gromkiewicz*, 43 A.3d 45, 49 (R.I. 2012). Petitioner directs the Court's attention to *Rioux*, 708 A.2d at 898, where the Supreme Court notes:

> "The defendant quotes a portion of the violation decision in which the hearing justice expressed uncertainty about the precise definition of 'reasonably satisfied. The hearing justice opined that it suggested 'an extremely low standard that does not take much to satisfy.' He even went on to quip, 'I can be reasonably satisfied by a hot dog on occasion."' *Rioux*, 708 A.2d at 898. *See* Pet'r's Mem. at 15 with n.36, n.37, and n.38.

However, Petitioner fails to point out the very next sentences that demonstrate that the Supreme Court was not amused, while it still applied an exacting review.

> "Notwithstanding the apparent flippancy of this remark, the hearing justice carefully considered all the evidence presented. He noted that the victim's bruises on her forearms, which the police officer observed and discussed in his testimony, were not consistent with injuries resulting from a bar fight but were more in the nature of defensive bruises. He also noted that in his experience [the victim's] testimonial flip-flop about the events of December 17 likely betrayed a motive to insulate defendant from the consequences of his domestic violence. When a probation-violation inquiry turns on a determination of credibility, as it did in this proceeding, and the hearing justice, after considering all the evidence, accepts one version of events for plausible reasons stated and rationally rejects another version, we can safely conclude that the hearing justice did not act unreasonably or arbitrarily in finding that a probation violation has occurred." *Rioux*, 708 A.2d at 898. *See also State v. Gilroy,* 688 A.2d 858, 859 (R.I. 1997); *State v. Sikhaolouanglath,* 683 A.2d 376, 378 (R.I. 1996).

The Supreme Court went further:

> "The hearing justice concluded that he was 'more than reasonably satisfied' that defendant had violated his probation by battering [the victim]. He further stated that he made this finding 'without any legal question' in his mind. Although the hearing justice did describe the state's burden of proof as 'extremely low' at one point in his decision, he did not otherwise explain or qualify his understanding of the reasonably satisfied standard. In any event, based upon our review of the proceedings, we are convinced that the evidence before the trial justice more than satisfied the standard for establishing a probation violation. Because the hearing

> justice correctly articulated the standard to be applied to probation-violation determinations and because the record shows that in any event the preponderance of the evidence indicated that defendant had violated the terms of his probation, we are persuaded that the standard actually applied by the hearing justice in finding defendant to be a violator was the proper one." *Id*. at 898.

Given this level of scrutiny, this Court *rejects* Petitioner's suggestion that "[a]pplying the Reasonably Satisfied Legal Burden of Proof denies any probationer's constitutional due process rights by allowing a hearing justice to take away [a probationer's] freedom based on facts asserted by the State *that can be more probably false than true*. Pet'r's Mem. at 14 (emphasis added).

2

Keeping the Peace and Remaining on Good Behavior

Petitioner argues that "[a]pplying the *Failed to Keep the Peace and to Remain on Good Behavior* Factual Burden of Proof denies any probationer's due process rights by allowing a hearing justice to take away his or her freedom for harmless and non-criminal behaviors." Pet'r's Mem. at 16. Notwithstanding the sincerity of Petitioner's point, this case *did not* involve harmless and non-criminal behaviors. (Emphasis added.) Petitioner's own memorandum and exhibits clearly acknowledge this. *See* Pet'r's Mem. at 8-10, beginning at, "[o]n September 28, 2011, the East Providence Police Department arrested Botelho . . ." The factual recitations include reference to the Rule 32(f) probation violation report, (Ex. 6), and the actual transcript of the violation hearing, (Ex. 8).[12] Even the most cursory reading of the exhibits reveal that Petitioner's alleged behavior was anything but harmless and non-criminal. Petitioner also recognizes that "[e]ssentially the [Violation of Probation] hearing is a continuation of the original prosecution for which probation was imposed." Pet'r's Mem. at 17 and n. 40 (citing *State v. Tucker*, 747 A.2d 451,

[12] Exhibit 8 is the complete transcript of the violation hearing that occurred on August 27, 28 and 29, 2012, consisting of 197 pages including the cover page and certification pages.

455 (R.I. 2000) (quoting *State v. Chase,* 588 A.2d 120, 122 (R.I. 1991)). That opinion actually goes much further. The Supreme Court expressly rejected Tucker's contention that a hearing justice could "only revoke the original suspended sentence in its entirety and order defendant to serve the sentence in prison, or [the justice could] continue the remainder of the suspended sentence." *Tucker,* 747 A.2d at 453. Tucker further asserted that because any revocation of a suspended sentence following a probation violation relates back to the sentence for the underlying offense, reinstatement of his suspended sentence following a prison term violates the constitutional prohibitions against placing him in double jeopardy. In rejecting the double jeopardy argument, the Supreme Court noted:

> "Finally, Tucker's double-jeopardy argument is without merit. It is well settled that a probation-revocation hearing is not part of the criminal prosecution process. *See State v. Chase,* 588 A.2d 120, 122 (R.I. 1991). Therefore, the full panoply of constitutional rights due a defendant at trial need not always be afforded in a probation-violation hearing. *See Morrissey v. Brewer,* 408 U.S. 471, 480, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484, 494 (1972). 'Essentially the hearing is a continuation of the original prosecution for which probation was imposed. *The sole purpose of the hearing is to determine whether a defendant has breached a condition of the existing probation, not to convict a defendant for a new criminal offense*.' *Chase,* 588 A.2d at 122 (citing *State v. Bourdeau,* 448 A.2d 1247, 1248 (R.I. 1982))."' *Id.* at 455 (emphasis added).

In its opinion, the Supreme Court expressly recognized the pitfalls of Tucker's suggested interpretation of the process and reinforced the policy considerations of the state:

> "As the state argues, under Tucker's all-or-nothing interpretation, 'a calculating and recidivist defendant, seeking to get out from under a lengthy suspended sentence, would have every incentive to be violated on a minor offense so that the lion's share of the suspended sentence may forever be extinguished.' This Court will not construe a statute 'in a way that would attribute to the Legislature an intent that would result in absurdities or would defeat the underlying purpose of the enactment.' *Brennan v. Kirby,* 529 A.2d 633, 637 (R.I.1987). *Here, Tucker's construction of the statute would produce an absurd result that would contravene the purpose of probation as 'a substitute for incarceration rather than a synonym for exculpation. Persons on probation are not absolved of the charges that led to their status as probationers. They are merely enjoying conditional liberty that may*

> *be revoked if they violate the terms of their probation agreement.' State v. Gobern,* 423 A.2d 1177, 1179 (R.I. 1981) (citing *State v. Plante,* 109 R.I. 371, 377–78, 285 A.2d 395, 398 (1972) and § 12–19–9)." *Id*. at 455 (emphasis added).

Petitioner next cites a host of cases to support his argument that the precise meaning of "a probationer's requirements to keep the peace or remain on good behavior" are "unclear and undefined," (Pet'r's Mem. at 18), while the exact requirements "remain muddled." *Id*.

Petitioner begins with the case of *State v. Wiggs*, 635 A.2d 272 (R.I. 1993). *Id*. at 18 and n.47. While Petitioner notes that the case was "abrogated on other grounds," *id*. n.47, context is important. The case involved a defendant's motion to dismiss certain criminal charges brought before a justice of the superior court some time after the defendant had been adjudged to be a violator by a different justice, noting that a probationer's conduct "must be not only lawful, it must be impeccable[,]…[p]robation is not a joke[,] a suspended sentence is not a joke, [and a] person can be violated for hanging around with the wrong people only." Pet'r's Mem. at 18, n.47 (citing *Wiggs*, 635 A.2d at 274.) It is important to note that *Wiggs* was decided before *State v. Gautier*, 871 A.2d 347 (R.I. 2005). *Gautier* and its holding is expressly acknowledged by Petitioner. Pet'r's Mem. at 17. In *Gautier*, the Rhode Island Supreme Court explicitly ruled that the hearing judge's role in a Violation of Probation Hearing "is not to determine the defendant's criminal guilt or innocence with respect to the underlying conduct that triggered the violation hearing, but rather, to determine whether a defendant has breached a condition of his probation by failing to keep the peace or remain on good behavior." *Id*. at 17 and *Gautier,* 871 a.2d at 358. The *Gautier* case precluded the use of collateral estoppel grounds to dispose of criminal charges based upon what occurred at a violation hearing. Therefore, the holding in *Wiggs* (reversing a motion justice's denial of defendant's motion to dismiss the charges against him on collateral estoppel grounds) was later abrogated by *Gautier*. Still, Petitioner's point needs to be examined in the entire context

of what the violation hearing justice actually stated. The *Wiggs* case had a factual recitation detailing how several individuals had ostensibly broken into and entered a victim's apartment at night and assaulted him. The victim testified that Wiggs had later entered and allegedly kicked the victim in the head. The violation hearing justice, as noted by the Rhode Island Supreme Court, appeared to state on the record:

> "Because Mr. Wiggs is on probation, his behavior must be not only lawful, it must be impeccable. The standard by which the Court must be satisfied is that the Court must be reasonably satisfied, not beyond a reasonable doubt, not even that Mr. Wiggs committed a felony, not even that he committed a misdemeanor, but that he was not of good behavior. Mr. Wiggs' behavior was not good.
>
> "There is not sufficient evidence, it's true, to prove even beyond a reasonable satisfaction standard, that Mr. Wiggs was present at the time the apartment was broken into and enter[e]d by the others, however, Mr. Wiggs had no legitimate purpose to be on those premises, and I find that he was trespassing. *I also find that he was involved in an assault, albeit a simple assault, on the victim James Burns, and his behavior otherwise was not in conformance with the behavior which should be consistently displayed by anyone who was on probation. Probation is not a joke; a suspended sentence is not a joke.* A person can be violated for hanging around with the wrong people only, which apparently Mr. Wiggs is developing a habit of doing.
>
> "For those reasons, Mr. Wiggs is declared to be a violator." *Wiggs,* 635 A.2d at 274 (emphasis added).

Petitioner next directs the Court's attention to *State v. Forbes*, 925 A.2d 929 (R.I. 2007) arguing that the "Rhode Island Supreme Court *seemingly relaxed* the standard it endorsed in *Wiggs,* holding that the probationer's aggressive actions towards the alleged victim and uncooperative nature during his arrest did not constitute a failure to keep the peace or remain on good behavior." Pet'r's Mem. at 18 and n.48 (emphasis added). This Court rejects that argument. Again, context being important, a look at the entire case details the level of the Supreme Court's scrutiny. Testimony from several witnesses revolved around the defendant's alleged sexual assault

of this victim. The violation hearing was combined with a bail hearing. The hearing justice made five specific findings, none of which amounted to commission of a crime. In reversing the finding of violation against the defendant, the Supreme Court addressed each specific finding:

> "Although there is ample evidence in the record that, if credible, would support a finding that defendant violated the conditions of his probation by failing to keep the peace and be of good behavior, the hearing justice pointedly avoided making any factual findings relating to the underlying charge of first-degree sexual assault. The hearing justice explained his reasoning in the following words: 'The real question which we should focus on is whether or not Mr. Forbes raped Ms. Gomes. While I would be inclined to find Mr. Forbes at the very least assaulted Ms. Gomes, that's not my call. That's a call for a jury to decide at trial.' Rather, the hearing justice predicated his determination on the five aforementioned findings. We are of the opinion, however, that these instances of 'bad behavior,' neither individually nor collectively, are sufficient to support an adjudication of probation violation." *Forbes*, 925 A.2d at 934.

The Supreme Court further noted that "in the present case, the hearing justice did not articulate his assessment of the witnesses' credibility." *Id*. at 935. This case refutes Petitioner's argument that a probationer, facing a violation hearing, is "guaranteed" to be found to be a violator and that finding will most likely will be upheld due to an imperfect level of scrutiny on any appeal to the Supreme Court.

Petitioner next directs the Court's attention to *State v. McCarthy*, 945 A.2d 318 (R.I. 2008) where "the Rhode Island Supreme Court upheld the hearing judge's finding that the probationer was a violator solely on the basis that he failed to cooperate with the requirement for sex-offender counseling[.]" Pet'r's Mem. at 18-19 and n.49. Petitioner argues that "the *McCarthy* decision and a 'strong accompanying dissent' . . . indicate some reluctance with finding a probation violation for conduct that is not expressly proscribed by a general or special condition." *Id*. at 19. This Court first notes that McCarthy "pled *nolo contendere* to three counts of second-degree child molestation [and] was sentenced to twenty years imprisonment. The defendant was to serve three years of that sentence, and the remaining seventeen years were suspended and he was placed on probation. The

conditions of probation required that defendant have no victim contact, that he engage in a sex-offender program, and that he register as a sex offender." *McCarthy*, 945 A.2d at 319-320. Thus, the requirement of sex offender counselling was an *express condition* of probation and was permissible under the applicable statute. *See* § 12-19-8.1 at (b) and (d) discussed *supra* at part A 1 hereof. The case involved a scenario where the defendant was presented as a violator and received a violation hearing where evidence was presented relative to the defendant driving by the home of his sex-offender counselor while informing the agency by phone that he was doing so, and also by the presence of female underwear taken from the lining of defendant's coat when he was arrested. *McCarthy*, 945 A.2d at 320. The state also alleged that the defendant failed to attend sex-offender counseling sessions. *Id*. at 320. The Supreme Court upheld the hearing magistrate's finding of violation primarily on the ground that the defendant failed to comply with certain conditions of his probation, including sex-offender counseling. The Supreme Court specifically noted that:

> "In the case before us, the magistrate who conducted defendant's probation violation hearing *discussed the evidence that had come before him, weighing the evidence and assessing the credibility of witnesses, as is required*. *See Forbes,* 925 A.2d at 934. Although the magistrate noted that two of the allegations would not be sufficient, if either had been standing alone, to merit a determination that defendant had breached a condition of his probation, he nevertheless held that the three allegations combined amounted to a probation violation. We agree with the result that the magistrate reached in his decision. *The defendant had been made aware of the conditions of his probation: significantly, on March 29, 2001, he signed a 'Conditions of Supervised Probation' form acknowledging the requirement that he comply with certain conditions of his probation, including attendance at sex-offender counseling*." *Id*. at 328. (emphasis added).

The Supreme Court further expressly noted:

> "The defendant's legal arguments concerning the non-criminal nature of the underwear possession and the possible explanation for the "drive by" incident *are not frivolous*; but, because we agree that defendant's failure to remain current with

> his sex-offender counseling, of which requirement defendant was well aware when he affixed his signature to the "Conditions of Supervised Probation" document, was a patent violation of a clear term of his probation, we need not and do not address the other two allegations upon which the magistrate based his decision. *Failure to cooperate with the requirement that he attend sex-offender counseling could reasonably have been found by the magistrate to be a violation of defendant's probation. We therefore cannot say that the magistrate's determination that defendant violated the terms of his probation was arbitrary or capricious*." *Id.* at 328 (emphasis added).

While the 4-1 Opinion does contain a dissent, the dissenting justice immediately acknowledged that this was a "close case." *Id.* at 329. The dissent went on to note that there was no evidence that the defendant violated the other two conditions of his probation, but did note that while defendant's "attendance [at sex-offender counseling] was not a model of consistency, . . . there was ample testimony that McCarthy encountered financial and health problems, both of which became obstacles to his attendance."[13] *Id*. at 329. The dissent also noted that "this bumpy road initially was not considered to be serious enough to justify violating McCarthy in the minds of either of two different probation officers who supervised him. The real problem did not arise until McCarthy had been dismissed from a particular group-therapy session, after he drove by the home of his drama therapists. . . . and then told the program coordinator for the counseling agency that he was doing so. That is what sparked the notice of violation, and indeed, it is the only incident referred to in the Super. R. Crim. P. 32(f) notice that was filed on November 18, 2004." *Id*. at 329. In further articulation, the dissenting justice noted:

> "With respect to McCarthy's failure to attend counseling to the satisfaction of his probation officer, I find it troubling that before the 'drive by' incident, McCarthy's lack of cooperation never occasioned the filing of a notice of violation. Equally troubling to me is the reasoning of the hearing magistrate, who combined two

[13] The Opinion specifically recites that the hearing magistrate took the financial means and health of the defendant into account when fashioning a sentence for the violation. *See McCarthy*, 945 A.2d at 326.

> incidents that he specifically found not to be violations with an allegation of partial noncompliance with counseling to determine that McCarthy was a violator. I also find the probation officers' failure to assist McCarthy in complying with the terms of his probation to be problematic. It is the function of probation counselors to work with offenders to aid them in becoming productive and law-abiding members of society." *Id.* at 329-330.

A thorough reading of *McCarthy* illustrates a reaffirmance of all of the tenets of the probation violation system discussed herein, as well as an appropriate analysis for a hearing justice to utilize when considering an alleged violation by a defendant for failure to engage in or complete certain counseling *required, as an express condition of probation*, and the defendant becomes unable to complete such counseling due to health and/or financial problems. This Court is not persuaded that the *McCarthy* opinion and dissent "indicate some reluctance with finding a probation violation for conduct that is not expressly proscribed by a general or special condition." Pet'r's Mem. at 19. *McCarthy* appears to involve an express condition of probation which was perfectly permissible, as discussed *supra*.

Petitioner's suggestions about the character of the dissent in *McCarthy* become more implausible when considered in light of *State v. Pitts*, 960 A.2d 240 (R.I. 2008), the next case that Petitioner draws the Court's attention to. Decided less than eight months after *McCarthy*, the same justice who wrote the *McCarthy* dissent authored the unanimous opinion of five justices upholding a finding of violation in *Pitts* after a contested hearing. Pitts was found to be masturbating in his van, a contention he denied at the hearing. The hearing justice stated that "even if Pitts's conduct did not satisfy the elements of the crime of disorderly conduct, he nonetheless found that Pitts exposed himself and that his actions clearly were inappropriate and not in keeping with the good behavior required of a probationer." *Id*. at 244. The Rhode Island Supreme Court ultimately ruled, "In our opinion, the fact that Pitts was engaged in a sexual act in a vehicle on a public highway, at

a time when he was on probation for prior sex offenses, constituted a violation of the terms of his probation. Especially in light of this defendant's prior convictions for child sexual molestation, his masturbating in his van near a school *undoubtedly does not meet the test of good behavior*." *Id.* at 246 (emphasis added).

While Petitioner suggests that "[a]ttempts to rationalize the Rhode Island Supreme Court's *Wiggs*, *Forbes*, *McCarthy*, and *Pitts* decisions results in a quagmire of contradictory guidance to probationers of what constitutes behavior [that] would and would not form the basis for a violation," Pet'r's Mem. at 19, this Court disagrees. A careful reading of the context of each of the cases that Petitioner points to clearly and consistently suggests certain duties incumbent on any hearing justice presiding over a probation violation hearing and the proper scrutiny to be applied by the Rhode Island Supreme Court on a case-by-case basis. All of that supports the underlying policy allowing a defendant to remain free on probation in lieu of incarceration as set forth in the statutes, Court rules, and the *Tillinghast* case, discussed, *supra*. This Court is not persuaded otherwise.

3

Claim of being "Essentially on Trial"/"Proxy Trial"

Petitioner argues that "[d]espite being essentially on trial for a new crime, [Petitioner] was not afforded the rights due to a defendant in a criminal proceeding." Pet'r's Mem. at 21, § 4.2. Petitioner next expressly acknowledges the case of *Morrisey v. Brewer*, 408 U.S. 471 (1972), wherein the United States Supreme Court "held that minimal due process requirements for parole revocation include a preliminary inquiry in the nature of a preliminary hearing to determine probable cause, to be conducted at or reasonably near the place of the alleged parole violation or arrest and as promptly as convenient after arrest, and a revocation hearing with respect to which

certain specified minimal due process requirements must be observed." *Morrissey*, 408 U.S. at 471. The United States Supreme Court analyzed some of the policy considerations involved in its holding. As to policy, the United States Supreme Court noted:

> "During the past 60 years, the practice of releasing prisoners on parole before the end of their sentences has become an integral part of the penological system. Note, Parole Revocation in the Federal System, 56 Geo.L.J. 705 (1968). Rather than being an ad hoc exercise of clemency, *parole is an established variation on imprisonment of convicted criminals. Its purpose is to help individuals reintegrate into society as constructive individuals as soon as they are able, without being confined for the full term of the sentence imposed*. It also serves to alleviate the costs to society of keeping an individual in prison. *The essence of parole is release from prison, before the completion of sentence, on the condition that the prisoner abide by certain rules during the balance of the sentence.* Under some systems, parole is granted automatically after the service of a certain portion of a prison term. Under others, parole is granted by the discretionary action of a board, which evaluates an array of information about a prisoner and makes a prediction whether he is ready to reintegrate into society.
>
> *"To accomplish the purpose of parole, those who are allowed to leave prison early are subjected to specified conditions for the duration of their terms. These conditions restrict their activities substantially beyond the ordinary restrictions imposed by law on an individual citizen.* Typically, parolees are forbidden to use liquor or to have associations or correspondence with certain categories of undesirable persons. Typically, also they must seek permission from their parole officers before engaging in specified activities, such as changing employment or living quarters, marrying, acquiring or operating a motor vehicle, traveling outside the community, and incurring substantial indebtedness. Additionally, parolees must regularly report to the parole officer to whom they are assigned and sometimes they must make periodic written reports of their activities. Arluke, A Summary of Parole Rules—Thirteen Years Later, 15 Crime & Delin. 267, 272—273 (1969)." *Morrissey*, 408 U.S. at 477-78 (footnote omitted) (emphasis added).

As to the *enforcement mechanism* related to parole revocation, the United States Supreme Court noted:

> "The enforcement leverage that supports the parole conditions *derives from the authority to return the parolee to prison to serve out the balance of his sentence if*

> *he fails to abide by the rules.* In practice, not every violation of parole conditions automatically leads to revocation. Typically, a parolee will be counseled to abide by the conditions of parole, and the parole officer ordinarily does not take steps to have parole revoked unless he thinks that the violations are serious and continuing so as to indicate that the parolee is not adjusting properly and cannot be counted on to avoid antisocial activity. The broad discretion accorded the parole officer is also inherent in some of the quite vague conditions, such as the typical requirement that the parolee avoid 'undesirable' associations or correspondence. *Cf. Arciniega v. Freeman*, 404 U.S. 4, 92 S.Ct. 22, 30 L.Ed.2d 126 (1971). Yet revocation of parole is not an unusual phenomenon, affecting only a few parolees. It has been estimated that 35%—45% of all parolees are subjected to revocation and return to prison. Sometimes revocation occurs when the parolee is accused of another crime; *it is often preferred to a new prosecution because of the procedural ease of recommitting the individual on the basis of a lesser showing by the State*.
>
> "*Implicit in the system's concern with parole violations is the notion that the parolee is entitled to retain his liberty as long as he substantially abides by the conditions of his parole.*" *Morrissey*, 408 U.S. at 478-79 (footnotes omitted). (emphasis added).

The United States Supreme Court next makes it clear that parole revocation proceedings are not part of a new criminal prosecution:

> "*We begin with the proposition that the revocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocations*. . . . Parole arises after the end of the criminal prosecution, including imposition of sentence. Supervision is not directly by the court but by an administrative agency, which is sometimes an arm of the court and sometimes of the executive. Revocation deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special parole restrictions . . . . We turn, therefore, to the question whether the requirements of due process in general apply to parole revocations." *Morrissey*, 408 U.S. at 480-81(emphasis added).

Petitioner next acknowledges the case of *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), where the United States Supreme Court held that "[p]robation revocation, like parole revocation, *is not a stage of a criminal prosecution*, but does result in a loss of liberty. Accordingly, [it held] that a

probationer, like a parolee, is entitled to a preliminary and a final revocation hearing, under the conditions specified in *Morrissey v. Brewer*." *Gagnon*, 411 U.S. at 782 (emphasis added).

In its objection to Petitioner's argument, the State cites a host of cases where the Rhode Island Supreme Court has approved *Scarpelli*, including *State v Vashey*, 823 A.2d 1151 (R.I. 2003). State's Obj. at 6. The *Vashey* Court stated:

> '"A probation-violation hearing (also referred to as probation-revocation hearing) is not part of the criminal-prosecution process; therefore, it does not call for the 'full panoply of rights' normally guaranteed to defendants in criminal proceedings.' *Hampton v. State*, 786 A.2d 375, 379 (R.I. 2001) (quoting *State v. Znosko*, 755 A.2d 832, 834 (R.I. 2000)). 'The minimum due process requirements of a violation hearing call for notice of the hearing, notice of the claimed violation, the opportunity to be heard and present evidence in defendant's behalf, and the right to confront and cross-examine the witnesses against defendant.' *State v. Casiano*, 667 A.2d 1233, 1239 (R.I. 1995) (quoting *State v. Bourdeau*, 448 A.2d 1247, 1249 (R.I. 1982)). '[T]he hearing justice's only responsibility is to determine, according to the Rule 32(f) requirements, whether he or she is reasonably satisfied that the defendant has violated one or more of the terms of his or her probation."' *Vashey*, 823 A.2d at 1154-55.

Petitioner expressly acknowledges this principle citing *State v. Gautier*, 871 A.2d at 359 and *State v. Campbell*, 833 A.2d at 1233. *See* Pet'r's Mem. at 21 and n.62 and n.63, respectively. Petitioner further notes a list of certain concepts that do not apply at a violation hearing, Pet'r's Mem. at 22 and accompanying notes and argues that, "Once the State charges a probationer with a new crime, *a violation of probation finding is all but guaranteed,* and judicial grace is the only recourse to avoid an imposition of a term of incarceration." Pet'r's Mem. at 22. A review of the Rhode Island cases cited thus far, especially including *State v. Forbes*, *supra*, leads this Court to conclude that Petitioner's assertion that "a violation of probation finding is all but guaranteed" is not accurate. Furthermore, given the policy considerations inherent in the statutes, Court rules, *Tillinghast* case, *supra*, and as discussed in *Morrissey* and *Scarpelli*, *supra*, this Court feels that Petitioner's claim of "[e]ssentially being on trial for a new crime" is a mischaracterization of an

extensive body of law developed and consistently affirmed over decades. This Court is not persuaded.

Petitioner next argues that "[t]he Violation of Probation Hearing Process . . . allows for the State to use a Proxy Trial as a Substitute for [Petitioner's] Criminal Trial." Pet'r's Mem. at 23 While the Rhode Island Supreme Court has not defined "proxy trial" as of the date of this Decision, Petitioner suggests that it involves a scenario "where the probation revocation proceedings are a substitute for a regular criminal trial, thus denying the probationer his or her fundamental due process rights." *Id*. This Court is also aware that legal writers and commentators have used that precise term. *See e.g.* Daniel F. Piar, *A Uniform Code of Procedure for Revoking Probation*, 31 Am. J. Crim. L. 117, 119 (2003), ("That task is further complicated by an important *practical effect* of probation revocations, which I will call the *"proxy trial"* effect. Where a probationer is alleged to have violated probation by committing a new crime, probation revocation proceedings can become a substitute for a regular criminal trial.") (emphasis added). *See also* Lara Montecalvo,[14] Kara Maguire, Angela Yingling, *No Exit, No End: Probation in Rhode Island*, 21 Roger Williams U. L. Rev. 316 (2016). In relevant part, the authors state and portray, with some eloquence, the probation violation circumstances existing at that time in Rhode Island, citing other authors and commentators as well as Rhode Island case law.

> "Given this probation violation landscape, prevailing at a violation hearing is a Herculean task, even for the innocent. As a result, a defendant facing flimsy or questionable allegations is often left to one of two unfortunate fates. First, if she elects to go to a hearing, she has a good chance of losing on extremely weak, unreliable, or even unsupported evidence, and facing years--if not decades--of imprisonment as a result, even if the criminal charges are later dismissed or amended. *This phenomenon--often referred to as the "proxy trial" problem*--allows the state to 'supplant[] the use of the more rigorous trial proceeding, and in effect create[] a criminal conviction where one might not otherwise be available.' This is

[14] Author Lara Montecalvo was appointed as a justice of the United States Court of Appeals for the First Circuit on September 30, 2022.

> especially true in Rhode Island, where a hearing justice may consider the 'totality of the circumstances' when determining what sentence to impose after a violation hearing, and has wide discretion in fashioning the imprisonment sentence. Thus, a hearing justice can take the new allegations into consideration when shaping a violation sentence, even if liability for that conduct has not been established through the rigorous criminal prosecution process." *Id*. at 325-26 (footnotes omitted). (emphasis added).

Thus refined, it is clear to this Court that the "practical effect" of a probation violation proceeding—i.e. a lengthy sentence imposed for a relatively minor offense, such as disorderly conduct,—is something that diligent counsel need to put before a hearing justice at all times[15] during a probation violation proceeding. Both counsel and a hearing justice, in addition to the facts and circumstances of a specific case, should be aware of the policy considerations of the statutes, Court rules, and the *Tillinghast*, *Morrissey*, and *Scarpelli* cases discussed *supra*.

The United States Supreme Court further examined policy considerations in the context of a parole revocation proceeding and the contemplation of whether or not to mandate the application of the exclusionary rule.[16] In its holding that parole boards were not required by federal law to exclude evidence obtained in violation of the Fourth Amendment, the United States Supreme Court noted:

> "The social costs of allowing convicted criminals who violate their parole to remain at large are particularly high, see *Morrissey v. Brewer,* 408 U.S. 471, 477, 483, 92 S.Ct. 2593, 2598, 2601, 33 L.Ed.2d 484, and are compounded by the fact that parolees (particularly those who have already committed parole violations) are more likely to commit future crimes than are average citizens, see *Griffin v.*

[15] Generally, a probation violation proceeding proceeds in stages. There is a presentment placing a defendant on notice of the allegations; one or more conferences involving discussion of the merits (of the proceeding); mitigation; offers to resolve; an evidentiary hearing on the violation; findings of the hearing justice relative to a violation; appropriate sentencing arguments if a violation is found; and imposition of an appropriate sentence by hearing justice.

[16] The exclusionary rule generally prevents the government from utilizing most evidence gathered in violation of the United State Constitution. *See Mapp v. Ohio*, 367 U.S. 643 (1961) expressly making the rule applicable to state actors under the Fourteenth Amendment to the United States Constitution.

> *Wisconsin,* 483 U.S. 868, 880, 107 S.Ct. 3164, 3172, 97 L.Ed.2d 709." *Pennsylvania Board of Probation & Parole v. Scott*, 524 U.S. 357, 358 (1998).

On review, an appellate court should be discerning of the findings and rationale of the hearing justice when it determines whether a hearing justice acted arbitrarily or capriciously in the finding of a violation and imposition of an appropriate sentence. *See* especially *Forbes*, *McCarthy,* and *Pitts* discussed *supra*.

While this Court acknowledges the validity of Petitioner's points on this issue, it declines the invitation to vacate the findings of violation and terminate Petitioner's sentence(s) on the grounds that the probation violation system, as a whole, is unconstitutional. This particular conclusion rests on a number of factors. First, it is axiomatic that courts approach constitutional challenges with "great deliberation, caution, and even reluctance." *Zab v. Rhode Island Department of Corrections*, 269 A.3d 741, 747 (R.I. 2022). Second, Petitioner had the opportunity to appeal the findings of violation and resulting sentences. That opportunity was not pursued to fruition. The findings and rationale of this Court as to Petitioner's violation(s) and ultimate violation sentence(s) are set forth in detail in Petitioner's Exhibit 8, which is a complete transcript of the three days of violation hearing and sentencing, discussed *supra* and *see* n.12, *supra*. This Court declines, after reviewing same, and after some twelve years of deliberation, to determine that those findings are arbitrary and capricious. Third, "[o]ne who challenges the constitutionality of a statute bears the burden of proving beyond a reasonable doubt that the challenged statute violates either the Rhode Island or the United States Constitution." *See State v. Germane*, 971 A.2d 555, 573 (R.I. 2009) (citing *Gem Plumbing & Heating Co. v. Rossi,* 867 A.2d 796, 808 (R.I. 2005); *see also Cherenzia v. Lynch,* 847 A.2d 818, 822 (R.I. 2004). Fourth, "legislative enactments of the General Assembly are *presumed* to be valid and constitutional." *Newport Court Club Associates v. Town Council of the Town of Middletown,* 800 A.2d 405, 409 (R.I. 2002) (emphasis added).

Fifth, Courts should not legislate from the bench. *See State v. Diamante*, 83 A.3d 546, 550 (R.I. 2014).

To eliminate the system, especially the statutes and rules discussed up to this point, would necessarily involve a rewrite of the entire system. In light of the policy consideration of those statutes, Court rules, and *Tillinghast* and other cases cited, and also in light of the host of Rhode Island Supreme Court opinions cited herein, upholding the specific premise(s) that Petitioner claims amount(s) to a flaw(s), this Court finds that Petitioner has not met his burden of proving beyond a reasonable doubt that the challenged statute violates either the Rhode Island or the United States Constitution.

There are other more basic policy considerations. In the Rhode Island Constitution, article 1, section 2 states, in pertinent part, "All free governments are instituted for the protection, safety, and happiness of the people. All laws, therefore, should be made for the good of the whole . . . " While the import of such words may mean different things to different individuals, especially in the context of victims versus defendants, the best way to proceed against any perceived flaw in the process is by the careful application of change accomplished carefully and deliberatively through the committee process[17] and with the time-honored application of appellate scrutiny, in appropriate cases, on a full record.

[17] *See e.g.* Legislative Committee – "A group of legislators [or others] appointed to help a legislature conduct its business esp. by providing careful consideration of proposals for new legislation within a particular field so that the entire body can handle its work efficiently without wasting time and effort on unmeritorious submissions." Black's Law Dictionary 289 (11th ed. 21019). .

4

The Sentence is Not Excessive

Petitioner maintains "[t]his Court's imposition of a seventeen (17) year term of incarceration of Botelho's nineteen (19) year suspended sentence in Case No. [P]1-2001-3183A is excessive." Pet'r's Mem. at 25. While Petitioner has not appealed his sentence, he does acknowledge that the hearing justice has "wide discretion to determine whether to execute *any or all* of a defendant's previously suspended sentence." *Id*. at 26 and n.82 (citing *State v. Molina*, 251 A.3d 485, 495-96 (R.I. 2021) (quoting *State v. McKinnon-Conneally*, 101 A.3d 875, 879 (R.I. 2014)) (emphasis in original). Petitioner also acknowledges that "the hearing justice may not abuse his or her discretion when determin[ing] whether to execute any or all of a defendant's previously suspended sentence." *Id*. at 26 and n.83 (citing *State v. Roberts*, 59 A.3d 693, 697 (R.I. 2013)). Petitioner goes on to argue, "Nevertheless, 'when a hearing justice is deciding how much of a previously suspended sentence to execute, his or her primary focus should be on the nature of the first offense . . . [while the] circumstances of the second offense . . . may also be taken into account." *Id*. at 26 and n.84 (citing *McKinnon-Conneally*, 101 A.3d at 879). Petitioner continues arguing that, "In the present matter, this Court concentrated almost exclusively on Botelho's actions regarding the second offense, not the first offense. [Thus], [t]his Court did not devote its primary focus to the first offense; instead of focusing on the second offense. [Therefore] [t]his Court's primary focus on the second offense, not the first offense, when executing seventeen (17) years of Botelho's previously suspended sentence constitutes an abuse of discretion. Accordingly, this Court abused its discretion when modifying Botelho's sentence after determining him to be a probation violator." *Id.* at 26.

The State counters that Petitioner has the burden to demonstrate that his sentence is manifestly excessive. State's Obj. at 8 (citing *State v. Ortega*, 755 A.2d 841 (R.I. 2000)). The State further notes that Petitioner has not provided any other examples of sentences to demonstrate that his sentence is manifestly excessive. *Id*. Furthermore the State submits that this Court was "restrained" in the imposition of its sentence as it could have imposed the entire nineteen years, and next reminds the Court that this was the "fifth time that the Petitioner had been declared a violator of this probationary sentence." *Id*. *See also* Pet'r's Mem. at p 4-10, *supra*, and exhibits referenced therein demonstrating Petitioner's record in the specific context of this case.

While *Ortega* involved an appeal from a defendant's motion to reduce sentence pursuant to Rule 35 of the Superior Court Rules of Criminal Procedure, that process is available in the context of a probation violation proceeding. *See State v. Fairweather*, 138 A.3d 822 (R.I. 2016). In *Fairweather*, involving imposition of a violation sentence of seventy-two months to serve out of the seventy-eight months of suspended sentence remaining, the Supreme Court noted that:

> *"It is well established that a hearing justice has 'wide discretion to determine whether to execute any or all of a defendant's previously suspended sentence.' State v. McKinnon–Conneally, 101 A.3d 875, 879 (R.I. 2014); see State v. Roberts, 59 A.3d 693, 697 (R.I. 2013). This Court's 'review of a probation-violation sentence is for an abuse of discretion only.'* McKinnon–Conneally, 101 A.3d at 879.
>
> "We recognize that the hearing justice did consider defendant's criminal record and previous Rule 32(f) presentments—with particular attention to one of those. With respect to defendant's contacts with the criminal justice system, the hearing justice stated that the court could 'only draw one conclusion, and that is that [defendant] cannot comport himself within the confines of the law or keep the peace and be of good behavior * * *.' The hearing justice further stated that the 'lenient treatment' defendant had received in the past had 'not in any, way, shape, or form deterred Mr. Fairweather, because he continues to engage in this type of behavior * * *.' *In our view, the hearing justice did not abuse his discretion in considering defendant's prior record as it relates to his ability to be rehabilitated, which is a factor to be considered in sentencing. See [State v.] Shepard,* 33 A.3d [158], 165–66 [R.I. 2011]*; State v. Jackson,* 966 A.2d 1225, 1230 (R.I. 2009)*; State v. Sylvia,* 871 A.2d

954, 958–59 (R.I. 2005) (per curiam)*; State v. Wisehart*, 569 A.2d 434, 437 (R.I. 1990).

"Furthermore, in spite of defendant's argument to the contrary, the record indicates that, in determining defendant's sentence, the hearing justice did consider the fact that the majority of defendant's prior incidents at issue had occurred in 1997 or before. The hearing justice explicitly stated that there had been a "hiatus" in defendant's criminal activity.

"It is clear to us that, after adjudicating the defendant to be a violator, the hearing justice did not abuse his discretion in fashioning the defendant's sentence. The hearing justice's execution of seventy-two months of the defendant's suspended sentence was not "excessive" and did not constitute an abuse of discretion. *See McKinnon–Conneally*, 101 A.3d at 879–80. *After reviewing the record, it is our view that the hearing justice properly considered the defendant's lack of amenability to rehabilitation* and did in fact recognize that the majority of the defendant's prior offenses had taken place at an earlier time before fashioning the defendant's sentence." *Fairweather*, 138 A.2d at 829 (emphasis added).

Most Charges Involve a Domestic Violence Element

In the instant matter, on October 17, 2001, a grand jury indicted Petitioner on two counts of Domestic Violence – Burglary, one count of resisting arrest, and one count of felony assault in case P1-2001-3183A. *See* Pet'r's Mem. at 4-10, *supra*, and exhibits referenced therein. Petitioner thereafter entered a plea of nolo contendere to the two counts of Domestic Violence – Burglary and one count of felony assault. *Id.* He received sentences of twenty-five years with six years to serve and the balance suspended with probation on Count 1 charging Domestic Violence – Burglary, and also a full sentence of twenty years with six years to serve with the balance suspended with probation on the Domestic Violence – Burglary in Count 2 and the Felony assault in Count 4, with all sentences running concurrently. *Id*. In case P2-2010-0804A, on October 21, 2010, Petitioner entered a plea of nolo contendere to a charge of domestic violence – simple assault third offense. He received a sentence of eight years with one year to serve and seven years suspended with probation. *Id*. In case K2-2010-0524A, on October 21, 2010, Petitioner entered

a plea of nolo contendere to a charge of domestic violence - criminal violation of a protective order, third offense. He received a sentence of eight years with one year to serve and seven years suspended with probation. Sentences in P2-2010-0804A and K2-2010-0524A were to run concurrently. *Id*. Thereafter, on September 28, 2011, the East Providence Police Department arrested Botelho, charging him with violating §§ 11-5-3(b) and 12-29(a)(1) Domestic Violence – Simple Assault, §§ 11-45-1(a) and 12-29-2(a)(4) Domestic Violence – Disorderly Conduct, and § 12-7-10 Resisting Arrest. Pet'r's Mem. at 8. Also, on September 28, 2011, the Office of the Attorney General presented Botelho as a violator before the Superior Court regarding Case Nos. 1-2001-3183A, P2-2010-0804A, and K2-2010-0524A. On September 30, 2011, the Office of the Attorney General filed a 32(f) Violation Report concerning Case Nos. P1-2001-3183A, P2-2010-0804A, and K2-2010-0524A. In the 32(f) Violation Report, the State alleges that Botelho "did fail to comply with a specific condition of probation in that he/she failed to keep the peace and be of good behavior. Said violation of probation is not contingent upon any specific criminal offense." *Id*. The probation violation hearing centered around these events and allegations.

On December 15, 2011, the Office of the Attorney General charged Botelho with the five counts in Case No. P2-2011-3378ADV related to the incident allegedly occurring in East Providence, Rhode Island on September 28, 2011. These charges included a charge of Domestic Violence – Felony Assault (Count 1), Domestic Violence – Simple Assault, (Counts 2 and 3), and Resisting Arrest (Count 4). *Id*. at 8-9. On February 24, 2014, the Office of the Attorney General dismissed all four counts in Case No. P2-2011-3378ADV pursuant to Rule 48(a) of the Superior Court Rules of Criminal Procedure. The State then filed a *Dismissal under Criminal Rule 48(a)* pleading stating:

> "Now comes the Attorney General of the State of Rhode Island and dismisses the above-entitled matter under Rule 48(a), Rules of Criminal Procedure, for the following reason(s):
>
> "Case dismissed the interests of justice, as the state and victim are satisfied with the 17 year sentence that the defendant is serving, the basis of that violation being the facts contained in this case.
>
> "This dismissal is NOT [*sic*] based upon a lack of probable cause nor does the state or its agents believe there is a doubt about the culpability of the defendant. In fact, the state believes probable cause does exist and has no doubt about the culpability of the defendant." *Id*. at 10.

Considering these uncontroverted facts, it is clear to this Court that most of Petitioner's prior charges involved a domestic violence element.

Domestic Violence Tends to Escalate

Legal writers and commentators have noted that domestic violence tends to escalate. *See* Natalie Loder Clark, *Crime Begins at Home: Let's Stop Punishing Victims and Perpetuating Violence*, 28 Wm. & Mary L. Rev. 263 (1987) ("Domestic violence always escalates, and one who has been abused for many years may very reasonably develop a mortal fear."). *Id*. at 266 and n.10. *See also id.* at 290-91. ("One must bear in mind the basics: that domestic violence escalates, that economic and psychological dependencies form, and that many practical obstacles stand in the way of victim self-help."). *See also* Andrea M. Kovach, *Prosecutorial Use of Other Acts of Domestic Violence for Propensity Purposes: A Brief Look at Its Past, Present, and Future*, 2003 U. Ill. L. Rev. 1115, 1131 (2003) ("studies have shown that batterers will continue the abuse unless there is some intervention: domestic violence defendants have a high rate of recidivism"). *Id*. at 1131 and n.136. *See also id*. at 1141 ("public policy considerations behind this evidence rule include the lack of witnesses in domestic violence cases and thus the need for corroboration, frequent victim reluctance to testify due to fear of the defendant, and the cyclical nature

of domestic violence: *the ongoing pattern of abuse escalates in frequency and severity over time*") (footnote omitted) (emphasis added). *See further* Jane K. Stoever, *Enjoining Abuse: The Case for Indefinite Domestic Violence Protection Orders*, 67 Vand. L. Rev. 1015, 1020–21 (2014) ("Abuse is recurrent and typically escalates in frequency and severity over time, with past intimate partner violence being the 'best predictor of future violence.'") (footnotes omitted). Finally, see Alison J. Nathan, *At the Intersection of Domestic Violence and Guns: The Public Interest Exception and the Lautenberg Amendment*, 85 Cornell L. Rev. 822 (2000) ("Recidivism is a prevalent factor: domestic violence is almost always characterized by a pattern of abusive conduct that continually escalates in both frequency and severity.). *Id*. at 824.

For more recent studies and reports, see Alvin *Buyinza@masslive.com*, "More needs to be done': Report shows more domestic violence in Massachusetts," dated January 4, 2024. Last accessed March 5, 2024. For actual report from "The State Domestic Violence Fatality Review Team and the Executive Office of Public Safety and Security" see https://bloximages.chicago2.vip.townnews.com/statehousenews.com/content/tncms/assets/v3/editorial/4/1d/41dd1792-aa65-11ee-bc99-cf1326788c2e/6595a67649048.pdf, 13 pages, last accessed March 5, 2024.

Sentencing Transcript

Petitioner's application contains a full transcript of the entire violation proceeding occurring over three days. Exhibit 8 contains 197 pages (hereinafter simply Transcript or Tr.). It contains the evidentiary hearings, the arguments, and the sentence on violation, along with this Court's reasoning and rationale. While fully accessible in the Court's electronic file, some points are emphasized here. Pages 164-175 of the Transcript relate to the Court's finding of violation. At one point, the Court acknowledges the testimony of the complaining witness recounting that the

Petitioner said to her: "We're done. I'm going to kill you." Tr. at 165:20-21. The Court acknowledges that the complaining witness further testified that she was "*attacked, . . . pushed against the wall, . . . punched in the head, [s]he fell, ...was kicked, . . . dragged around, . . . her husband dragged or grabbed her hair.*" *Id*. at 165:22-25 (emphasis added). At page 172, the Court acknowledges listening to four minutes and thirty-one seconds of a 911 call noting the Petitioner was "angry." *Id*. at 172:13-18. Without any suggestion as to Petitioner's *guilt,* the Court finds that Petitioner, "*at a minimum, . . .* engaged in fighting, threatening, and tumultuous behavior." *Id*. at 173:13-15 (emphasis added). Taking into account Petitioner's past record, the Court stated, "I can't predict the future. *I'm very interested in trying to curb what is at least apparent as a continuing course of conduct. . .*" *Id*. at 174:5-7 (emphasis added) (implying an apparent escalation into an even more serious or possibly fatal incident).

During the sentencing arguments, the State brought to the Court's attention the Petitioner's lengthy criminal history from 1986. *Id.* at 177:20-183:13. The prosecutor also brought forth the statements of the complaining witnesses. *Id*. at 182-183.

Petitioner, at the sentencing phase of the violation hearing, through counsel, acknowledged that Petitioner's record "speaks for itself." *Id.* at 183:16-17. Defense counsel also brought out Petitioner's issues with drug and alcohol abuse, his age, and family circumstances including his extended family. *Id*. at 183:19-186:22. Petitioner, at that time, was also given an opportunity to address the Court. *Id*. at 187:7-188:16.

In sentencing, this Court acknowledged that certain cases indicate that a violation sentence "*is imposed primarily on the prior cases*." *Id*. at 188:18-20 (emphasis added). This Court also acknowledged that it could also, "*take the new conduct into account*," as Petitioner has acknowledged, *supra*. *Id.* at 189:1-2 (emphasis added). The Court stated, *"The whole purpose*

for having a probation violation hearing out ahead of the trial is for the purpose of protecting the public. It's an effort to make sure or to check on whether or not probation is working because it's the attorney general's job, under their duties, under the constitution, to look after the safety and the happiness of the people, to make sure that the public welfare is served." *Id*. at 189:2-9 (emphasis added).

In assessing whether "probation was working," the Court took into account Petitioner's record. *Id*. at 189:20-25. This Court noted that it had seen, implying reference to Petitioner's criminal record, "*a great many violent crimes . . . rang[ing] from robbery, witness intimidation, burglary, [and] breaking and entering,*" including "*three domestic assaults*." *Id*. at 190:20-25 (emphasis added). The Court also factored mitigation into its sentencing, noting if "*there's anything good we can say about this proceeding . . . is* [*sic*] *that you haven't actually done anything from which there can be no retreat. By that I mean you have not killed anyone. And I emphasize you haven't done that yet. And I can't tell what the future is going to hold*." *Id*. at 191:21-192:6 (emphasis added). In articulating a sentence, this Court stated, "*I'm confident in concluding that probation really isn't working*." *Id*. at 192:17-18 (emphasis added). This Court ultimately imposed seventeen years of the potential nineteen years remaining, indicating it was giving Petitioner "some credit for mitigation" in acknowledging some problems with alcohol and drugs. *Id*. at 193:10-15. The Court also offered some final words of encouragement to Petitioner, reminding him that the Court was "*think[ing]" of the overall success of the probation program,*" along with other factors. *Id*. at 193:22-194:12 (emphasis added).

After considering all of the above, this Court declines to find that the sentence was excessive. Petitioner's claim is denied on these grounds.

5

Vagueness, Definiteness, and Arbitrary Enforcement

Petitioner brings a number of other claims in his Application. Specifically, he alleges that the "Failed to Keep the peace and to remain on Good Behavior Factual Standard Violated the Void-for-Vagueness Doctrine." Pet'r's Mem. at 26, § 4.5. Petitioner argues, "From the probationer's perspective, the requirements to keep the peace and be of good behavior hardly provide fair notice of what behavior may qualify as a probation violation." *Id*. at 28. Petitioner argues, "Accordingly, a law must be defined (1) 'with sufficient definiteness that ordinary people can understand what conduct is prohibited' and (2) 'in a manner that does not encourage arbitrary and discriminatory enforcement.'" *Id*. at 28 (citing *State ex rel. City of Providence v. Auger*, 44 A.3d 1218 (R.I. 2012)).

Petitioner also claims that "[t]he Keep the Peace and be of Good Behavior Factual Burden of Proof Lacks Sufficient Definiteness." *Id*. at 28, § 4.5.1. Petitioner argues, "An ordinary person can not understand what conduct is allowed or prohibited under the *Keep the Peace and be of Good Behavior* Factual Burden of Proof. The *sufficient definiteness* requirement 'is intended to furnish the ordinary citizen with the information necessary to conform his or her conduct to the law' [and] '[m]oreover, [v]ague laws may trap the innocent by not providing fair warning.'" Pet'r's Mem. at 29 and n.97 and n.98 (citing *Auger*, 44 A.3d at 1233). Petitioner finishes his argument by stating, "Clearly, the *Keep the Peace and be of Good Behavior* Factual Burden of Proof lacks sufficient definiteness allowing ordinary people can [*sic*] understand what conduct is prohibited." *Id*. at 29 (emphasis in original).

Petitioner next argues that "[t]he Keep the Peace and be of Good Behavior Factual Burden of Proof encourages arbitrary enforcement." *Id*. at 30. Petitioner states, "As Rhode Island Supreme

Court facilitates a legal system with no precise definition of the terms *keeping the peace* or *good behavior*, lower courts may interpret these terms differently, yielding results arbitrarily depending on the assignment (sic) of a hearing justice. The *Keep the Peace and be of Good Behavior* Factual Burden of Proof is defined in a manner that encourages arbitrary enforcement in the lower courts." *Id*. at 30. Petitioner has not cited any authority for this last sentence.

The State responds by arguing that the "petitioner's obligation as a probationer to keep the peace and be of good behavior is objectively clear and discernable to any reasonable person." State Obj. at 6.

This Court is not persuaded. Petitioner acknowledges the case of *State v. Stierhoff*, 879 A.2d 425 (R.I. 2005) when Petitioner argues "the state has an obligation to frame its criminal statutes so as to inform adequately the persons to whom it is addressed of the type of conduct that is prohibited." Pet'r's Mem. at 27 and n.90 (citing *Stierhoff*, 879 A.2d at 425). In *Stierhoff*, the Rhode Island Supreme Court expressly stated:

> '"Vagueness challenges under the due process clause rest principally on lack of notice.' *State v. Sahady,* 694 A.2d 707, 708 (R.I. 1997). Thus, we have held that '[a]bsent some other constitutional concern, if the facts show that a defendant is given sufficient notice that his conduct is at risk *we see no reason to speculate whether the statute notifies a hypothetical defendant.' Id.* 'This method of generally examining vagueness challenges only as they apply to a particular defendant's factual circumstances furthers our long settled practice of construing 'legislative enactment[s] of the General Assembly to be constitutional and valid * * * whenever such a construction is reasonably possible.'" *Id.* (quoting *State v. Fonseca,* 670 A.2d 1237, 1240 (R.I. 1996))." *Stierhoff*, 879 A.2d at 435-36 (emphasis added).

In the instant case, Petitioner, with ample experience in the criminal justice system, and having been charged with similar domestic violence offenses in the past, was clearly on notice to avoid the precise kind of behavior depicted in Exhibit 8, the transcript described earlier herein. This Court will not speculate on Petitioner's hypothetical about differing definitions of the factual

standard. Furthermore, as this Court earlier noted, a careful reading of the *Wiggs*, *Forbes*, and *McCarthy* cases, discussed *supra*, as well as an understanding of the policy considerations set forth in the *Tillinghast*, *Morrissey*, and *Scarpelli* cases, discussed *supra*, demonstrate a more than adequate hearing and review mechanism employed by the Superior Court and the Rhode Island Supreme Court on a case-by-case basis. The Court denies Petitioner's claims on these grounds.

6

Overbreadth and First Amendment

Petitioner next argues that "[t]he Keep the Peace and be of Good Behavior Factual Standard interferes with First Amendment Freedoms of Free Speech and Free Association." Pet'r's Mem. at 31. Petitioner cites several hypothetical examples, such as "electing not to vocalize his displeasure with the presence of a police officer reasoning that the hearing justice may consider this a *wrong* vocalization, [thereby] constituting a failure to keep the peace or be of good behavior." *Id*. at 32. In this regard, Petitioner cites *Thurairajah v. City of Fort Smith*, 925 F.3d 979 (8th Cir. 2019) (holding that the arrest of the Plaintiff-Appellee yelling a two-word expletive at an Arkansas State Trooper violated the Plaintiff-Appellee's clearly established constitutional rights). *Id*. at 32 and n.109. Petitioner raises further hypotheticals regarding a probationer "[meeting] the . . . wrong people," *id*. at 32-33 and "exercis[ing] his or her right to petition the government for a redress of grievances," *id*. at 33, as further examples as to why the "factual standard should be deemed vague." *Id*. at 33. This Court is not persuaded. Such hypotheticals are not what occurred here. A reading of the Transcript, Ex, 8, makes that abundantly clear.

Petitioner raises the overbreadth doctrine, but that is also inapplicable because this case is not about speech. The Court refers to the activity depicted in Exhibit 8, the Transcript, in declining Petitioner's claimed relief on such grounds.

7

A Word on the "Aggregate"

The Court adds a coda.[18] As this Court articulated earlier, "*Taken in the aggregate*, Petitioner implores this Court to terminate its sentence(s) and vacate its findings of violation based upon the premise that the criminal justice system and mechanisms, taken as a whole, is flawed to the extent that any adjudication of violation and resulting imprisonment is *unconstitutional*." *See* Part III A, *supra*. This Court has carefully considered Petitioner's contentions in light of his precise arguments and the existing case law as well as the legal writings of authors critical of certain components of the probation violation system. The Court notes that Petitioner seeks a termination of his sentence(s) and a vacation of this Court's findings of violation(s) based upon the alleged flaws that Petitioner sets forth. However, in light of Petitioner's own citations, and in light of the policy considerations discussed in the context of the *Tillinghast*, *Morrissey*, and *Scarpelli* cases discussed herein, this Court is loath to dismantle the entire probation violation system.

Rather, any meaningful change should occur incrementally and utilizing a collaborative or committee process along with meaningful review by the Rhode Island Supreme Court. As already stated, courts should not legislate from the bench. *See Diamante*, 83 A.3d at 550. *See also* n.17 elaborating on the committee process.

Some change has already occurred; as the Court has already noted, the factual burden of proof for a probation violation hearing was modified in 2016 to a "fair preponderance of the evidence" standard. Furthermore, since May of 2015, the "Justice Reinvestment" concept has

[18] In music, a more or less independent passage, at the end of a composition, introduced to bring it to a satisfactory close. *See* www.dictionary.com.

been utilized in Rhode Island. *See https://csgjusticecenter.org/wp-content/uploads/2020/01/RhodeIslandOverview.pdf* (last visited 3/7/2024). According to the beginning paragraph of the document, in May of 2015, the Governor, legislative leaders, Rhode Island Supreme Court, the Department of Corrections, and U.S. Department of Justice's Bureau of Justice Assistance (BJA) engaged in a 'justice reinvestment' approach to reduce corrections spending and reinvest savings *in strategies that can reduce recidivism and increase public safety*." *Id*. (emphasis added). The project will "collect and analyze data and *work with state leaders to develop appropriate policy options for Rhode Island*." (Emphasis added.) In 2021, the Rhode Island Senate passed a bill creating a special legislative commission to study justice reinvestment proposals and provide recommendations for reducing the incarceration of women. *See https://webserver.rilegislature.gov/BillText/BillText21/SenateText21/S0245A.pdf* (last visited 3/7/24).

Also, the authors of *No Exit, No End: Probation in Rhode Island*, 21 Roger Williams U. L. Rev. 316, (2016), *supra*, have indicated that they were inspired "by the March 2015 Symposium *Sounding the Alarm on Mass Incarceration: Moving Beyond the Problem and Toward Solutions* ("Symposium") at Roger Williams University School of Law[.]" *Id*. at n.d1. That Symposium is described more fully in n.d1 thereof and it will be reprinted here in its entirety:

> "Inspired by the March 2015 Symposium *Sounding the Alarm on Mass Incarceration: Moving Beyond the Problem and Toward Solutions* ("Symposium") at Roger Williams University School of Law, this Article was drafted in August and early September of 2015. At the same time, Governor Gina Raimondo's Justice Reinvestment Working Group was beginning to work on several proposals to alter the state of probation and incarceration in Rhode Island. *See* Press Release, R.I. Office of the Governor, Raimondo Launches Working Group to Improve Criminal Justice System, Reduce Costs (July 7, 2015), *available at* http://www.ri.gov/press/view/25229. Recently, we have begun to see the results of the group's efforts: The same week this Article was submitted for publication, a majority of justices on the Rhode Island Superior Court proposed a series of

> amendments to the rules that address some of the concerns discussed herein. *See* Order Soliciting Comments on Proposed Amendments to the Rhode Island Superior Court Rules of Criminal Procedure and Superior Court Sentencing Benchmarks (Mar. 16, 2016), https://www.courts.ri.gov/Courts/SupremeCourt/SupremeMiscOrders/Order-ProposedAmendmentsSuperiorCourtRulesofCrProcedure-entencingBenchmarks3-16-16.pdf. We are hopeful that the efforts of the working group, the courts, and others will continue to improve the criminal justice landscape in Rhode Island and render obsolete some of the observations made in this Article. The same may be true of our references to other states' practices because this area of law is rapidly evolving as the states explore ways to encourage rehabilitation while limiting the cost of corrections." *Id*. at 354, n.d1.

Since that time there have been legislative endeavors submitted and debated in committees, with some endeavors attaining passage and evolving into law in this jurisdiction.[19] Furthermore, on April 13, 2022, Governor Daniel J. McKee issued Executive Order 22-25. This established the "Executive Working Group for the Justice Reinvestment Initiative: Reducing Domestic Violence by Improving Justice System Performance in Rhode Island." *See* https://governor.ri.gov/executive-orders/executive-order-22-25 (last visited 3/8/24). In pertinent parts of the initial paragraphs, the Executive Order notes the policy considerations:

> "**WHEREAS**, Rhode Island has utilized the Justice Reinvestment approach to achieve criminal justice reform goals, such as: the creation of standards for batterer's intervention programming to improve program quality and reduce recidivism; . . . the strengthening of evidence-based sentencing and probation violation responses;. . . [and] **WHEREAS,** despite an overall drop in crime, domestic violence remains a pervasive public safety issue in Rhode Island. . . [and] **WHEREAS,** we must continue to deploy resources in our justice system to better understand the scope of domestic violence incidences, arrests, and sentencing trends in Rhode Island and thereby combat and prevent domestic violence incidences in the State." [*Id*.] In light of the above indicated and many other policy considerations contained therein, the Executive Order established the "Executive Working Group for the Justice Reinvestment Initiative: Reducing Domestic Violence by Improving Justice System Performance in Rhode Island." *Id*. (hereinafter "working group"). The working group was tasked with certain "duties" which the Executive Order describes with particularity:

[19] Not all such endeavors relate directly to the probation violation scenario.

> "a. Providing feedback on data presentation related to Rhode Island's domestic violence systems responses. This data will highlight responses from community-based organizations, such as domestic violence service providers, nonprofit organizations, and other community-based supports; law enforcement; the Rhode Island Department of Children, Youth and Families; the Rhode Island Judiciary; treatment providers; the Rhode Island Department of Corrections; and any other appropriate and relevant agencies or organizations;
>
> "b. Promoting awareness of the Initiative; and
>
> "c. Evaluating programmatic and policy measures proposed by Working Group members and/or the Council of State Governments to improve statewide domestic violence responses." *Id*. at item 5.

The Executive Order further requires a report which "shall reflect and include, but not be limited to:"

> "a. Description of the Justice Reinvestment process, including impetus for the Initiative, stakeholder engagement, data collection and analysis, and data presentation;
>
> "b. Discussion of data analysis findings relating to domestic violence responses in Rhode Island;
>
> "c. Detailed proposed policy options and any applicable policy implementation;
>
> "d. A summary of the Initiative's strengths, challenges, findings, and implications; and
>
> "e. Recommendations for systems improvement, including interagency collaboration and service delivery; data collection, sharing and tracking; state and/or agency level policy updates; and legislative proposals." *Id*. at item 6.

This Court feels that this, along with meaningful hearings and appellate review, is the best way to accomplish any significant and sustainable change in the current system of resolving probation violations, especially in light of the policy decisions and considerations described herein. Petitioner has not sustained his burden of convincing this Court to terminate his sentence(s) and vacate its findings of violation(s) for the reasons stated herein.

V

Conclusion

After consideration of the arguments and the lengthy record of the case, as well as the complete context of said record, the Court denies Petitioner's Application for Post-Conviction Relief on all theories and claims advanced for the reasons stated herein. This Court will enter a separate order and judgment in this particular matter consistent with this Decision.

PM-2023-01503

Application to Reinstate Lost Good-Time

I

Facts and Travel

On or about March 17, 2023, Petitioner filed another Application for Post-Conviction Relief in *pro se* format (hereinafter simply application or petition). The hand-written application appeared to use the standard template forms available at the Rhode Island Department of Corrections. The application was not notarized or sworn to under oath but did contain a verification clause.[20] Under the section of the application entitled "RELIEF REQUESTED," Petitioner hand wrote "Reinstate lost good time. Implament [*sic*] Morris Rules. Violation of 14th ammmendment [*sic*]. Reinstate lost good time approximately 1308 days." The Court promptly called the appointed attorney representing Petitioner and advised him of the new petition and this Court's intention to appoint said counsel for the second application and consolidate the matters in the interest of expedition and efficiency. On May 2, 2023, Petitioner was brought to Court and the

[20] Section 10-9.1-3 provides that in addition to filing an application verified by the applicant with the clerk of the court, "[f]acts within the personal knowledge of the applicant and the authenticity of all documents and exhibits included in or attached to the application must be sworn to affirmatively as true and correct."

Court's intentions to appoint the same counsel and consolidate the proceedings were placed on the record and formalized with an Order. *See* Docket.

Evidentiary Hearing on January 8, 2024

An evidentiary hearing on Petitioner's applications was held on January 8, 2024. Petitioner neither called witnesses nor produced any evidence on either application at said hearing. The Respondent, State of Rhode Island, called one witness relative to this second application. The State called Captain Paul Rao of the Rhode Island Department of Corrections. Captain Rao testified that he had been employed at the Rhode Island Department of Corrections since 1989 and had been in charge of the Records and Identification (ID) unit as a captain for the past five years. He testified about how inmates earn "good time" and the amounts that can be earned. He testified that the system for keeping track of an inmate's good time is "mostly automated" but can be corrected from time to time manually. Further, he testified that an inmate earns ten days of good time per month, and it is posted to the inmate's records on the first day of the following month and each following month thereafter. His testimony distinguished other types of credit or time an inmate can earn, including "program" time and "industrial" time. He also explained how the prison disciplinary process can impact only "good time" but not program time or industrial time.

The Court received one exhibit during his testimony. State's Exhibit 1 was marked full after testimony without objection. The exhibit is entitled "Inmate Sentence Information" and it appears on an official State of Rhode Island Department of Corrections form. Captain Rao further testified that Petitioner had just paroled into a different consecutive sentence.[21] The consecutive

[21] On the second page of State's Exhibit 1, the data indicates this consecutive sentence involves case P2-2019-5328A. That case charges an assault with bodily fluid. The sentence of five years with four months to serve and fifty-six months suspended with five years of probation was imposed March 23, 2021. The sentence was specifically consecutive to the violation sentence(s) imposed

sentence is unrelated to any facet of Petitioner's two different applications before this court. The import of this testimony is that, notwithstanding Petitioner's violation sentence(s) of seventeen years, imposed on August 29, 2012, discussed *infra*, Petitioner was issued a parole permit[22] on January 3, 2024 and paroled to the consecutive sentence. *See* State's Ex. 1. Without the benefit of parole, Petitioner would have been required to "flatten"[23] his sentence, which would have run to August 28, 2029. Essentially, it appears that Petitioner was able to obtain a parole permit on his violation sentence(s) some five years and eight months early, and before the end date of the violation sentence(s), thus allowing him to begin serving the consecutive sentence.

Captain Rao testified that, according to State's Exhibit 1, Petitioner had accumulated 1,150 days of good time for use in the calculation of his sentences and parole permits.

Petitioner, through counsel, declined to cross-examine the witness and the State thereafter rested. State's Ex. 1does indicate a loss of good time in the amount of 758 days. No information was elicited regarding Petitioner's disciplinary bookings while incarcerated. When offered a chance to argue on Petitioner's second application after the evidentiary hearing, counsel indicated that the record "appeared factual" and stated "it is what it is" before going on to address Petitioner's initial application and the issues presented therein.

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by this Court and discussed infra. The sentence was imposed by a different justice of the superior court and is not at issue in Petitioner's present applications before this Court.

[22] A parole permit is issued pursuant to G.L. 1956 § 13-8-9 after a "prisoner has served not less than one-third (⅓) of the term for which he or she was sentenced. The permit shall entitle the prisoner to whom it is issued to be at liberty during the remainder of his or her term of sentence upon any terms and conditions that the board may prescribe." For prisoners subject to more than one sentence, as in the case before this Court, parole is calculated pursuant to § 13-8-10. In calculating a parole eligibility date, the parole board may consider all good time and other time earned by a prisoner during his incarceration. *See* § 13-8-11 (a).

[23] This is the common vernacular used when discussing the end date of a prisoner's sentence.

II

Standard of Review - Postconviction Relief

"'[T]he remedy of postconviction relief is available to any person who has been convicted of a crime and who thereafter alleges either that the conviction violated the applicant's constitutional rights or that the existence of newly discovered material facts requires vacation of the conviction in the interest of justice.'" *DeCiantis*, 24 A.3d at 569 (quoting *Page*, 995 A.2d at 942 (further citation omitted)); *see also* § 10-9.1-1. "An applicant for such relief bears '[t]he burden of proving, by a preponderance of the evidence, that such relief is warranted' in his or her case." *Brown*, 32 A.3d at 907 (quoting *Laurence*, 18 A.3d at 521. Postconviction relief motions are civil in nature and thus governed by all the applicable rules and statutes governing civil cases. *Ferrell*, 889 A.2d at 184. Issues regarding good time credit should appropriately be filed as an application for postconviction relief. *Gomes v. Wall*, 831 A.2d 817, 821-22 (R.I. 2003) (citing *Leonardo v. Vose*, 671 A.2d 1232, 1233 (R.I. 1996)). In accordance with the statute, "[t]he court shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented." Section 10-9.1-7.

III

Analysis

1

Morris Rules

Petitioner has asked this Court to implement *Morris* Rules in restoring "approximately" 1308 days of lost good time. The *Morris* Rules are "a highly structured body of rules that were initially established pursuant to a consent decree entered in [the federal court case of] *Morris v. Travisono*, 310 F. Supp. 857 (D.R.I. 1970)." *L'Heureux v. State Department of Corrections*, 708

A.2d 549, 550 (R.I. 1998). In *L'Heureux*, the Rhode Island Supreme Court addressed whether the Rhode Island Administrative Procedures Act (APA), found in G.L. 1956 chapter 35 of title 42, was applicable to the review of ACI[24] disciplinary and classification procedures or the promulgation of rules and regulations that govern the internal administration of the ACI. *L'Heureux*, 708 A.2d at 550. The Supreme Court held that the APA does not provide an appellate process whereby an ACI inmate may ask the Superior Court to review either a disciplinary or classification decision made by prison officials. *See id.* at 551-52. Furthermore, the Supreme Court stated that the *Morris* Rules, a creature unique to the Department of Corrections, [hereinafter simply DOC], "are binding upon the DOC and are enforceable for violation of such rules by contempt proceedings in the Federal District Court." *Id.* at 552. Therefore, the Supreme Court held that the trial justice was correct in ruling that the Superior Court has no jurisdiction over such a contempt proceeding. Thereafter, in 2002, the Rhode Island Supreme Court, in *DiCiantis v. Wall*, 795 A.2d 1121 (R.I. 2002), reaffirmed that the APA did not provide an appellate process "whereby an ACI inmate may ask the Superior Court to review either a disciplinary or classification decision made by prison officials." *DiCiantis*, 795 A.2d at 1124. The Supreme Court added that "[t]he *Morris* Rules were born in the federal court in the context of a consent judgment and that is where they should be raised and laid to rest." *Id.* at 1125. The Supreme Court unmistakably reaffirmed this concept a year later in *Marrapese v. Wall*, 828 A.2d 514 (R.I. 2003). In an action for a declaratory judgment based upon a wrongful classification by the director of the DOC, the Supreme Court clearly held, "In *DiCiantis* . . . , this Court reaffirmed its previous holding in

[24] The acronym, ACI, means Adult Correctional Institutions in the State of Rhode Island. It is generally held to mean, when referred to in Court decisions, as one of the several buildings located on the grounds of the Rhode Island Department of Corrections in Cranston, Rhode Island. *See* Rhode Island Department of Corrections website, https://doc.ri.gov. Last visited January 25, 2024.

L'Heureux and unequivocally ruled that the *Morris* rules are not cognizable in state court . . . We need not elaborate on this settled law, nor are we convinced that Marrapese has suffered a wrong that should be addressed." *Marrapese*, 828 A.2d at 516.

Given the definitive state of the law on this claim as well as the state of the instant record, this Court need go no further. Petitioner's claim is denied on this theory, as Petitioner has not sustained his burden of proof, and the Court does not have subject matter jurisdiction.

2

Due Process, 14th Amendment, and Lost Good Time Approximately 1308 Days

Petitioner next alleges, through his handwritten filing, that he is entitled to a reinstatement of approximately 1308 days of "good time" that was lost, ostensibly, because the DOC engaged in due process violations against Petitioner.

Good Time Statute

Any analysis of a prisoner's good time begins with the relevant statute. General Laws 1956 § 42-56-24, entitled "Earned time for good behavior or program participation or completion," provides in relevant part:

> "(b) The director, or his or her designee, shall keep a record of the conduct of each prisoner, and for each month that a prisoner who has been sentenced to imprisonment for six (6) months or more and not under sentence to imprisonment for life, appears by the record to have faithfully observed all the rules and requirements of the institutions . . . there shall, with the consent of the director of the department of corrections, or his or her designee, upon recommendation to him or her by the assistant director of institutions/operations, be deducted from the term or terms of sentence of that prisoner the same number of days that there are years in the term of his or her sentence; provided, that when the sentence is for a longer term than ten (10) years, only ten (10) days shall be deducted for one month's good behavior; . . .
>
> "For the purposes of this subsection computing the number of days to be deducted for good behavior, consecutive sentences shall be counted as a whole sentence. This subsection recognizes the serious nature of sex offenses; promotes community

> safety and protection of the public; and maintains the ability of the department of corrections to oversee the rehabilitation and supervision of sex offenders.
>
> "(c) For all prisoners serving sentences of more than one month, . . . the director, or his or her designee, shall keep a record of the conduct of each prisoner, and for each month that prisoner has faithfully observed all the rules and requirements of the institutions and has not been subjected to discipline, there shall, with the consent of the director of the department of corrections or his or her designee and upon recommendation by the assistant director of institutions/operations, be deducted from the term or terms of sentence of that prisoner ten (10) days for each month's good behavior.
>
> "(d) For every day a prisoner shall be shut up or otherwise disciplined for bad conduct, as determined by the assistant director, institutions/operations, subject to the authority of the director, there shall be deducted one day from the time he or she shall have gained for good conduct.
>
> "(e) The assistant director, or his or her designee, subject to the authority of the director, shall have the power to restore lost good conduct time in whole or in part upon a showing by the prisoner of subsequent good behavior and disposition to reform."

The relevant parts of the statute are entirely consistent with Captain Rao's credible testimony as described earlier. "An inmate's right to good-time credits is purely statutory and may be acquired only in the manner and under the circumstances pointed out by statute." *Gomes*, 831 A.2d at 817. Good time credits must be "awarded on a monthly basis and not upfront at the beginning of an inmate's sentence[.]" *Leach v. Vose*, 689 A.2d 393, 395 (R.I. 1997). No good time credits can be awarded prior to '"an inmate's monthly compliance with and obedience to prison rules and regulations."' *Id*. (quoting *Barber v. Vose*, 682 A.2d 908, 912 (R.I. 1996)). "The actual method of computation of those credits is left to the discretion of the [Director of Corrections]." *Id*. at 396. "[S]o-called good time credit for good behavior while incarcerated is not a constitutional guarantee . . . but is instead an act of grace created by state legislation that may provide therein for the manner in which good time credits may be granted for compliance with, or revoked for violations of, prison rules and regulations." *Barber*, 682 A.2d at 914 (citing *Wolff v.*

McDonnell, 418 U.S. 539, 557 (1974); *Tuitt v. Fair,* 822 F.2d 166, 180 (1st Cir. 1987)). *See also Leach,* 689 A.2d at 396, and *Toro v. Wall*, 926 A.2d 1019, 1021 (R.I. 2007) ("the computation of good-time credit under § 42-56-24 implicates neither a constitutional right, . . . nor an issue that is likely to recur in such a way as to evade judicial review").

In 2011, the Rhode Island Supreme Court again reaffirmed its application of the law regarding an inmate's issue with the calculation of the inmate's good time.

> "The issues before us today nearly are identical to those we addressed more than a decade ago in *Barber v. Vose,* 682 A.2d 908 (R.I. 1996), and *Leach v. Vose,* 689 A.2d 393 (R.I. 1997). In *Leach,* 689 A.2d at 398, we squarely stated that '[b]ecause, as we said in *Barber,* there is no liberty interest created by our good time and industrial time credit statute since it is completely discretionary, the [DOC's] modification of its manner of calculating good time and industrial time credits does not implicate the due-process clause.' *See Barber,* 682 A.2d at 912. We further held that 'the ex post facto clause is not implicated when the department changes its procedures to conform to the mandates of the statute' and that 'the ex post facto clause does not give a prisoner a vested right to a favorable, but erroneous, interpretation of the law.' *Leach,* 689 A.2d at 397 (quoting *Lerner v. Gill,* 751 F.2d 450, 457 (1st Cir. 1985)). Lastly, in *Barber,* we declined to address the applicant's alleged equal protection claim because we held that the law had 'long since been determined contrary to his contention[.]' *Barber,* 682 A.2d at 910 (citing *Mastracchio v. Superior Court,* 98 R.I. 111, 112–13, 200 A.2d 10, 11 (1964)). We are of the same opinion today." *Spivey v. Wall*, 19 A.3d 1234, 1235 (R.I. 2011).

IV

Conclusion

After due consideration of Captain Rao's credible testimony, and according significant weight to the exhibit received on this particular application, and after considering the parties' arguments and filings, the Court finds that Petitioner has not presented any case related to an unlawful loss of 1308 days of good time accumulation. He has not sustained his burden of proof on this claim. Accordingly, after due consideration of the record and the applicable law as stated herein, the Court denies Petitioner's application on this particular claim.

The Court will enter an order and a judgment relative to this application that are consistent with this Decision.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**Joseph Botelho v. State of Rhode Island**
CASE NOS:	**PM-2021-01044, PM-2023-01503**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**March 26, 2024**
JUSTICE/MAGISTRATE:	**Carnes, J.**

ATTORNEYS:

For Plaintiff:	**Michael Goldberg, Esq.**
For Defendant:	**Eric A. Batista, Esq.** **Bethany A. Laskowski, Esq.**