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Articles

More Horse-Hair for the Sword of Damocles? The Rhode Island Probation System and Comparisons to Federal Law

Timothy Baldwin and Olin Thompson**

*Then he chanced to raise his eyes toward the ceiling. What was it that was dangling above him, with its point almost touching his head? It was a sharp sword, and it was hung by only a single horse-hair. What if the hair should break? There was danger every moment that it would do so.*¹

The United States Court of Appeals for the First Circuit's decision in *United States v. St. Hill*² has the trappings of a standard appeal from federal district court. The facts and travel are pedestrian: the defendant pleaded guilty to distributing drugs

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† The views expressed herein are solely those of the authors.

1. State v. Parson, 844 A.2d 178, 180 n.2 (R.I. 2004) (quoting *The Sword of Damocles*, in FAVORITE TALES OF LONG AGO 97, 98–99 (Aladdin Books 1955) (retold by James Baldwin)) (probation revocation decision).

2. 768 F.3d 33, 34 (1st Cir. 2014).

in hopes of less jail-time but appealed after receiving a stiffer sentence than expected. The defendant's displeasure stemmed from the government's reliance on "relevant conduct" evidence to increase the guidelines range for the sentence.³ The defendant admitted to selling a small number of oxycodone pills, but at sentencing, the government introduced evidence of other drug sales that it did not charge by indictment to increase the prison term. The defendant disputed most of the uncharged drug sales, but the federal district court ruled in favor of the government, increasing the sentencing guidelines range from two to eight months for the charged drug sales all the way up to eighty-four to 105 months with the inclusion of the uncharged sales. The district court sentenced the defendant to eighty-four months of imprisonment; on appeal, the First Circuit quickly dispatched the defendant's arguments of error. By all appearances, an open and shut case.

Then comes the concurring opinion in *St. Hill*, penned by Judge Torruella. It is not pedestrian. Judge Torruella warns of "a disturbing trend in criminal prosecutions. All too often, prosecutors charge individuals with relatively minor crimes, carrying correspondingly short sentences," but then they use the "relevant conduct" mechanism in the sentencing guidelines to increase the term of imprisonment.⁴ Judge Torruella describes *St. Hill* as a typical example: the defendant pleaded guilty to distributing a small amount of drugs, but the government's introduction of relevant conduct evidence during the sentencing phase subjected the defendant to "an additional six to eight years in prison due to isolated drug sales not directly related to the twenty oxycodone pills which led to his conviction, all of which he was never arrested for, never charged with, never pleaded guilty to, and never convicted of by a jury beyond a reasonable doubt."⁵ As Judge Torruella sees it, the defendant's predicament in *St. Hill*

3. Under the United States Sentencing Guidelines, in drug sales cases like *St. Hill*, "relevant conduct" can include sales that are "part of the same course of conduct or common scheme or plan as the offense of conviction." U.S. SENTENCING GUIDELINES MANUAL § 1B1.3(a)(2) (U.S. SENTENCING COMM'N 2015).

4. *St. Hill*, 768 F.3d at 39 (Torruella, J., concurring).

5. *Id.* at 40 (emphasis omitted).

is “the tail wagging the dog.”⁶ His solution to the problem is simple: “if the government intends to seek an increase in a criminal defendant’s sentence for conduct that independently may be subject to criminal liability, the government should charge that conduct in the indictment.”⁷

In Judge Torruella’s view, the use of relevant conduct evidence at sentencing implicates two core constitutional rights afforded to criminal defendants—the right to due process and the right to a jury trial:

The practice of arguing for higher sentences based on uncharged and untried “relevant conduct” . . . seems like an end-run around these basic constitutional guarantees afforded to all criminal defendants. The government’s role is to ensure justice, both to the accused and to the public at large; it is not to maximize conviction rates and argue for the greatest possible sentence. And, while it is unclear to me whether this trend is due to shaky police work resulting in cases that cannot be proven beyond a reasonable doubt . . . or other less nefarious factors, it remains troubling regardless.⁸

The concurrence in *St. Hill* is remarkable juxtaposed against existing federal law. The defendant in *St. Hill* was convicted of illegal drug distribution in violation of 21 U.S.C. § 841(b)(1)(C), which carries no mandatory minimum and a maximum sentence of twenty years. Post-*Booker*,⁹ the federal sentencing guidelines are advisory, not mandatory, and sentencing courts have wide discretion to impose a sentence within the statutory authorization.¹⁰ As long as the sentence does not increase a mandatory minimum or enhance a maximum sentence, a well-reasoned sentencing decision is virtually immune from attack.¹¹ Such was the case in *St. Hill* where the defendant was sentenced to seven years—a term of imprisonment well within the authorized statutory range. Even Judge Torruella, in the midst of

6. *Id.*

7. *Id.* at 41 (emphasis omitted).

8. *Id.* (citation omitted).

9. *United States v. Booker*, 543 U.S. 220 (2005).

10. *See, e.g., United States v. Lata*, 415 F.3d 107, 112 (1st Cir. 2005).

11. *See United States v. Vargas-Garcia*, 794 F.3d 162, 165–67 (1st Cir. 2015); *United States v. Pizarro*, 772 F.3d 284, 293 (1st Cir. 2014).

expressing displeasure about the use of relevant conduct to increase jail terms, affirmed the defendant's sentence as consistent with binding federal precedent.¹²

The concerns posed by Judge Torruella are familiar to those acquainted with Rhode Island's probation violation system. The amorphous trigger that results in a probation violation is usually the defendant's failure to "keep the peace" or "maintain good behavior."¹³ Like the "relevant conduct" conundrum that distressed Judge Torruella, a probation violation in Rhode Island can be used to drastically increase prison time with limited due process, no jury trial and allegations that would not support a criminal conviction.

The bare-bones requirements for probation violation hearings originate from the tandem United States Supreme Court decisions in *Morrissey v. Brewer*,¹⁴ and *Gagnon v. Scarpelli*.¹⁵ *Morrissey* set the minimum due process required for parole revocation hearings and *Gagnon* extended its reasoning to probation revocation.¹⁶ Rhode Island courts have used the reasoning in *Morrissey* and *Gagnon* as building blocks to flesh out procedural and substantive rights at probation violation hearings.¹⁷

12. *St. Hill*, 768 F.3d at 42 (Torruella, J., concurring) ("Nevertheless, as a judge, it is my responsibility to faithfully apply the law as articulated by both the Supreme Court and this court, and I do not dispute that both the Guidelines and our interpretation of them currently condone this questionable process.").

13. *See, e.g.*, *State v. Barrientos*, 88 A.3d 1130, 1133 (R.I. 2014).

14. 408 U.S. 471 (1972).

15. 411 U.S. 778 (1973).

16. Together, *Gagnon* and *Morrissey* hold that due process requires that parole and probation violation hearings include: (a) "written notice of the claimed violations"; (b) disclosure to the defendant of "evidence against him"; (c) "opportunity to be heard in person and to present witnesses and documentary evidence"; (d) "the right to confront and cross-examine adverse witnesses" (unless there is "good cause for not allowing confrontation"); (e) "a neutral and detached" decision-maker; and (f) "a written statement by the factfinders as to the evidence relied on and reasons for revoking parole" or probation. *Gagnon*, 411 U.S. at 782; *Morrissey*, 408 U.S. at 489.

17. These cases represent the first and last time the United States Supreme Court addressed probation violation hearings in any detailed way. Many commentators have discussed *Morrissey* and *Gagnon* and there is no need to do so again here. *See, e.g.*, Andrew M. Hladik & Robert J. Taylor, *Parole, Probation and Due Process*, 70 PA. B. ASS'N Q. 168, 172-75 (1999); Esther K. Hong, *Friend or Foe? The Sixth Amendment Confrontation Clause in Post-Conviction Formal Revocation Proceedings*, 66 SMU L. REV. 227, 233

Rhode Island courts consider probation violation hearings to be civil (not criminal) proceedings.¹⁸ Due process rights are limited because the defendant has already been convicted of a crime.¹⁹ The State must prove a probation violation by “reasonably satisfactory” evidence, a standard much lower than beyond a reasonable doubt.²⁰ The violation hearing is conducted in summary fashion by the judge, in theory to be held within ten days of when the defendant is charged with the probation violation.²¹ There is no right to a preliminary hearing and the defendant can be (and usually is) held without bail pending the violation hearing.²² A judge conducts the probation violation hearing and there is no right to jury trial.²³ The pre-trial criminal rules of discovery do not apply.²⁴ The rules of evidence do not apply.²⁵ The exclusionary rule does not apply and the State can rely on illegally-obtained evidence.²⁶ Hearsay can be admissible and the defendant does not have an absolute right to cross-examine witnesses.²⁷ Essentially, the defendant has the right to notice of the hearing, notice of the claimed violation, and the opportunity to be heard and present evidence.²⁸ Although probation violation hearings are considered civil proceedings—where the Sixth Amendment right to counsel does not attach²⁹—the defendant has the right to be represented by counsel in all cases, apparently on state constitutional grounds.³⁰ Double

(2013); Mary T. Casey, Note, *Due Process in Probation Revocation v. Self-Incrimination: A Comparative Perspective for the Massachusetts Probationer*, 17 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 181, 184 (1991).

18. *E.g.*, State v. Gautier, 950 A.2d 400, 408 (R.I. 2008).

19. State v. Gilbert, 984 A.2d 26, 29 (R.I. 2009).

20. State v. Sylvia, 871 A.2d 954, 957 (R.I. 2005).

21. See R.I. GEN. LAWS § 12-19-9 (2006); State v. Lancellotta, 35 A.3d 863, 867 (R.I. 2012); State v. Lawrence, 658 A.2d 890, 892 (R.I. 1995).

22. R.I. GEN. LAWS § 12-19-9; see State v. DeLomba, 370 A.2d 1273, 1275 (R.I. 1977).

23. See R.I. GEN. LAWS § 12-19-9.

24. State v. Delarosa, 39 A.3d 1043, 1050 (R.I. 2012).

25. R.I. R. EVID. 101(b)(3).

26. See State v. White, 37 A.3d 120, 121 (R.I. 2012).

27. State v. Casiano, 667 A.2d 1233, 1239 (R.I. 1995).

28. *Delarosa*, 39 A.3d at 1051.

29. *Obert v. Republic W. Ins. Co.*, 264 F. Supp. 2d 106, 118 (D.R.I. 2003) (“[T]here is no constitutional right to counsel of one’s choice in civil cases.”).

30. State v. Gilbert, 984 A.2d 26, 30 (R.I. 2009); see State v. Chabot, 682 A.2d 1377, 1379 (R.I. 1996) (describing right to counsel as “constitutional safeguard” in probation violation proceeding). This standard is stronger than

jeopardy and collateral estoppel do not attach; a defendant found not guilty of a probation violation may still be prosecuted for a crime based on the same conduct.³¹ Conversely, a defendant who is criminally convicted for the same conduct that forms the basis for the probation violation renders “moot” a challenge to a probation violation.³²

Against this procedural backdrop, under Rhode Island law, any probation violation proven to the “reasonable satisfaction”³³ of the court that occurs at any time during the probationary period can lead to revocation and imposition of a portion or the entire suspended sentence imposed at the sentencing on the underlying crime.³⁴ To illustrate, a defendant sentenced to two years to serve with eight years suspended with probation (a common type of sentence in Rhode Island) will serve the remainder of the ten-year term on probation upon release after two years in prison (or less with parole and good time credits).³⁵ If, on the ninth year and 364th day after the imposition of the sentence, the defendant violates probation, the defendant can be sentenced to up to eight years in prison based on the suspended sentence.³⁶ This is not an empty threat; in one case, a Rhode Island court sentenced a

that required by the Due Process Clause for probation proceedings; the United States Supreme Court has held that an attorney may be required, but ultimately “the need for counsel must be made on a case-by-case basis.” *Gagnon v. Scarpelli*, 411 U.S. 778, 763 (1973).

31. *State v. Gautier*, 871 A.2d 347, 358, 361 (R.I. 2005).

32. *State v. Seamans*, 935 A.2d 618, 623 (R.I. 2007).

33. *See, e.g., State v. Gromkiewicz*, 43 A.3d 45, 48 (R.I. 2012).

34. R.I. GEN. LAWS § 12-19-9 (2006); *State v. Parson*, 844 A.2d 178, 180 (R.I. 2004).

35. Most prisoners are eligible for parole after serving one third of their jail sentence. R.I. GEN. LAWS § 13-8-9. Most, but not all, prisoners can also earn up to ten days of good credit per month depending on the length of their sentence. R.I. GEN. LAWS § 42-56-24(b); *see also Rose v. State*, 92 A.3d 903, 909 (R.I. 2014). The federal system does not have parole, but prisoners are eligible for good time credits that can reduce their time in custody by fifty-four days a year. *See* 18 U.S.C. § 3624(b) (2012); *Hackley v. Bledsoe*, 350 F. App'x 599, 601 (3d Cir. 2009) (“The Sentencing Reform Act created new sentencing procedures in the federal system, replacing ‘indeterminate sentences and the possibility of parole with determinate sentencing and no parole.’” (quoting *Lyons v. Mendez*, 303 F.3d 285, 288–89 (3d Cir. 2002))). Federal prisoners can also serve up to the last twelve months of their term on “pre-release custody” at a community correctional facility to aid reentry. 18 U.S.C. § 3624(c)(1).

36. *See Parson*, 844 A.2d at 180; *see also Rose*, 92 A.3d at 919.

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defendant to serve an entire nine-year suspended sentence in prison, after he was previously released from a six-year jail term.³⁷ His probation violation: moving out of Rhode Island in violation of probation conditions.³⁸ Appellate review of a probation revocation decision is limited to whether the lower court acted arbitrarily or capriciously in assessing the credibility of witnesses or in finding a probation violation.³⁹ The sentencing court “possess[es] wide latitude in deciding whether a probation violator’s suspended sentence should be removed in whole, in part, or not at all.”⁴⁰

Seen from this perspective, as the Rhode Island Supreme Court has aptly noted, a probationer lives under “the sword of Damocles, [where] the unexecuted portion of a probationer’s suspended sentence hangs over his or her head by the single horsehair of good behavior, until such time as the term of probation expires.”⁴¹ Probationers, especially those who face new criminal charges, feel a strong gravitational pull from the reduced procedural protections to admit to new criminal charges in hopes of a reduced sentence and period of incarceration, regardless of whether the evidence against them is sound or not.

The question that lingers, and the subject of this Article, is whether the discomfort about federal sentencing expressed by Judge Torruella in *St. Hill* can provide insight into the Rhode Island probation violation system. As framed by a recent Symposium at the Roger Williams University School of Law, the current architecture of Rhode Island’s probationary rules has triggered a cycle of mass incarceration. According to the most recent U.S. Department of Justice statistics, Rhode Island has 2793 adults on probation per 100,000 adult residents, the second highest ratio in the country behind Georgia.⁴² This Article asks whether the issues identified in the *St. Hill* concurrence and a

37. See *State v. Murray*, 22 A.3d 385, 387 & n.1 (R.I. 2011).

38. *Id.* at 386.

39. *State v. Prout*, 116 A.3d 196, 202 (R.I. 2015); *State v. Horton*, 971 A.2d 606, 610 (R.I. 2009).

40. *State v. Jackson*, 966 A.2d 1225, 1230 (R.I. 2009) (alteration in original) (quoting *State v. Christodal*, 946 A.2d 811, 817 (R.I. 2008)).

41. *Parson*, 844 A.2d at 180.

42. DANIELLE KAEBLE, LAURA M. MARUSCHAK & THOMAS P. BONCZAR, U.S. DEPT OF JUSTICE, PROBATION AND PAROLE IN THE UNITED STATES, 2014, app. tbl. 4, at 17 (2015), <http://www.bjs.gov/content/pub/pdf/ppus14.pdf>.

fresh look at related legal conundrums might lead to a more efficient Rhode Island probation system that protects the public and preserves the rights of criminal defendants, while simultaneously reducing mass incarceration.⁴³

This Article analyzes the Rhode Island probation system chronologically starting with the sentencing on the underlying crime. It moves on to discuss the conditions imposed while the defendant is on probation, the initial charging decision that alleges the defendant violated probation, the defendant's prospects for bail pending the violation hearing, the burden of proof at the probation violation hearing, and the sentencing on the violation. The Article concludes with thoughts on revisions to the probation system that might minimize concerns about reduced due process and the absence of a jury trial. Along the way, the article compares the Rhode Island system to analogous aspects of the federal system for defendants under supervision, based on the common practice of Rhode Island courts to look to federal law as persuasive authority on similar issues.⁴⁴

I. THE ORIGINAL SENTENCE FOR THE UNDERLYING CRIME

The Rhode Island probation violation cycle begins with the sentence for the original crime. The sentencing court has discretion "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. The suspension shall place the defendant on probation for the time and on any terms and conditions that the court may fix."⁴⁵ In practice, the sentence typically includes probation regardless of whether the defendant is incarcerated.⁴⁶ In many instances, the defendant is

43. To be clear, the Rhode Island probation system as it currently exists has tangible benefits. This Article is meant to pose questions about the legal structure of the probation system.

44. See, e.g., *Weeks v. 735 Putnam Pike Operations, LLC*, 85 A.3d 1147, 1156 n.11 (R.I. 2014); *Horn v. S. Union Co.*, 927 A.2d 292, 300 (R.I. 2007); *State v. Damiano*, 587 A.2d 396, 401 (R.I. 1991); *Johnson v. Mullen*, 390 A.2d 909, 912 (R.I. 1978).

45. R.I. GEN. LAWS § 12-19-8(a) (2006 & Supp. 2015). The rule is the same for state district court except that the statute is tailored for misdemeanor crimes and limits probation to one year unless otherwise permitted by law. See *id.* § 12-19-13.

46. Rhode Island sentencing practices include several variations of

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sentenced to a relatively short period of incarceration (or no prison time at all) followed by a long suspended sentence coupled with a term of probation that matches the length of suspended sentence. This is the prevailing sentencing practice in Rhode Island. Although there is no statutory requirement that the length of probation match the length of the suspended sentence,⁴⁷ Rhode Island's reported decisions are chock-full of this phenomenon and it occurs in nearly one hundred percent of all sentences that have a term of commitment and probation.⁴⁸ The following are a few examples, organized by the length of the overall sentence:

- 1) Two years suspended with two years probation for domestic felony assault;⁴⁹
- 2) Five years of imprisonment at the Adult Correctional

probation in addition to deferred sentences. Probationary sentences work in three different ways at the sentencing for the underlying crime. First, defendants can receive probation in addition to a term of incarceration. Second, probation can be coupled with a suspended sentence that does not include any term of actual incarceration. Third, defendants can be sentenced to "straight probation," which means the court does not impose any actual prison term or suspended sentence, and will not do so if the defendant successfully completes the term of probation. If the defendant violates straight probation, the defendant can be sentenced to anything authorized by the statute for the underlying crime. A defendant with a deferred sentence is technically not on probation, but as a practical matter a deferred sentence operates the same as probation for the purposes of determining a sanction (like prison time) when a violation occurs. *See id.* § 12-19-19(b) ("The determination of whether a violation has occurred shall be made by the court in accordance with procedures relating to violation of probation §§ 12-19-2 and 12-19-14."). For the purposes of this Article, there is no practical difference between a deferred sentence and probation, except the length of the probationary term. Probation can be any length up to the maximum term for the crime, while deferred sentences are capped at five years and are limited to defendants who have pleaded guilty or nolo contendere. *See id.* §§ 12-19-9, -19(a).

47. *Id.* § 12-19-8(b). The Rhode Island Supreme Court has stated in dicta that a term of probation should be imposed along with a suspended sentence, but the court has never said that the length of probation must match the length of the suspended sentence. *See Lyons v. State*, 43 A.3d 62, 67 n.4 (R.I. 2012).

48. COUNCIL ST. GOV'TS: JUST. CTR., THIRD PRESENTATION TO RHODE ISLAND'S JUSTICE REINVESTMENT WORKING GROUP 28 (Oct. 27, 2015), <https://csgjusticecenter.org/jr/rhode-island/publications/third-presentation-to-rhode-islands-justice-reinvestment-working-group/> [hereinafter JUSTICE REINVESTMENT WORKING GROUP].

49. *State v. Krakue*, 726 A.2d 458, 461 (R.I. 1999).

Institutions (ACI), with six months to serve and four and one-half years suspended with probation for larceny over \$500 and solicitation of another to commit a felony;⁵⁰

3) Eight years at the ACI, with one year to serve and seven years suspended with probation for entering a building with felonious intent;⁵¹

4) Ten years at the ACI, with twenty-one days to serve and nine years and eleven months suspended with probation for delivery of cocaine and conspiracy to deliver cocaine;⁵²

5) Fifteen years at the ACI, with three to serve and twelve years suspended with probation for second-degree sexual assault;⁵³

6) Twenty-five years suspended with probation for one count of possession of cocaine;⁵⁴

7) Thirty years at the ACI, with seven and a half to serve and twenty two and a half suspended with probation for second-degree child molestation;⁵⁵

8) Forty years at the ACI, with twelve years to serve and twenty-eight years suspended with probation for arson and eight robbery charges;⁵⁶ and

9) Fifty years at the ACI, with ten years to serve and forty years suspended with probation for first-degree sexual assault.⁵⁷

The Rhode Island practice of long suspended sentences coupled with long periods of probation looks innocuous on paper and has an indicia of leniency. Ultimately, however, the framework leads to significantly reduced due process for the many criminal defendants that cycle through the probation violation system.

50. State v. Whiting, 115 A.3d 956, 957 (R.I. 2015).

51. State v. Nania, 786 A.2d 1066, 1067 (R.I. 2001).

52. State v. Gautier, 774 A.2d 882, 883. (R.I. 2001).

53. State v. Lawless, 996 A.2d 166, 166 (R.I. 2010).

54. State v. Pena-Lora, 710 A.2d 1262, 1264 (R.I. 1998).

55. State v. Armour, 110 A.3d 1195, 1198 (R.I. 2015).

56. State v. Raso, 80 A.3d 33, 34 (R.I. 2013).

57. State v. Texter, 896 A.2d 40, 43 n.2 (R.I. 2006).

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One of the teachings from the United States Supreme Court decisions in *Morrissey* and *Gagnon* decided in 1972 and 1973 is that probation is an “act of grace” that subjects the defendant to “conditional liberty,” and therefore, probationers facing revocation have limited due process rights.⁵⁸ Rhode Island courts have employed this reasoning regularly to justify reduced due process at probation violation hearings. Under Rhode Island law, a suspended sentence is considered an “act of grace” under which the defendant “retains his liberty, conditioned however on such probationary terms as the court may impose.”⁵⁹ Probationers are afforded limited due process rights “by virtue of the fact that the defendant has already been convicted of a crime.”⁶⁰ “It is well established that a probation-violation hearing is not part of the criminal-prosecution process and thus is not entitled to the full panoply of due-process rights.”⁶¹ A probation violation proceeding is more of a hearing on re-sentencing than a taking of rights as “the hearing is a continuation of the original prosecution for which probation was imposed.”⁶² Rhode Island courts further hold probation revocations deprive defendants not of absolute liberty, but only of the “conditional liberty that may be revoked if they violate the terms of the probation agreement.”⁶³ Because probation is an act of grace, the “full panoply of rights’ applicable to a defendant at a criminal proceeding does not apply at a violation or revocation hearing.”⁶⁴

Notwithstanding Rhode Island courts’ interpretation of the

58. *Gagnon v. Scarpelli*, 411 U.S. 778, 782 n.4, 789 (1973); *see also Morrissey v. Brewer*, 408 U.S. 471, 480–89 (1972).

59. *Tillinghast v. Howard*, 287 A.2d 749, 751–52 (R.I. 1972).

60. *State v. Gilbert*, 984 A.2d 26, 29 (R.I. 2009) (quoting *State v. Sampson*, 884 A.2d 399, 404 (R.I. 2005)) (internal quotation marks omitted).

61. *State v. Olsen*, 610 A.2d 1099, 1103 (R.I. 1992).

62. *State v. Tucker*, 747 A.2d 451, 455 (R.I. 2000); *State v. Lawrence*, 658 A.2d 890, 892 (R.I. 1995); *see also United States v. Czajak*, 909 F.2d 20, 24 (1st Cir. 1990) (opining that a probation revocation hearing is similar to “a re-sentencing hearing than a taking of rights”).

63. *State v. Gubern*, 423 A.2d 1177, 1179 (R.I. 1981); *see also Czajak*, 909 F.2d at 24 (“[R]evocation 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 [probation] restrictions.” (alterations in original) (quoting *Morrissey*, 408 U.S. at 480) (internal quotation marks omitted)).

64. *State v. Salvail*, 362 A.2d 135, 138 (1976) (quoting *Morrissey*, 408 U.S. at 480)).

teachings of *Morrissey* and *Gagnon*, Rhode Island's sentencing practice of long probationary periods with equally long suspended sentences calls into question the justification for the limited due process afforded to probationers facing violations. While Rhode Island courts are technically sentencing defendants to long prison sentences and suspending a large portion of those sentences as "act[s] of grace," in practice they are imposing shorter prison sentences followed by long periods of probation. When the defendant cycles back through the criminal justice system at a probation violation hearing, the new prison term facing the defendant often has lost the legal moorings that justify the reduced process and proof required. The defendant has already served the time in prison intended by the sentencing court for the original crime. A new prison sentence based on a probation violation is precisely that: a new sentence prompted by new allegations. Suspended sentences are so long that the options available to the court for sentencing at a violation hearing are not that much different from the original sentencing on the underlying crime.

No one at the original sentencing—not the prosecutor, judge, defendant, or defense counsel—believes the case against the defendant is worth serving the entire term (the term to serve plus the suspended term) in prison. This is clarified by Rhode Island's use of non-mandatory "benchmark" guidelines for criminal sentencing that set the starting point for the length of the prison term.⁶⁵ As the Rhode Island Supreme Court has stated, the "time

65. The sentencing benchmarks were originally drafted in 1981 by a committee appointed by the Rhode Island Supreme Court. See JOHN A. MACFADYEN & BARBARA HURST, RHODE ISLAND CRIMINAL PROCEDURE § 32.2, at 303 (1993). The sentencing benchmarks are not mandatory; they are "a guide to proportionality." *State v. Snell*, 11 A.3d 97, 102 (R.I. 2011). The sentencing court "is bound only by the statutory limits." *State v. Coleman*, 984 A.2d 650, 655 (R.I. 2009) (quoting *State v. Bettencourt*, 766 A.2d 391, 394 (R.I. 2001)) (internal quotation marks omitted). The benchmarks encourage the sentencing court to consider various factors, including:

"[T]he severity of the crime, the defendant's personal, educational, and employment background, the potential for rehabilitation, social deterrence, and the appropriateness of the punishment." The sentencing benchmarks allow departure "when substantial and compelling circumstances exist." If a trial justice sentences a defendant outside the recommended range, the benchmarks instruct the trial justice to "give specific reasons for the departure on the

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ranges given in the sentencing benchmarks represent time to be served in jail.”⁶⁶ Likewise, the text of the sentencing benchmarks stresses that “[t]he use of suspended sentences, probation, and fines, in addition, is not precluded.”⁶⁷ Stated another way, there is no sentencing benchmark for the imposition of a suspended sentence or the length of the probationary term that comes with it. The primary focus at sentencing is on the length of the term to serve. The Rhode Island Supreme Court has explained that, if a benchmark calls for three years in prison, a sentence of three years to serve with twelve years suspended with probation is entirely consistent with the benchmarks.⁶⁸

The only limitation on the length of a suspended sentence or a probation term is the statutory maximum for the crime.⁶⁹ The result is a customary sentencing practice in Rhode Island where the prison term frequently comports with the benchmarks, but where the probationary sentence is equal in length to a long suspended sentence. This occurs with little statutory or benchmarks guidance on whether it makes sense to place a defendant on probation for a prolonged period, which, in turn, could lead to another long stint in jail from a suspended sentence, when the defendant has already served a jail sentence for the

record.” Examples of compelling circumstances provided in the sentencing benchmarks include a defendant’s prior criminal record, lack of remorse, whether the defendant testified, and if he or she testified and gave patently false testimony, and “other substantial grounds” which tend to mitigate or aggravate the offender’s culpability. Further, the sentencing benchmarks explicitly allow for a sentencing departure based on a defendant’s criminal history.

Id. (first quoting *Bettencourt*, 766 A.2d at 394; then quoting R.I. R. SUPER. CT. SENTENCING BENCHMARKS ¶ 1, 1(q)). In practice:

The use of benchmarks by judges now varies widely, with some judges utilizing them in nearly all cases, and others consistently imposing sentences greatly in excess of the guidelines. To some degree, as a practical matter, the benchmarks have become a *minimum* range for sentences after trial for the enumerated crimes; and it is more usual to see sentences persistently in excess of the benchmark than it is to see them significantly lower than those recommended.

MACFADYEN & HURST, *supra* note 65, § 32.2, at 302–03.

66. *State v. Ibrahim*, 862 A.2d 787, 794 (R.I. 2004).

67. R.I. R. SUPER. CT. SENTENCING BENCHMARKS ¶ 4.

68. *Ibrahim*, 862 A.2d at 794.

69. R.I. GEN. LAWS § 12-19-8(b) (2006).

underlying crime.⁷⁰

This sentencing rubric explains many of the long suspended sentences in Rhode Island, where the suspended sentence and probation term is longer than the jail term, and the overall length of suspended sentences imposed is 3.5 times longer than the length of incarceration.⁷¹ A criminal defendant convicted of one count for felony assault, for example, would not be sentenced to fifteen years as the defendant was in *State v. Rieger*,⁷² if the court intended all fifteen years to be served in prison. Rather, the highest prison sentence articulated by the sentencing benchmarks for felony assault is five years;⁷³ the *Rieger* Court sentenced the defendant to four years in prison with eleven years suspended.⁷⁴

This sentencing practice is different from the federal system. Under federal law, probationary sentences are available only for defendants who do not serve prison time; incarcerated defendants receive sentences of supervised release after prison.⁷⁵ Probation terms are capped at five years and are frequently shorter.⁷⁶ Supervised release terms following prison are usually three years

70. On March 16, 2016, two days before the final draft of this Article went to press, the Presiding Justice of the Rhode Island Superior Court submitted to the Rhode Island Supreme Court proposed amendments to Superior Court Rules of Criminal Procedure and the Superior Court Sentencing Benchmarks. 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) [hereinafter Order Soliciting Comments on Proposed Amendments], <https://www.courts.ri.gov/Courts/SupremeCourt/SupremeMiscOrders/Order-ProposedAmendmentsSuperiorCourtRulesofCriminalProcedure-SentencingBenchmarks3-16-16.pdf>. At press time, the proposed amendments were in a public comment period scheduled to end on April 12, 2016. The proposal would add language to the sentencing benchmarks to de-couple the probationary sentence from the suspended sentence.

71. JUSTICE REINVESTMENT WORKING GROUP, *supra* note 48, at 27.

72. 763 A.2d 997, 1000 (R.I. 2001).

73. R.I. R. SUPER. CT. SENTENCING BENCHMARKS ¶¶ 8–10.

74. *Rieger*, 763 A.2d at 1000.

75. Technically, probation differs between the state and federal system in the sense that probation is considered a criminal conviction in the federal system while a sentence of probation without more is not a conviction under Rhode Island law when it follows a plea of *nolo contendere*. R.I. GEN. LAWS § 12-18-3(a). Nevertheless, probation following a plea of *nolo contendere* is considered a conviction for the purposes of criminal expungement under Rhode Island law. See *State v. Alejo*, 723 A.2d 762, 765 n.2 (R.I. 1999).

76. 18 U.S.C. § 3561(c) (2012).

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and the statutory cap is five years for most crimes.⁷⁷ A violation of probation or supervised release subjects a federal defendant to less jail time than the state system. If a federal defendant violates probation or supervised release, the term of incarceration is usually under one year unless the conduct that forms the basis of the violation is a serious felony.⁷⁸ The maximum sentence allowed in the federal system for a supervised release violation is five years for most crimes.⁷⁹

In essence, the prison term—not the suspended sentence and probation portion of the sentence—is the main driver in Rhode Island state courts at the sentencing for the original crime. The suspended sentence and probation are afterthoughts that represent a battle to be fought later if the defendant faces a probation violation hearing. This is not substantially different from the federal system. Typically, as Judge Posner of the Seventh Circuit has explained, a federal criminal defendant is concerned with jail time and does not exert much effort at the original sentencing in challenging overly burdensome conditions that will be imposed upon release from prison:

Because conditions of supervised release do not take effect until the defendant completes his prison term and is released, defendants given long prison sentences—and long prison sentences are common in federal sentencing—often have little interest in contesting conditions of supervised release at sentencing. Criminals who court long prison sentences tend to have what economists call a

77. *Id.* § 3583(b).

78. *See id.* § 3583(e)(3). In the federal system, when the probation or supervised release violation results in a term of incarceration on a separate criminal charge, the court has discretion to impose the sentence consecutively to the prison sentence imposed for the separate crime. *See, e.g.,* United States v. Fannin, 562 F. App'x 457, 458 (6th Cir. 2014); United States v. Taylor, 628 F.3d 420, 425 (7th Cir. 2010); *see also* U.S. SENTENCING GUIDELINES MANUAL § 7B1.3(f) (U.S. SENTENCING COMM'N 2015).

79. 18 U.S.C. § 3583(e)(3). Probation violators can be sentenced to anything allowed by the statute for the original crime that resulted in the sentence of probation, although the United States Sentencing Guidelines call for much shorter sentences that are consistent with supervised release violations. *See id.* § 3565; United States v. De Jesus, 277 F.3d 609, 611 (1st Cir. 2002). Probation sentences are relatively rare in the federal system, mainly because the government tends to prosecute only more serious crimes that generally warrant incarceration.

high discount rate. That is, they give little weight to future costs and benefits. Defendants or their lawyers may also worry that a successful challenge to a condition or conditions of supervised release may induce the judge to impose a longer prison sentence, thinking that resistance to supervised release implies recidivist tendencies or intentions.⁸⁰

Despite the lack of focus on the suspended sentence, it is a part of the judgment under Rhode Island law and a “conviction for all purposes.”⁸¹ “[I]t is actually *imposed*; only its execution is held in abeyance.”⁸²

Ostensibly, the conditional liberty granted to Rhode Island defendants through suspended sentences and probation is for the opportunity to rehabilitate while on probation.⁸³ In reality, the current sentencing practice of tying the length of the probationary term to the length of the suspended sentence bears little relation to the stated goal of rehabilitation. It is difficult, for example, to justify a twenty-five year term of probation for possession of cocaine⁸⁴ as having anything to do with rehabilitation. A person does not require twenty-five years, roughly a third of a lifetime, to rehabilitate from the crime of drug possession.

At bottom, concerns with Rhode Island’s probation system begin with the original sentencing. A long suspended sentence is the primary threat to a defendant facing a long probationary period, but it often cannot be justified as necessary for rehabilitation. The long suspended sentence is also the driver of the events that follow; because of the criminal conviction, the defendant receives reduced due process rights at all phases of a

80. *United States v. Thompson*, 777 F.3d 368, 373 (7th Cir. 2015).

81. *State v. Parson*, 844 A.2d 178, 180 (R.I. 2004) (quoting MACFADYEN & HURST, RHODE ISLAND CRIMINAL PROCEDURE § 32.9, at 308–09 n.2) (internal quotation marks omitted).

82. *Id.* (alteration in original) (quoting MACFADYEN & HURST, RHODE ISLAND CRIMINAL PROCEDURE § 32.9, at 308–09 n.2) (internal quotation marks omitted).

83. See *Tillinghast v. Howard*, 287 A.2d 749, 752 (R.I. 1972); Andrew Horwitz, *The Costs of Abusing Probationary Sentences: Overincarceration and the Erosion of Due Process*, 75 BROOK. L. REV. 753, 756–64 (2010) [hereinafter *The Costs of Abusing Probationary Sentences*] (explaining that the primary purpose of probation is not rehabilitation).

84. See *State v. Pena-Lora*, 710 A.2d 1262, 1264 (R.I. 1998).

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probation violation proceeding.⁸⁵ Long suspended sentences accompanied by probation are justified as an act of grace, but the sentences are imposed in a problematic way given the limited due process rights that flow from the so-called act of grace. One small tremor can disturb the defendant's "conditional liberty"⁸⁶ and sever the single horse-hair holding the Sword of Damocles above the defendant's head, with significant criminal consequences.

II. FAIR NOTICE OF PROBATION CONDITIONS

A criminal defendant sentenced to probation is exposed to additional jail time pursuant to the terms and conditions of probation as set by the sentencing court. If the defendant violates a condition, the court may revoke probation and incarcerate the defendant for any portion of the remaining suspended sentence.⁸⁷

To avoid the threat of additional jail time, criminal defendants in Rhode Island must comply with three varieties of probation conditions: implied, general, and special.⁸⁸ Turning first to the implied conditions of probation, these are the requirements to "keep the peace" and "remain on good behavior."⁸⁹ Keeping the peace and remaining on good behavior are "conditions inherent in the very privilege of probation."⁹⁰ They "come into existence at the very moment that a sentence that includes probation is imposed," even if the defendant is incarcerated and the probationary sentence has yet to begin, and continue for the duration of the probationary sentence.⁹¹ Keeping the peace and remaining on good behavior are imposed on all defendants regardless of whether the sentencing court exercises its

85. See *State v. Gilbert*, 984 A.2d 26, 29 (R.I. 2009); *State v. Tucker*, 747 A.2d 451, 455 (R.I. 2000).

86. *Tucker*, 747 A.2d at 455.

87. R.I. GEN. LAWS §§ 12-19-8(a), -9, -13, -14 (2006 & Supp. 2015); see *Tucker*, 747 A.2d at 455.

88. See *State v. Baton*, 688 A.2d 824, 825 (R.I. 1997) ("[A]n implied condition of good behavior arises immediately upon the imposition of a suspended sentence."); *Rose v. State*, 92 A.3d 903, 917 n.20 (R.I. 2014) (Flaherty, J., dissenting) (general conditions); *State v. McCarthy*, 945 A.2d 318, 320 (R.I. 2008) (special conditions).

89. *State v. Prout*, 116 A.3d 196, 202 (R.I. 2015) (quoting *State v. Barrientos*, 88 A.3d 1130, 1133 (R.I. 2014)) (internal quotation marks omitted).

90. *Price v. Wall*, 31 A.3d 995, 1002 (R.I. 2011).

91. *State v. Dantzler*, 690 A.2d 338, 339 (R.I. 1997).

prerogative to outline other probation conditions.⁹²

Second, the defendant must comply with the general conditions of probation. These “includ[e] reporting to the [probation officer] as required; not breaking any laws; not traveling or moving out of Rhode Island without advance approval; advising the [probation officer] of any change of address immediately; and so on.”⁹³ Like the implied conditions, these general conditions are imposed on all supervised probationers. However, unlike the implied conditions of keeping the peace and good behavior, general conditions are more specific and technical in nature.

Third, the sentencing court can impose special conditions as needed on a case-by-case basis. For example, in a child molestation case, the sentencing court might set special conditions such as “a no-contact order,” “registration as a sex offender,” and “attendance at sex-offender counseling,” some of which are required by statute for certain crimes.⁹⁴ Other special conditions include counseling for substance abuse, mental health, and anger management.⁹⁵

92. *Price*, 31 A.3d at 1003.

93. *Rose*, 92 A.3d at 917 n.20 (alterations in original). The current version of the probation form used in Rhode Island lists the standard conditions as: (1) obey all laws; (2) report to probation officer as directed; (3) remain within the State of Rhode Island, except with the prior approval of the probation officer; (4) notify the probation officer immediately of any change in address, telephone number, or employment and inform them of whereabouts and activities as required; (5) make every effort to keep steadily employed, attend school, and/or attend vocational training; (6) waive extradition from anywhere in the United States if required to appear in any Rhode Island Court; (7) provide a DNA sample if required by state law; and (8) fulfill any and all Special Conditions of Probation as ordered by the Court. State of R.I. Dept. of Corr., Adult Probation and Parole Conditions of Supervised Probation (rev. Mar. 2015), <http://www.interstatecompact.org/StateDocs/ConditionsofSupervision.aspx>.

94. *State v. McCarthy*, 945 A.2d 318, 320 (R.I. 2008); *see also* R.I. GEN. LAWS §§ 11-37.1-3, -8.2.1 (2006 & Supp. 2015) (requiring sex offender registration and treatment for certain crimes).

95. The current version of the Rhode Island probation form lists the special conditions as including but not limited to: (1) substance abuse counseling; (2) mental health counseling; (3) alcohol counseling; (4) AIDS testing/education; (5) sex offender counseling; (6) batterer’s intervention program; (7) anger management counseling; (8) community service; (9) restitution; (10) no contact order; (11) sex offender registration; and (12) other. State of R.I. Dept. of Corr., *supra* note 93.

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Federal practice includes general, standard and special conditions for probation and supervised release analogous to Rhode Island law, but the federal system has nothing similar to the implied conditions of good behavior and keeping the peace. General conditions are set by statute and include “the defendant [shall] not commit another Federal, State, or local crime during the term of supervision[,] . . . unlawfully possess a controlled substance[,] . . . [and] refrain from any unlawful use of a controlled substance and submit to a drug test within 15 days of release on supervised release and at least 2 periodic drug tests thereafter (as determined by the court) for use of a controlled substance.”⁹⁶ The federal sentencing court also can set standard⁹⁷

96. 18 U.S.C. § 3583(d) (2012); *see also id.* § 3563(a)(1), (b); U.S. Fed. Courts, Judgment in a Criminal Case Form AO 245B (rev. Feb. 1, 2016), <http://www.uscourts.gov/forms/criminal-judgment-forms/judgment-criminal-case>.

97. The standard conditions of supervision in the federal system are: (1) the defendant shall not leave the judicial district without the permission of the court or probation officer; (2) shall report to the probation officer in a manner and frequency directed by the court or probation officer; (3) answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer; (4) support his or her dependents and meet other family responsibilities; (5) work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons; (6) notify the probation officer at least ten days prior to any change in residence or employment; (7) refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician; (8) not frequent places where controlled substances are illegally sold, used, distributed, or administered; (9) not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer; (10) permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer; (11) notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer; (12) not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and (13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant’s criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant’s compliance with such notification requirement. Federal defendants are also generally prohibited from possessing firearms, destructive devices or other dangerous weapons. *See* Judgment in a Criminal Case Form AO 245B, *supra* note 96; *see also* 18 U.S.C. § 3583(g).

and special⁹⁸ conditions, provided they involve no greater deprivation of liberty than reasonably necessary (among other factors).⁹⁹ The conditions are provided to a federal defendant in writing and are required to be “sufficiently clear and specific to serve as a guide for the defendant’s conduct and for such supervision as is required.”¹⁰⁰

In contrast to Rhode Island’s implied probation conditions, there are no open-ended conditions in the federal system like keeping the peace and good behavior. Ironically, good behavior becomes a factor in the federal system only when the sentencing court seeks to reduce the term of supervised release because the criminal defendant exhibits good behavior.¹⁰¹

Unlike general and special conditions imposed on Rhode Island defendants that raise no serious concerns if they are unambiguous and reasonable infringements on liberty, the implied conditions of keeping the peace and good behavior are problematic because it is not clear what these terms mean. The Rhode Island Supreme Court has never defined them and courts interpret them factually on a case-by-case basis. For fans of dictionaries to aid interpretation, Black’s Law Dictionary is equally murky; it contains no helpful definition for “good behavior,”¹⁰² and the definition of “keeping the peace” is “[t]o

98. Special conditions of supervision often include requirements such as: (1) the defendant shall participate in and satisfactorily complete a program of substance-abuse treatment, on an inpatient and/or outpatient basis, including periodic testing (up to seventy-two drug tests per year), as approved by the probation office; (2) participate in and satisfactorily complete a program of mental-health treatment, as approved by the probation office; (3) spend the first three months on curfew with radio-frequency monitoring and be restricted to his or her residence from 9:00 PM to 7:00 AM; and (4) participate in a manualized behavioral program as directed by the probation office, either in group sessions led by a counselor or participation in a program administered by the probation office. *See* 18 U.S.C. § 3563(b).

99. *Id.* § 3583(d)(2) (2012); *see also id.* § 3563(b).

100. *Id.* § 3583(f).

101. *See id.* § 3583(e)(1)–(2) (2012); *United States v. Pettus*, 303 F.3d 480, 483 (2d Cir. 2002); *United States v. Etheridge*, 999 F. Supp. 2d 192, 196 (D.D.C. 2013).

102. Black’s Law Dictionary defines “good behavior” as “[a] standard by which judges are considered fit to continue their tenure, consisting in the avoidance [sic] of criminal behavior” or “[o]rderly conduct, which in the context of penal law allows a prisoner to reduce the time spent in prison.” BLACK’S LAW DICTIONARY 808 (10th ed. 2014).

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maintain law and order or to refrain from disturbing it,”¹⁰³ whatever that means.

Rhode Island case law reveals a clear dichotomy between actions that constitute alleged crimes and those that do not. The commission of a crime is a breach of keeping the peace and good behavior. This is made clear by *State v. Jacques*, where the Rhode Island Supreme Court held that engagement in criminal acts is a violation of the implied conditions of probation.¹⁰⁴ Participation in a murder for hire scheme, a felon in possession of a firearm, or a large scale credit card fraud scheme, for example, are crimes and breaches of keeping the peace and maintaining good behavior while on probation.¹⁰⁵ Ironically, this bright line means little in practice, because Rhode Island’s general probation conditions already require criminal defendants to “not break[] any laws.”¹⁰⁶ The implied condition not to break any laws is redundant of the general condition not to break any laws.¹⁰⁷

Beyond the commission of a crime, the outer limits of good behavior and keeping the peace are undefined and Rhode Island courts have given conflicting signals over the years. In *State v. Wiggs*, a 1993 case, the Rhode Island Supreme Court quoted extensively from the decision below, in which the superior court stated that to satisfy good behavior, a probationer’s conduct “must be not only lawful, it must be impeccable.”¹⁰⁸ The quoted

103. *Id.* at 1000.

104. *State v. Jacques*, 554 A.2d 193, 195 (R.I. 1989); *see also State v. Dantzler*, 690 A.2d 338, 340 (R.I. 1997) (“The commission of a new crime violates an implied condition of probation and suggests that the defendant is a poor probation risk.” (quoting *Commonwealth v. Miller*, 516 A.2d 1263, 1265 (Pa. Super. Ct. 1986)) (internal quotation marks omitted)).

105. *See, e.g., State v. Hazard*, 68 A.3d 479, 501 (R.I. 2013); *State v. Maloney*, 956 A.2d 499, 507 (R.I. 2008); *State v. Tatro*, 659 A.2d 106, 114 (R.I. 1995).

106. *Rose v. State*, 92 A.3d 903, 917 n.20 (Flaherty, J., dissenting).

107. The only concrete difference is that the implied conditions are enforceable as soon as the sentence is imposed, while the general conditions may not be enforceable until the probationary period begins and the defendant receives a list of probation conditions from the probation officer. As a practical matter, this nuance would only affect prisoners who violate the implied probation conditions of keeping the peace and good behavior while incarcerated—that is, before they are released and the term of probation begins. Theoretically, it is also possible that a Rhode Island defendant sentenced to “unsupervised probation” might not be subject to a written general probation condition not to break any laws.

108. 635 A.2d 272, 274 (R.I. 1993), *overruled on other grounds by State v.*

language in *Wiggs* from the superior court continues with the observation that “[p]robation is not a joke; a suspended sentence is not a joke. A person can be violated for hanging around with the wrong people only.”¹⁰⁹

Wiggs sets a high bar and requires a probationer to be a model citizen above the average Rhode Islander not on probation. It is also a difficult standard to meet; in some neighborhoods, many residents have criminal records, making it difficult to avoid associating with the so-called “wrong people.”¹¹⁰ In *State v. Forbes*, decided in 2007, the Rhode Island Supreme Court took a markedly different approach.¹¹¹ In *Forbes*, the State charged the defendant with first-degree sexual assault for rape while he was on probation. The charge arose from allegations that the defendant made unwanted sexual advances at a house party; the police arrested him on the scene. At the ensuing probation violation hearing, the superior court found that the defendant failed to keep the peace and maintain good behavior for several reasons: he approached a female acquaintance who had threatened to make trouble for him (she had accused him of fathering her child in the past); he took the woman’s cell phone and refused to return it when she demanded it back; he walked into the house where the victim was staying uninvited, he had a large knife on him; and he refused to get out of the passenger seat of a car when he was approached by a police officer.¹¹² The superior court made these findings solely for the purpose of determining whether the defendant kept the peace and acted in good behavior, while avoiding making any findings on the pending charge of first-degree sexual assault.¹¹³ Against this backdrop,

Gautier, 871 A.2d 347 (R.I. 2005).

109. *Wiggs*, 635 A.2d at 274. The superior court has made similar statements. See, e.g., *State v. Ford*, No. P2-05-0083A, 2012 WL 3638916, at *11 (R.I. Super. Ct. Aug. 20, 2012) (“[T]he mere presence of a defendant at a crime can trigger a violation.”).

110. Cf. Rick Guzman, *An Argument for A Return to Plessy v. Ferguson: Why Illinois Should Reconsider the Doctrine of “Separate but Equal” Public Schools*, 29 N. ILL. U. L. REV. 149, 165 (2008) (“[A]pproximately one in four convicted felons returning from prison each year in Illinois returns to one of these eight (out of seventy-seven) neighborhoods in Chicago.”).

111. *State v. Forbes*, 925 A.2d 929, 931 (R.I. 2007).

112. *Id.* at 933.

113. *Id.* at 934.

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the superior court revoked the defendant's probation and sentenced him to his entire suspended sentence.¹¹⁴

On appeal, the *Forbes* court reversed, reasoning that the evidence showed the defendant acted aggressively towards the victim later in the evening, but it did not support a finding that the defendant approached and threatened her, took her cell phone, or entered the house uninvited. The court also noted that the defendant's supposed large knife was in reality a small pocketknife that was legal to possess, and that "[c]arrying a small pocketknife is not in and of itself behavior constituting a failure to keep the peace."¹¹⁵ With respect to the defendant's arrest, despite the police officer's testimony that the defendant stepped out of the car only after the officer threatened to smash the car windows, *Forbes* found the incident not a violation of good behavior because the defendant was not the driver of the vehicle and the police report stated he was arrested without incident.¹¹⁶

Forbes is hard to reconcile with *Wiggs*. Despite rejecting many of the lower court's factual findings, on appeal the Rhode Island Supreme Court left intact that the defendant acted aggressively towards the victim later in the evening, and did not exit the vehicle as a passenger because he had rolled up the windows and locked the door before the police officer asked him to step out of the vehicle. Whether these actions are criminal or not, they are not "impeccable behavior" and demonstrate a tendency to "hang around with the wrong people"—actions that *Wiggs* found sufficient to revoke probation.¹¹⁷

114. *Id.* at 933.

115. *Id.* at 935.

116. *Id.* at 932–33.

117. *Forbes* is also noteworthy because the Rhode Island Supreme Court chided the lower court for not making any findings at the probation violation hearing on the conduct that formed the basis for the first-degree sexual assault charge. *See id.* at 935 ("Although the hearing justice correctly perceived that his role was not to determine the validity *vel non* of the first-degree sexual assault charge, he unnecessarily avoided making any factual finding concerning the defendant's conduct relative to that charge."). *Forbes* makes clear that it is not necessary to avoid factual questions at probation violation hearings that form the basis for a companion criminal charge. *Forbes* thus solidifies the legal fiction of the Rhode Island probation system that a defendant is violated for failing the keep the peace and maintaining good behavior, not for committing a crime, even when a defendant is violated for conduct that also is the basis for the underlying crime. *See infra* Part VI.

A year after *Forbes*, in 2008, the Rhode Island Supreme Court decided *State v. McCarthy*, another case that gives conflicting signals on the meanings of keeping the peace and good behavior. In *McCarthy*, the defendant's underlying crime of conviction was second-degree child molestation with special probation conditions that included a no-contact order and attendance at sex-offender counseling.¹¹⁸ The State alleged the defendant violated the terms of his probation by driving by the sex-offender counselor's house (in the same town as one of his victims) while informing the counseling agency by phone that he was doing so, making the counselor feel threatened. The State also alleged the defendant failed to keep an accurate travel log or report his whereabouts to his probation officer; did not attend sex-offender counseling sessions; and possessed a pair of female underwear in the lining of his coat when he was arrested for violating probation.¹¹⁹

In *McCarthy*, the superior court determined that the discovery of underwear in the defendant's coat, in and of itself, did not constitute failure to keep the peace or breach of good behavior.¹²⁰ Similarly, the superior court reasoned that the defendant's drive-by past the counselor's house did not constitute a breach by itself, but the events surrounding the incident, such as his phone call to the agency giving notice of the drive by, raised serious questions. The straw that broke the camel's back, in the superior court's view, was the defendant's failure to stay involved and current with his sex offender counseling. The superior court reasoned that while the underwear and the drive-by "would not be sufficient, if either had been standing alone, to merit a determination that defendant had breached a condition of his probation . . . the three allegations combined [the underwear, drive-by, and lack of counseling] amounted to a probation violation."¹²¹ The superior court adjudged the defendant a probation violator and sentenced him to six years in prison based on his seventeen-year suspended sentence.¹²²

On appeal, the *McCarthy* court affirmed the end result but declined to rule on whether the underwear or the drive-by incident

118. *State v. McCarthy*, 945 A.2d 318, 319–20. (R.I. 2008).

119. *Id.* at 320.

120. *Id.* at 327.

121. *Id.* at 328.

122. *Id.* at 326.

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constituted a breach of probation.¹²³ Instead, *McCarthy* affirmed the probation revocation solely on the basis that the defendant failed to cooperate with the requirement for sex-offender counseling.¹²⁴ The *McCarthy* court reasoned this “was a patent violation of a clear term of [the defendant’s] probation,” which the defendant was well aware of when he signed a document informing him of his probation conditions.¹²⁵

The majority opinion prompted a strong dissent from Justice Flaherty. Before the drive-by incident, Justice Flaherty pointed out that because the defendant had partially complied with counseling his probation officers had decided not to charge him with a probation violation.¹²⁶ The charge of technical non-compliance with sex-offender counseling, which eventually emerged as the basis for adjudging the defendant a probation violator, was not added until the day of the probation violation hearing.¹²⁷ Justice Flaherty found this sequence of events and the superior court’s reasoning troubling in several respects. First, before the drive-by incident, the defendant’s lack of cooperation with counseling never prompted a probation violation charge. Second, the superior court combined two incidents that it found not to be violation of good behavior with a finding of partial compliance to determine that the defendant was a violator. Third, Justice Flaherty found it troubling that the defendant tried to participate in treatment but encountered several obstacles, including a switch in therapists, financial and health problems, and his probation officer’s failure to work with him to overcome these hurdles.¹²⁸ Justice Flaherty reasoned that “[i]t is the function of probation counselors to work with offenders to aid them in becoming productive and law-abiding members of society. Individuals on probation have not been model citizens; indeed, that is why they are on probation and under the supervision of

123. *Id.* at 328.

124. *Id.*

125. *Id.*

126. *Id.* at 329–30 (Flaherty, J., dissenting).

127. *Id.* at 327–28 (majority opinion).

128. *Id.* at 329–30 (Flaherty, J., dissenting). One of the defendant’s probation officers in *McCarthy* was Gerald Silva. In proceedings unrelated to *McCarthy*, the United States recently prosecuted Mr. Silva for receipt and possession of child pornography. See *United States v. Silva*, 794 F.3d 173, 176 (1st Cir. 2015).

probation officers in the first place.”¹²⁹ Based on the defendant’s attempts at compliance with sex-offender counseling and the lack of a finding that he violated any other condition of probation, Justice Flaherty concluded that the defendant was not a probation violator.

Reconciling the majority and dissent in *McCarthy*, the takeaway might be that if an action is not prohibited by a specific probation condition and does not constitute a crime, it does not constitute a breach of the peace or failure to remain on good behavior. The majority specifically declined to find that the drive-by incident and the underwear constituted a breach of good behavior. Similarly, the dissent reasoned the defendant did not breach his probation conditions, and found that the defendant’s possession of female underwear, while “unsettling if not downright disturbing” given his status as a twice-convicted sex offender, was neither a violation of the law nor a breach of a probation condition.¹³⁰ Both the majority and the dissent appear uncomfortable with finding a probation violation for conduct that is not clearly proscribed by a general or special condition.

Later in 2008, after *McCarthy*, the Rhode Island Supreme Court issued *State v. Pitts*, a decision leaning in the opposite direction.¹³¹ In *Pitts*, the defendant’s underlying crime was first and second degree child molestation.¹³² While on probation, he was arrested for masturbating in the driver’s seat of a van near a school.¹³³ At the ensuing probation revocation hearing, the superior court reasoned that the defendant could likely be convicted of disorderly conduct, but even if his behavior did not satisfy the elements of disorderly conduct, the manner in which the defendant exposed himself and his actions “clearly were inappropriate and not in keeping with the good behavior required of a probationer.”¹³⁴ The superior court adjudged the defendant a violator and sentenced him to five years of his twenty-eight year suspended sentence.¹³⁵

129. *McCarthy*, 945 A.2d at 330 (Flaherty, J., dissenting).

130. *Id.* at 329–30 n.9.

131. *State v. Pitts*, 960 A.2d 240, 242 (R.I. 2008).

132. *Id.*

133. *Id.* at 243.

134. *Id.* at 244.

135. *Id.*

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On appeal, the Rhode Island Supreme Court affirmed, reasoning that “[i]rrespective of whether [the defendant] could be found guilty of disorderly conduct, there was sufficient evidence for the hearing justice to conclude that he had violated his probation by failing to keep the peace and remain on good behavior.”¹³⁶ *Pitts* explained that “the fact that [the defendant] 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.”¹³⁷ This finding is *contrapposto* to *McCarthy*. *McCarthy* and *Pitts* both assumed the conduct forming the basis for the probation revocation was not criminal. Under *McCarthy*, a child molester can carry female underwear around in his jacket (which is “disturbing”) and drive by his sex offender counselor’s house in a threatening manner—all without fear of probation revocation; while under *Pitts*, a child molester cannot masturbate in a van near a school.

To sum up the cases in chronological order, *Wiggs* reasons that a probationer must be model citizen, above and beyond the behavior of the average Rhode Islander.¹³⁸ *Forbes* gives a probationer more leeway, allowing a defendant to get in some hot water but escape revocation if the bad behavior is relatively minor.¹³⁹ *McCarthy* seems to cabin probation violations to actual criminal conduct and violations of specific probation conditions.¹⁴⁰ *Pitts*, on the other hand, allows bad conduct that may not be a crime or in contravention of a specifically-stated condition (other than an implied condition) to form the basis for a violation.¹⁴¹

The problematic theme from these decisions is that “good behavior” and “keeping the peace” are questions of fact decided on a case-by-case basis. The Rhode Island Supreme Court overturns a revocation decision only if the lower court acts arbitrarily or

136. *Id.* at 246. After the probation violation hearing, the *Pitts* defendant was eventually convicted of disorderly conduct for the same conduct. *Id.* at 244 n.7.

137. *Id.* at 246.

138. *State v. Wiggs*, 635 A.2d 272, 274 (R.I. 1993).

139. *State v. Forbes*, 925 A.2d 929, 934 (R.I. 2007).

140. *State v. McCarthy*, 945 A.2d 318, 328 (R.I. 2008).

141. *Pitts*, 960 A.2d at 246.

capriciously in assessing the credibility of witnesses or finding a violation.¹⁴² This arbitrary and capricious standard applies to the lower court's determination that conduct does not keep the peace or comport with good behavior.¹⁴³ In effect, the low standard of review facilitates a legal system with no precise legal definition to the terms "keeping the peace" or "good behavior." The lower courts have free rein to interpret them as they see fit under the umbrella of deciding factual questions. This treatment of keeping the peace and good behavior as factual questions effectively stunts development of the law because there is no meaningful review of what the terms mean.

Equally problematic, because there is no precise definition, is what constitutes good behavior and the identity of the "right" and "wrong" people to associate with because it depends on the perspective of the judge at the violation hearing. This opens up the system to criticism about different lifestyles and cultures. There is no right to a jury trial in a probation violation proceeding, and therefore a jury of one's peers does not make the factual finding on what constitutes "good behavior" or "keeping the peace."¹⁴⁴ The finding is made by the court, and the "right" people from the perspective of a judge may not be the "right" people from the vantage point of a nineteen year-old single mother living in poverty. In effect, the lack of definition to good behavior and keeping the peace leads to moral judgments by the judge dressed up as findings of fact. The end result is a judicial decision about what is morally "good" or "bad" that is virtually unassailable on appeal because it is couched as a question of fact, coupled with the potential of significant jail time for the probation violation.

The line between questions of fact and questions of law can be difficult to draw. The Rhode Island Supreme Court hews the line towards questions of fact in probation violation proceedings. Another possible approach is to distinguish between (a) findings on the conduct that form the basis for the alleged violation, which are clearly findings of fact; and (b) findings on whether the conduct amounts to a violation of good behavior and keeping the

142. See, e.g., *id.* at 244.

143. See *State v. Salvail*, 362 A.2d 135, 137 n.3 (R.I. 1976) (describing finding a probation violation as a finding of fact).

144. *Minnesota v. Murphy*, 465 U.S. 420, 435 n.7 (1984); *United States v. Czajak*, 909 F.2d 20, 23–24 (1st Cir. 1990).

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peace, which could be construed as a question of law and therefore subject to de novo review.¹⁴⁵ To illustrate, whether a defendant drove by his counselor's house is a question of fact, but whether the drive-by constitutes a breach of good behavior or keeping the peace could be a question of law. This is the approach that federal courts take, for example, when deciding cases on warrantless searches. Like good behavior and keeping the peace, reasonableness in the Fourth Amendment context is an amorphous concept.¹⁴⁶ The lower court's findings on what happened are questions of fact entitled to deference, but whether those findings amount to a reasonable search or seizure is a question of law afforded de novo review.¹⁴⁷

From a defendant's perspective, the treatment of good behavior and keeping the peace as case-by-case factual determinations makes it difficult to have fair notice of what constitutes a probation violation. This is troubling because breach of these implied conditions can lead to significant jail time.

The lack of definiteness also raises constitutional questions. The Ninth Circuit's reasoning in *United States v. Dane* is illustrative of the issues that arise from vague or ill-defined probation conditions.¹⁴⁸ The *Dane* court held that due process generally requires fair warning of conduct that might lead to loss of liberty through probation revocation, but it drew a clear line between lawful and illegal behavior.¹⁴⁹ Advance warning is not essential when the probationer commits a crime because "[i]n such a case, knowledge of the criminal law is imputed to the probationer, as is an understanding that violation of the law will lead to the revocation of probation."¹⁵⁰ But for otherwise lawful behavior, general and special conditions of probation serve the important purpose of giving notice of restricted activities.¹⁵¹ When there are no allegations of criminal activity, unless the

145. A more radical approach would be to do away with implied probation conditions altogether and craft more detailed conditions similar to the federal system.

146. See, e.g., *Hudson v. City of Riviera Beach*, 982 F. Supp. 2d 1318, 1341 (S.D. Fla. 2013).

147. See, e.g., *United States v. Tibolt*, 72 F.3d 965, 969 (1st Cir. 1995).

148. *United States v. Dane*, 570 F.2d 840, 843 (9th Cir. 1977).

149. *Id.* at 843-44.

150. *Id.* at 844.

151. *Id.*

defendant receives prior fair warning that the alleged acts can lead to revocation, *Dane* holds that a court's decision to revoke probation violates due process and is an abuse of discretion.¹⁵² Applying this logic to Rhode Island, it is questionable whether the implied conditions of keeping the peace and good behavior are definite enough to constitute prior fair warning.

Recently, in *Johnson v. United States*, the United States Supreme Court held that a criminal law is unconstitutionally vague, and therefore violates due process, when it "fails to give ordinary people fair notice of the conduct it punishes, or [is] so standardless that it invites arbitrary enforcement."¹⁵³ The vagueness doctrine applies "not only to statutes defining elements of crimes, but also to statutes fixing sentences."¹⁵⁴ As the United State Supreme Court has explained, vague sentencing provisions pose constitutional problems when "they do not state with sufficient clarity the consequences of violating a given criminal statute."¹⁵⁵ Under federal law, there are three manifestations of this fair warning requirement:

First, the vagueness doctrine bars enforcement of "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." Second, as a sort of "junior version of the vagueness doctrine," the canon of strict construction of criminal statutes, or rule of lenity, ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered. Third, although clarity at the requisite level may be supplied by judicial gloss on an otherwise uncertain statute, due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its

152. *Id.*

153. *Johnson v. United States*, 135 S. Ct. 2551, 2556 (2015).

154. *Id.* at 2557.

155. *Butler v. O'Brien*, 663 F.3d 514, 518 (1st Cir. 2011) (quoting *United States v. Batchelder*, 442 U.S. 114, 123 (1979)) (internal quotation marks omitted).

scope.¹⁵⁶

In *Johnson*, the Supreme Court examined a statutory provision in the Armed Career Criminal Act that defines a “violent felony” as a crime that “otherwise involves conduct that presents a serious potential risk of physical injury to another.”¹⁵⁷ This language is known as the residual clause of the Act; it subjects a criminal defendant with three or more prior convictions for “violent felonies” to a minimum prison sentence of fifteen years and a maximum term of life if they are subsequently convicted of possessing a firearm.¹⁵⁸

Johnson found the residual clause unconstitutionally vague for several reasons. First, the Court observed that the residual clause “requires a court to picture the kind of conduct that the crime involves in ‘the ordinary case,’ and to judge whether that abstraction presents a serious potential risk of physical injury.”¹⁵⁹ Framed as such, *Johnson* reasoned that a “court’s task goes beyond deciding whether the creation of risk is an element of the crime,” and even “beyond evaluating the chances that the physical acts that make up the crime will injure someone.”¹⁶⁰ As an example, *Johnson* explained that breaking and entering does not, in and of itself, cause physical injury; rather, risk of injury arises after entry into a home when the burglar confronts the resident.¹⁶¹ *Johnson* held that the residual clause runs afoul of the vagueness doctrine because it leaves uncertainty about how to estimate risk when committing a crime.¹⁶² According to *Johnson*, there is no reliable method to determine what an “ordinary case” of a crime means, and asked rhetorically: “How does one go about deciding what kind of conduct ‘the ordinary case’ of a crime involves? ‘A statistical analysis of the state reporter? A survey? Expert evidence? Google? Gut instinct?’”¹⁶³

156. *Id.* at 519 (quoting *United States v. Lanier*, 520 U.S. 259, 266 (1997)).

157. 18 U.S.C. § 924(e)(2)(B)(ii) (2012); *Johnson*, 135 S. Ct. at 2556–67.

158. *Johnson*, 135 S. Ct. at 2555.

159. *Id.* at 2557 (quoting *James v. United States*, 550 U.S. 192, 208 (2007)).

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.* (quoting *United States v. Mayer*, 560 F.3d 948, 952 (2009) (Kozinski, C.J., dissenting) (denying rehearing en banc)).

Second, *Johnson* found the residual clause unconstitutionally vague because it left too much uncertainty about how much risk is required to qualify as a “violent felony” in the abstract.¹⁶⁴ “By combining indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony, the residual clause produces more unpredictability and arbitrariness than the Due Process Clause tolerates.”¹⁶⁵

Third, *Johnson* noted the Supreme Court had already attempted to establish a workable standard for the residual clause in four prior cases and—according to the *Johnson* majority—failed every time.¹⁶⁶ Lower courts also struggled to agree on a standard. The Court found the lack of agreement as further evidence of vagueness.¹⁶⁷

Finally, *Johnson* rejected the argument that the residual clause is constitutional because some crimes fit within the clause’s definition and pose a serious risk of physical injury. *Johnson* reasoned that the Court’s prior “holdings squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision’s grasp.”¹⁶⁸ If a statute is vague, *Johnson* holds it is vague in all its applications.¹⁶⁹

Johnson’s reasoning raises serious questions about Rhode Island’s implied probation conditions of good behavior and keeping the peace.¹⁷⁰ For starters, similar to *Johnson*, virtually any behavior can subject a Rhode Island defendant to a probation violation, and the probationer cannot estimate the risk in advance. Also, like in *Johnson*, the meaning of good behavior and keeping the peace is indeterminate because the terms are undefined. No Rhode Island court has said what they mean and there is much

164. *Id.* at 2558.

165. *Id.*

166. *Id.* at 2556.

167. *Id.* at 2556, 2558.

168. *Id.* at 2561.

169. *Id.*

170. The Rhode Island Supreme Court often relies on federal precedent to decide due process challenges to penal statutes based on void for vagueness. *See, e.g.*, *State v. Russell*, 890 A.2d 453, 459 (R.I. 2006) (citing *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999)); *State v. Stierhoff*, 879 A.2d 425, 435 (R.I. 2005) (citing *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)).

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uncertainty. As in *Johnson*, Rhode Island courts have had difficulty articulating a consistent standard. Finally, while the commission of a crime falls within the ambit of breach of good behavior and keeping the peace, *Johnson* holds that a criminal law is vague even if some behavior clearly falls within its ambit. Add it all up, and *Johnson* suggests that good behavior and keeping the peace are unconstitutionally vague.

The application of *Johnson* to Rhode Island's implied probation conditions is by no means clear. Two federal cases decided decades before *Johnson* suggest a "good behavior" standard is not unconstitutionally vague, although those cases addressed employment law and prisoner conduct.¹⁷¹ More recent federal cases decided before *Johnson* have held that probation conditions, where violations turn on phrases such as "deemed to be inappropriate by the probation officer,"¹⁷² "questioned by a law enforcement officer,"¹⁷³ or "associating with 'any disruptive group,'"¹⁷⁴ can be void for vagueness as applied to the specific facts of the case.

Johnson itself was decided under the Due Process Clause of the Fifth Amendment, which applies to the federal government.¹⁷⁵ It is an open question whether the same vagueness principles would attach to the Due Process Clause of the Fourteenth Amendment that is applicable to the States.¹⁷⁶ There is some authority based on federalism concerns that suggests the vagueness doctrines applicable to the federal government through the Fifth Amendment might be more stringent than the vagueness doctrine applied to the States under the Fourteenth Amendment. For example, in *Butler v. O'Brien*, the First Circuit held that federal courts exercising habeas corpus review have no power to require state courts to adopt the rule of lenity, which is typically

171. See *Douglas v. Sigler*, 386 F.2d 684, 686 (8th Cir. 1967) (prisoner good conduct case); *Hayes v. City of Wilmington*, 451 F. Supp. 696, 713 (D. Del. 1978) (due process case based on termination of employment).

172. *United States v. Begay*, 556 F. App'x 581, 583 (9th Cir. 2014).

173. *United States v. Maloney*, 513 F.3d 350, 357 (3d Cir. 2008).

174. *United States v. Vallejo*, 292 F. App'x 660, 662 (9th Cir. 2008) (quoting *United States v. Soltero*, 510 F.3d 858, 867 (9th Cir. 2007)).

175. See, e.g., *Martinez-Rivera v. Ramos*, 498 F.3d 3, 8 (1st Cir. 2007).

176. See, e.g., *United States v. Rivera-Rodriguez*, 489 F.3d 48, 54 n.3 (1st Cir. 2007); *Ramirez-Lliveras v. Pagan-Cruz*, 862 F. Supp. 2d 82, 86 (D.P.R. 2012).

considered part of the vagueness doctrine.¹⁷⁷

It is also noteworthy that probation violation hearings in Rhode Island are considered civil proceedings, raising the specter that vagueness doctrines apply with less force to probation revocation because it is not criminal. But this seems unlikely because Rhode Island's probation statute is codified in the criminal laws, and a probation violation is based on a previously imposed sentence and subjects the defendant to significant prison time. In the federal system, courts have tested probation and supervised release conditions against the vagueness doctrine.¹⁷⁸ It stands to reason that Rhode Island courts would do the same.

Irrespective of these theoretical musings, the vagueness concerns in *Johnson* raise substantial questions about the validity of good behavior and keeping the peace as implied probation conditions. Criminal defendants in Rhode Island may not have fair notice of all the probation conditions that expose them to additional jail time.

III. THE STANDARD FOR BRINGING A PROBATION VIOLATION CHARGE

When the defendant commits an act that allegedly breaches a probation condition, whether it is a new crime or something else, the next step is to charge the defendant with a probation violation. The charging process is governed by R.I. Gen. Section 12-19-9 of the Rhode Island General Laws and Rule 32(f) of the Superior Court Rules of Criminal Procedure.¹⁷⁹ Section 12-19-9 authorizes "the police or the probation authority [to] inform the attorney general of the violation, and the attorney general shall cause the defendant to appear before the court." When the defendant appears before the court, section 12-19-9 states that "[t]he court may request the division of field services to render a report relative to the conduct of the defendant, and, pending receipt of the report, may order the defendant held without bail for a period

177. 663 F.3d 514, 519 (1st Cir. 2011).

178. See, e.g., *United States v. King*, 608 F.3d 1122, 1128 (9th Cir. 2010); *United States v. Locke*, 482 F.3d 764, 768 (5th Cir. 2007).

179. The comparable state district court provisions are section 12-19-14 of the Rhode Island General Laws and Rule 32(f) of the District Court Rules of Criminal Procedure. They are mostly the same as to the superior court provisions; there is one difference in the charging procedure as noted *infra* Part III.

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not exceeding ten (10) days.”¹⁸⁰ Pursuant to Rule 32(f), prior to the revocation hearing, “the State shall furnish the defendant and the court with a written statement specifying the grounds upon which” the probation revocation is based.¹⁸¹

The major fly in the ointment with the probation charging process is that there is no articulated standard to bring a probation violation charge. Conceptually, whatever the standard is, it should be less rigorous than the “reasonably satisfied” standard required to find a probation violation. This type of dichotomy is pervasive in criminal law: for a crime, the complaint or indictment must satisfy probable cause at the pre-trial phase and at trial the charge must be proven beyond a reasonable doubt. In the probation violation context, however, there is no dichotomy spelled out in Rhode Island’s procedural rules, statutes or case law. The problem is exacerbated by the lack of clarity about the meaning of “reasonably satisfied” discussed in greater detail in Part V.

Morrissey v. Brewer suggests the standard to bring a probation violation charge should be “probable cause or reasonable ground to believe that the arrested [defendant] has committed acts that would constitute a violation of [probation] conditions.”¹⁸² The Rhode Island Attorney General echoed this approach in a 1996 advisory opinion on the burden of proof for parole revocation in advising the Parole Board that a parolee has a right to a preliminary hearing, and that the purpose of such hearing is to determine if there is probable cause to believe the parolee committed a parole violation.¹⁸³

Notwithstanding *Morrissey* and the Attorney General’s opinion in the parole violation context, one Rhode Island court has stated that the “reasonably satisfied” burden of proof to establish a probation violation is a standard lower than probable cause.¹⁸⁴ If this decision is correct, the evidence required in order to bring a

180. R.I. GEN. LAWS § 12-19-9 (West Supp. 2015).

181. R.I. SUPER. CT. R. CRIM. P. 32(f).

182. 408 U.S. 471, 485 (1972).

183. Office of the Att’y Gen. of R.I., Unofficial Op. U96-05, 1996 WL 33164516, at *1 (Aug. 15, 1996).

184. *State v. Reis*, No. P2-03-2726A, 2012 WL 3638892, at *14 (R.I. Super. Ct. Aug. 20, 2012) (“The same way the State does not need to prove a violation beyond a reasonable doubt, the State need not prove that there exists probable cause to determine a finding of violation.”).

probation violation charge is virtually nothing; logically, the burden to bring a charge should be lower than the burden to find a violation.

Consider that preponderance of the evidence means “more likely than not” and requires only 51% certainty.¹⁸⁵ Probable cause is a lower hurdle than preponderance; it is “something less” than 51% certainty, but more than a bare suspicion.¹⁸⁶ Probable cause exists when there is a fair probability that the defendant has committed the offense charged based on the totality of the circumstances.¹⁸⁷ As the Rhode Island Supreme Court has observed, noting a “wry observation” by Sol Wachtler, former Chief Judge of the New York Court of Appeals, any good prosecutor “can get a grand jury to ‘indict a ham sandwich’” based on probable cause.¹⁸⁸ If, as the Rhode Island court held, the “reasonably satisfied” standard to find a probation violation means less than probable cause, then the standard for bringing a probation violation charge must be even lower than that. Forget the ham sandwich: on a probation violation, any good prosecutor could bring a charge against broccoli, particularly if Congress required everyone to eat it.¹⁸⁹

Whatever the standard might be for bringing a probation violation charge in Rhode Island, it appears to be extremely low. Perhaps it is reasonable suspicion, like that employed in a Fourth Amendment *Terry* stop, which “requires there be both a particularized and an objective basis for suspecting the individual stopped of criminal activity.”¹⁹⁰ Or maybe it is substantial evidence, like that used in the administrative law context, defined as “more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established. It means such relevant evidence as a reasonable mind might accept as

185. See *Nat'l Lime Ass'n v. Env'tl. Prot. Agency*, 627 F.2d 416, 453 n.139 (D.C. Cir. 1980); *United States v. Melvin*, 596 F.2d 492, 495 (1st Cir. 1979).

186. *United States v. Bentley*, 795 F.3d 630, 636 (7th Cir. 2015); *United States v. Pack*, 612 F.3d 341, 352–53 n.7 (5th Cir. 2010).

187. See *Illinois v. Gates*, 462 U.S. 213, 231 (1983); *United States v. Gomez*, 716 F.3d 1, 7 (1st Cir. 2013).

188. *State v. Russell*, 950 A.2d 418, 420 n.1 (R.I. 2008).

189. Cf. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2609 (2012) (sparring between justices over the limits of the Commerce Clause and eating broccoli).

190. *United States v. Dapolito*, 713 F.3d 141, 148 (1st Cir. 2013).

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adequate to support a conclusion.”¹⁹¹ Whatever the standard is, it is concerning that a probation violation charge exposes a defendant to significant loss of liberty, but the standard for bringing that charge is unclear and unknown.

Another significant issue is that the charging procedure resides solely within the executive branch and is unchecked by the judiciary. In superior court, pursuant to section 12-19-9 of the Rhode Island General Laws, the Attorney General makes the decision to bring the violation charge along with the police or probation office, and the Attorney General “cause[s] the defendant to appear before the court.” In state district court, under section 12-19-14 of the Rhode Island General Laws, the Attorney General has no role at all under the letter of the statute; it is the “police or division of field services [that] cause[s] the defendant to appear before the court.”¹⁹²

The state procedure is in marked contrast to the federal system where the judiciary plays a significant role in issuing the probation charge. In federal court, a probation officer drafts a violation report and presents it to a district judge for review. The reviewing judge is normally the same judge that originally sentenced the defendant and is familiar with the case. The notice of violation is not issued, thereby causing the defendant to be brought before the court, until the district judge finds probable cause that a violation has occurred and signs the probation violation report that authorizes the summons.¹⁹³ Under federal law, “it is the court and the court alone that ultimately decides

191. *R & B Transp., LLC v. U.S. Dep’t of Labor*, 618 F.3d 37, 44 (1st Cir. 2010) (quoting *BSP Trans Inc. v. U.S. Dep’t of Labor*, 160 F.3d 38, 47 (1st Cir. 1998)) (internal quotation marks omitted).

192. R.I. GEN. LAWS § 12-19-14 (2006). The state district court practice raises a host of issues associated with police officers and the unauthorized practice of law that are beyond the scope of this Article. *See, e.g.*, Andrew Horwitz & John R. Grasso, *Police Prosecution in Rhode Island: The Unauthorized Practice of Law*, R.I.B.J., May/June 2006, at 5–6; Andrew Horwitz, *The Right to Counsel in Criminal Cases: The Law and the Reality in Rhode Island District Court*, 9 *ROGER WILLIAMS U. L. REV.* 409, 421 (2004); Andrew Horwitz, *Taking the Cop Out of Copping A Plea: Eradicating Police Prosecution of Criminal Cases*, 40 *ARIZ. L. REV.* 1305, 1306 (1998); *see also* Nikolas Frye, Note, *Allowing New Hampshire Police Officers to Prosecute: Concerns with the Practice and a Solution*, 38 *NEW ENG. J. ON CRIM. & CIV. CONFINEMENT* 339, 340 (2012).

193. *See generally* 3 CHARLES ALAN WRIGHT & SARAH N. WELLING, *FEDERAL PRACTICE AND PROCEDURE* § 562 (4th ed. 2015).

whether or not revocation proceedings shall be initiated and, if initiated, what consequences will befall the individual who has violated his conditions of release.”¹⁹⁴ As such, the federal court provides an important check on the violation-charging decision. The judge reviewing the probation violation report has the discretion to not authorize a summons even if probable cause exists that a violation occurred. This is different from Rhode Island’s system, which does not provide for the judiciary to check at all on the charging decision.

The difference between the state and federal systems can be largely explained on where the probation department fits within the structure of the respective governments. In the state system, the probation department is part of the executive branch.¹⁹⁵ In the federal system, probation is part of the judicial branch.¹⁹⁶ A federal probation officer is not working for the prosecution at the charging decision-stage, but, rather is assisting the court in its supervision of the defendant—“an integral part of the courts’ quintessentially judicial sentencing responsibility.”¹⁹⁷

Structurally, it is problematic in Rhode Island’s system that a probation officer is working solely for the prosecution. Checks and balances are lessened when the prosecutor and probation are working for the same branch of government,¹⁹⁸ and the structure gives the executive branch more bargaining power when the probation charge is coupled with allegations of a new crime. If the Attorney General can file a probation violation charge without any judicial review whatsoever, the mere existence of the probation

194. *United States v. Bermudez-Plaza*, 221 F.3d 231, 234 (1st Cir. 2000).

195. The state probation office, technically known by statute as the division of rehabilitative services, is part of the state department of corrections. R.I. GEN. LAWS §§ 42-56-2, 42-56-7 (2006). It is also worth noting that the Attorney General in Rhode Island is elected and has a unique constitutional role. *See In re House of Representatives*, 575 A.2d 176, 179 (R.I. 1990). For present purposes what matters is that the power and discretion to prosecute crimes is a “*fundamental executive power*” and both the probation department and the attorney general are part of the executive branch. *In re McKenna*, 110 A.3d 1126, 1140 (R.I. 2015); *see* R.I. GEN. LAWS §§ 42-56-2, -7; *see also* *Mosby v. Devine*, 851 A.2d 1031, 1055 (R.I. 2004) (describing attorney general as an executive branch official).

196. 18 U.S.C. § 3602(a) (2012).

197. *Bermudez-Plaza*, 221 F.3d at 234.

198. *See* Andrew R. Klein, *When Should We Revoke Parole?*, JUDGES’ J., Winter 1988, at 2, 38.

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charge—and all the lesser procedural protections that come with it, including a lower burden of proof and lack of jury trial combined with the substantial threat of jail time—make it more likely the defendant will agree to a plea deal regardless of the merits of the case.

IV. BAIL FOR ALLEGED PROBATION VIOLATORS AND THE LACK OF A PRELIMINARY HEARING

When a Rhode Island defendant is charged with a probation violation, the defendant is either arrested or served a summons to appear in court at a specific date and time. The summons is sent to the defendant's last known address by regular mail; if the defendant does not appear in court, a bench warrant is issued and the defendant is arrested.

The First Circuit and Rhode Island courts have held that an alleged probation violator does not have a constitutional right to bail.¹⁹⁹ Pursuant to section 12-19-9 of the Rhode Island General Laws, a defendant facing a probation violation charge may be “held without bail for a period not exceeding ten (10) days, excluding Saturdays, Sundays, and holidays.” Similarly, Rule 32(f) of the Superior Court Rules of Criminal Procedure states simply that “[t]he defendant may be admitted to bail pending [the probation violation] hearing.”²⁰⁰ Rhode Island's Bail Guidelines are silent as to bail conditions for alleged probation violators. The Rhode Island Bail Guidelines do, however, specify that money or surety bail is required as a minimum for defendants on probation who are also charged with a new crime.²⁰¹

In Rhode Island, the bail decision is especially significant when the defendant is facing new criminal charges in addition to a probation violation. A defendant charged with a new crime is ordinarily released on bail. But a probation violator charged with a new crime is detained in virtually all cases. Thus, if the probationer does not admit to the probation violation and new

199. See *State v. Osei*, No. P1-2001-1557A, 2013 WL 1852948, at *4 (R.I. Super. Ct. Apr. 26, 2013) (citing *In re Whitney*, 421 F.2d 337, 338 (1st Cir. 1970)).

200. The state district court rules are the same. See R.I. DIST. CT. R. CRIM. P. 32(f); see also R.I. GEN. LAWS § 12-19-14 (2006).

201. R.I. R. SUPER. CT. BAIL GUIDELINES § II.4.c.

criminal charge at the outset, there is a strong likelihood that the defendant will be detained. This creates a strong fulcrum for the defendant to plead guilty to the probation violation and the new criminal charge. Lurking in the background is the reality that the detention, pending the probation violation hearing, usually lasts longer than the ten business day limit specified in section 12-19-9 of the Rhode Island General Laws. In practice, ten business days—two full calendar weeks—is typically the minimum amount of time a defendant is held before the violation hearing, not the maximum amount of time.

Article I, section 9 of the Rhode Island Constitution governs the right to bail for pre-trial defendants facing new charges unless the crime either carries a potential punishment of life in prison, involves dangerous weapons when the defendant has already been convicted of a crime that carries a maximum sentence of life imprisonment, or in certain drug offenses, when the maximum sentence is greater than ten years. These offenses are colloquially known as capital offenses and drug distribution crimes. For these pre-trial defendants, although they “do not have a constitutional right to bail, they do have a constitutional right to have their bail determined in accordance with the due process clause.”²⁰² In all other cases, a defendant facing a new criminal charge has a constitutional right to bail. Bail terms are set pursuant to Rule 46(c) of the Superior Court Rules of Criminal Procedure, which requires the court to set terms that:

[W]ill insure the presence of the defendant, having regard to the nature and circumstances of the offense charged, the weight of the evidence against the defendant, the financial ability of the defendant to give bail, the character of the defendant, and the policy against unnecessary detention of defendants pending trial.²⁰³

Defendants found guilty who are awaiting sentencing may be granted bail or committed.²⁰⁴ Similarly, defendants adjudged

202. Witt v. Moran, 572 A.2d 261, 264 (R.I. 1990).

203. The standard is the same for pre-trial defendants in state district court. See R.I. DIST. CT. R. CRIM. P. 46(c).

204. See, e.g., State v. Briguglio, 661 A.2d 525, 525 (R.I. 1995) (per curiam) (releasing defendant on bail pending sentencing); State v. Thomas, No. K1-94-0149A, 1999 WL 360752, at *1 (R.I. Super. Ct. May 25, 1999)

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guilty but who challenge their conviction do not have an automatic right to bail. Bail, pending appeal, is committed to the court's sound discretion.²⁰⁵ Factors considered by the court include:

- (1) whether the appeal is taken for delay or in good faith on grounds not frivolous but fairly debatable;
- (2) the habits of the individual regarding respect for the law insofar as they are relevant on the question of whether an applicant's release would pose a threat to the community;
- (3) local attachments to the community by way of family ties, business or investment;
- (4) the severity of the sentence imposed, and circumstances relevant to the question of whether a defendant would remove himself from the jurisdiction of the court.²⁰⁶

Harmonizing these rules, in the Rhode Island system, the only criminal defendants facing new charges who do not have an automatic right to bail (other than defendants already on bail) are those charged with capital crimes, certain drug distribution offenses—and probation (or deferred sentence) violators. Unlike the first two categories on this list, a probation violator could be detained for non-criminal conduct such as failure to attend a counseling session, or for a misdemeanor crime such as disorderly conduct that would ordinarily result in bail.

Bail for alleged probation violators exists in a kind of netherworld. A probationer with a violation charge has one foot in the post-conviction world because he or she is already convicted, and another foot in the pre-trial world because the probationer has no pending charges at the time the alleged violation occurs. But, unlike the rules for pre-trial defendants and convicted defendants who are appealing their convictions, there are no clear standards governing bail for alleged probation violators. Rule

(holding defendant without bail pending sentencing). In the federal system:

[T]he judicial officer shall order that a person who has been found guilty of an offense and who is awaiting imposition or execution of sentence . . . be detained, unless the judicial officer finds by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released.

18 U.S.C. § 3143(a) (2012).

205. *State v. Feng*, 421 A.2d 1258, 1263 (R.I. 1980).

206. *State v. Abbott*, 322 A.2d 33, 35 (1974).

32(f) says “[t]he defendant may be admitted to bail pending [the probation violation] hearing,” but there is nothing else that fleshes out the rule. The superior court has explained that “[u]nder the commonly accepted view, the amount of bail set pending [probation] violation hearings is thus clearly subject to a relaxed standard” because “[t]here is no presumption of innocence in the probation revocation process, at least not in the sense in which the phrase is used with reference to the criminal process.”²⁰⁷ This is as far as Rhode Island courts have gone—there is no guidance on what the “relaxed standard” should be, or how bail should be decided. The Rhode Island Supreme Court has suggested an alleged probation violator can be held for ten days pursuant to section 12-19-9 of Rhode Island’s General Laws without any inquiry at all into whether bail is appropriate.²⁰⁸ Probation revocation hearings are considered “civil proceeding[s],”²⁰⁹ which as a general matter should mean the stakes are lower. Ironically, defendants are typically detained in a “civil” probation proceeding, while the same defendant would usually be released on bail in a criminal proceeding for the same conduct.

The rules for bail in the federal system for probation and supervised release are more clearly defined. The standard for release on bail in the federal system is high: the defendant must show by clear and convincing evidence that he will not flee or pose a danger to any person or to the community.²¹⁰ In practice, federal defendants who face revocation for technical violations are frequently granted bail. If a new crime is the basis for the violation, a federal defendant is usually detained pending the final revocation hearing. This is not as onerous as it sounds. New criminal charges are usually resolved before a violation proceeding goes forward in the federal system. It is not heavy lifting for the court to find risk of flight or danger to the community when the

207. State v. Osei, No. P1-2001-1557A, 2013 WL 1852948, at *4 (R.I. Super. Ct. Apr. 26, 2013) (second alteration in original) (quoting *In re Whitney*, 421 F.2d 337, 338 (1st Cir. 1970)) (internal quotation marks omitted).

208. State v. Lawrence, 658 A.2d 890, 893 (R.I. 1995) (“[W]e are of the opinion that § 12-19-9 is quite clear in mandating that a defendant may be held without bail pending a probation-revocation hearings ‘for a period not exceeding ten (10) days.’”).

209. State v. Jones, 969 A.2d 676, 681 (R.I. 2009).

210. FED. R. CRIM. P. 32.1(a)(6).

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new crime that is the basis for the violation has already been adjudicated.

Another important distinction from the state system is that federal defendants in custody have the right to challenge the violation at a preliminary hearing; if no probable cause exists, the defendant must be released.²¹¹ Pursuant to Rule 32.1(b)(1) of the Federal Rules of Criminal Procedure, a federal magistrate judge must promptly conduct the preliminary hearing and the defendant has the right to present evidence and cross-examine witnesses.²¹² Significantly, this rule applies only when the defendant is held in custody based on allegations of violation of probation or supervised release.²¹³ If the defendant is not in custody, federal courts hold there is no right to a preliminary hearing because a loss of liberty does not arise until the defendant is taken into custody.²¹⁴ “The point of [Rule 32.1] is to prevent people from being held indefinitely on mere allegations of supervised release [or probation] violations.”²¹⁵ Stated another way, there is no liberty interest at stake if the federal defendant is not taken into custody, and therefore, no due process right to a preliminary hearing.²¹⁶

At the conclusion of the preliminary hearing, “[i]f the judge finds probable cause, the judge must conduct a revocation hearing. If the judge does not find probable cause, the judge must dismiss the proceeding.”²¹⁷ Some federal courts have gone so far as to

211. See also *United States v. Vixamar*, 679 F.3d 22, 25 (1st Cir. 2012).

212. FED. R. CRIM. P. 32.1(b).

213. *United States v. Scott*, 182 F.3d 902, 1999 WL 464993, at *2 (2d Cir. 1999) (unpublished table decision).

214. *United States v. Pippin*, 613 Fed. App’x 476, 479 (6th Cir. 2015); *Scott*, 182 F.3d 902, 1999 WL 464993, at *2.

215. *Scott*, 182 F.3d 902, 1999 WL 464993, at *2; cf. *United States v. Chaklader*, 987 F.2d 75, 77 (1st Cir. 1993) (“[T]here is ‘no constitutional duty to provide petitioner an adversary parole hearing until he is taken into custody as a parole violator.’” (emphasis omitted) (quoting *Moody v. Daggett*, 429 U.S. 78, 89 (1976))).

216. Cf. *Swarthout v. Cooke*, 562 U.S. 216, 220 (2011) (stating that due process requires a liberty interest).

217. FED. R. CRIM. P. 32.1(b)(1)(C). The First Circuit, in a short footnote, has stated that a no probable cause finding by a magistrate judge at a preliminary hearing does not bind a district judge at a subsequent revocation hearing. The preliminary hearing is available to those defendants held in custody and does not constrain a district judge’s factual findings at the revocation hearing. See *Vixamar*, 679 F.3d at 26 n.2 (citing 3 CHARLES ALAN

equate the protections in Rule 32.1 as synonymous with constitutional due process.²¹⁸

By contrast, the Rhode Island probation violation procedure has no mechanism to challenge the probation charge at a preliminary hearing. Instead, the defendant appears at a presentment, which is akin to an arraignment. The defendant can argue for bail at the presentment, but it is not an evidentiary hearing. After that, the charge proceeds directly to the probation violation hearing.²¹⁹

In *State v. DeLomba*, the Rhode Island Supreme Court held there is no right to a preliminary hearing to determine probable cause for a probation violation.²²⁰ Under *DeLomba*, the defendant is only entitled to one hearing at which it is “determine[d] whether [the defendant] is, in fact, a violator and, if so, what his punishment should be.”²²¹ Citing *Goldberg v. Kelly*, a United States Supreme Court case, *DeLomba* held that “due process does not, of course, require two hearings,” reasoning that “no constitutional purpose would be served by bifurcating our present unitary judicial violation hearing, at which an alleged violator is afforded due process rights equal or superior to those required” by federal precedent.²²² *DeLomba* also declined to adopt a dual hearing requirement on public policy grounds.²²³ After *DeLomba*, Rhode Island courts have routinely relied on it for the proposition that criminal defendants have no right to a preliminary hearing to

WRIGHT & SARAH N. WELLING, FEDERAL PRACTICE AND PROCEDURE § 562, at 379 (4th ed. 2011)).

218. *United States v. Destefano*, 178 Fed. App’x 613, 615 (8th Cir. 2006) (“[D]ue process requires that a probationer who is in custody for an alleged probation violation be afforded a prompt ‘preliminary hearing to determine whether probable cause exists to believe that a probation violation has occurred.’” (quoting *United States v. Sutton*, 607 F.2d 220, 222 (8th Cir. 1979))).

219. R.I. GEN. LAWS § 12-19-9 (2006). The court can request the probation department to produce a report on the violation for the final revocation hearing while the defendant is detained. *Id.*; see also R.I. R. CRIM. P. 32(f) (requiring that prior to the revocation hearing, the State must provide the defendant and the court with a written statement specifying the grounds for the probation violation).

220. *State v. DeLomba*, 370 A.2d 1273, 1276 (R.I. 1977).

221. *Id.* at 1275.

222. *Id.* at 1275, 1276 (citing *Goldberg v. Kelly*, 397 U.S. 254, 267 n.14 (1970)).

223. *Id.* at 1276.

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determine probable cause on a probation violation followed by a final revocation hearing.²²⁴

DeLomba is problematic. Structurally, the federal system provides for a probable cause determination when the court issues a summons on a violation. If the federal defendant is held in custody, the defendant is entitled to a preliminary hearing to challenge probable cause, followed by another assessment of the evidence at the revocation hearing. Thus, a federal judge potentially passes on the merits of the charges against a defendant three times (summons, preliminary hearing, and violation hearing). By contrast, in the state system under *DeLomba*, the court passes on merits of the violation just once—at the probation violating hearing.

DeLomba's reasoning is suspect for several reasons. First, *DeLomba* has a blind spot for probation violation cases without a related criminal charge. The defendant in *DeLomba* asked for the final revocation hearing to be delayed until after criminal charges based on the same conduct as the probation violation were resolved. *DeLomba* rejected this approach, reasoning that if the final revocation hearing is delayed until after the criminal proceeding, the defendant will receive more due process than required for probation violators.²²⁵ The problem with this logic is that it presupposes there is a criminal charge based on the same conduct. If there is no companion criminal charge, the defendants' due process rights rise and fall on the procedure afforded by the probation violation hearing.

DeLomba also reasons that Rhode Island's "unitary judicial violation hearing" procedure affords rights equal or superior to those required by *Gagnon*²²⁶ and that a preliminary hearing is not required because "[n]either the federal nor our own state constitution requires empty ceremonies."²²⁷ This holding is hard to square with the plain language of *Gagnon*, which reads:

Even though the revocation of parole is not a part of the criminal prosecution, we held [in *Morrissey*] that the loss

224. See, e.g., *State v. Vashey*, 823 A.2d 1151, 1155 (R.I. 2003); *State v. DeRoche*, 389 A.2d 1229, 1231 n.1 (R.I. 1978); *State v. Almeida*, No. C.A. P1/94-1686A, 1998 WL 960806, at *2 (R.I. Super. Ct. Oct. 28, 1998).

225. *DeLomba*, 370 A.2d at 1276.

226. *Gagnon v. Scarpelli*, 411 U.S. 617, 782 (1973).

227. *DeLomba*, 370 A.2d at 1276.

of liberty entailed is a serious deprivation requiring that the parolee be accorded due process. Specifically, we held that a parolee is entitled to two hearings, one a preliminary hearing at the time of his arrest and detention to determine whether there is probable cause to believe that he has committed a violation of his parole, and the other a somewhat more comprehensive hearing prior to the making of the final revocation decision. . . .

Probation revocation, like parole revocation, is not a stage of a criminal prosecution, but does result in a loss of liberty. Accordingly, we hold that a probationer, like a parolee, is entitled to a preliminary and a final revocation hearing, under the conditions specified in *Morrissey v. Brewer*.²²⁸

DeLomba distinguishes this holding on the theory that a final probation revocation hearing in Rhode Island has all the procedural protections of what a defendant would receive at a preliminary hearing, so no harm, no foul.²²⁹ The problem with this rationale is it goes against the entire purpose for early review of criminal proceedings. After all, criminal defendants receive more due process at a criminal trial than in front of grand juries; under *DeLomba*'s logic, there is no need for a grand jury because it is an "empty ceremon[y]."²³⁰ The whole point of preliminary criminal reviews—whether in the form of a grand jury, warrant authorizations, or probable cause hearings—is to provide a check on prosecutorial power. Perhaps one could rationalize that a probation violation hearing is technically not a stage of a criminal prosecution, and therefore there is no need to provide a check against the executive. Given that a probation violation often subjects the criminal defendant to more jail time than a newly-charged crime based on the same conduct,²³¹ this is a weak justification.

228. *Gagnon*, 411 U.S. at 781–82 (footnote omitted) (citation omitted).

229. *See DeLomba*, 370 A.2d at 1276.

230. *See id.*

231. *See, e.g., State v. Pitts*, 960 A.2d 240, 242 (R.I. 2008) (affirming sentence to five years for probation violation). The defendant's conduct in *Pitts* formed a basis for a disorderly conduct charge, a petty misdemeanor that carries a maximum sentence of six months. *See R.I. GEN. LAWS* § 11-45-1(c) (2006); *State v. Hesford*, 900 A.2d 1194, 1198 (R.I. 2006).

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DeLomba's reliance on a unitary revocation hearing procedure ignores the reality that serious consequences flow from the probation charging decision. When a probation violation is coupled with a new criminal charge, detention on the probation violation creates a strong hammer for the defendant to plead to the new criminal charge and admit the violation in a package deal. The hammer is all the stronger because Rhode Island's probation system provides no method to challenge detention for a probation violation based on lack of probable cause.

Finally, *DeLomba* over-reads the United States Supreme Court's quote in *Goldberg v. Kelly* that "[due] process does not, of course, require two hearings."²³² *Goldberg* addressed whether the Due Process Clause requires an evidentiary hearing before termination of public assistance benefits.²³³ Under the state-law benefits scheme before the *Goldberg* Court, the challenged administrative process entitled the beneficiary to a "fair hearing" with full administrative review only *after* the termination of benefits.²³⁴ *Goldberg* held that a person is entitled to an initial determination *before* public assistance is terminated to protect against error because of the importance of benefits to the beneficiary's livelihood.²³⁵

Goldberg does state that "due process does not, of course, require two hearings," but the decision makes clear that it is not the categorical rule that *DeLomba* makes it out to be.²³⁶ The next sentence in *Goldberg* qualifies the rule—two hearings are not required "[i]f, for example, a State simply wishes to continue benefits until after a 'fair' hearing there will be no need for a preliminary hearing."²³⁷ In other words, *Goldberg* says only one hearing is necessary if a State decides to continue paying benefits until after a full administrative hearing.²³⁸ This analogy is inapt to the probation revocation context, where a defendant is usually subject to arrest and detention based solely on the allegation of a

232. *DeLomba*, 370 A.2d at 1275, 1276 (alteration in original) (quoting *Goldberg v. Kelly*, 397 U.S. 254, 267 n.14 (1969)) (internal quotation marks omitted).

233. *See Goldberg*, 397 U.S. at 256.

234. *See id.* at 266–67.

235. *See id.* at 267.

236. *See id.* at 267 n.14.

237. *Id.*

238. *See id.*

probation violation. The beneficiary in *Goldberg* was not subject to immediate arrest if the State notified him that his benefits could be terminated after a full evidentiary hearing. Unlike *Goldberg*, where there would be no immediate consequence from a notice that benefits might be terminated in the future, a probationer suffers immediate harm.²³⁹

DeLomba may also interpret that *Goldberg* denies the need for a preliminary hearing, since a probation revocation does not occur until after the full revocation hearing. The problem with this logic is it ignores the reasoning in *Morrissey*, which set the minimum due process required for parole revocation hearings,²⁴⁰ and *Gagnon*, which extended to probation revocation.²⁴¹ *Morrissey* held that due process requires a minimal preliminary inquiry conducted promptly while information is fresh and sources are available because there is often a time lag between the time of arrest and the final determination by the parole board.²⁴² *Morrissey* explained that the preliminary hearing should be “to determine whether there is probable cause or reasonable ground to believe that the arrested [defendant] has committed acts that would constitute a violation of . . . conditions.”²⁴³ Notably, the Rhode Island Attorney General concurred with *Morrissey*’s reasoning in a 1996 Advisory Opinion, informing the State Parole Board that due process requires a preliminary hearing for parole revocations.²⁴⁴

Analytically, the import of *DeLomba* as measured against federal law can be split into two different scenarios: first, when the probationer is charged with a violation but not a crime, and second, when the probation violator is also charged with a crime based on the same conduct. In the first scenario, when a probationer faces only a violation, *DeLomba* could be rationalized as consistent with *Morrissey* as long as the alleged violator is not held without bail. This is because the defendant does not face a significant deprivation of a liberty interest if not held in custody

239. *See id.* at 267–68.

240. *See Morrissey v. Brewer*, 408 U.S. 471, 488–89 (1972).

241. *See Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1972).

242. *See Morrissey*, 408 U.S. at 485.

243. *Id.*

244. *See* Office of the Att’y Gen. of R.I., Unofficial Op. U96-05, 1996 WL 33164516, at *1 (Aug. 15, 1996).

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pending the violation hearing. In Rhode Island, this fact pattern plays out only sometimes—technical violators are regularly held without bail pending the violation hearing. When defendants are detained, the reasoning in *Morrissey* and *Goldberg* requires a preliminary hearing because the defendant is in custody and no neutral decision-maker has determined the probation charge has merit. Thus, for probationers charged with violations but not crimes, the key determining factor is the bail decision: if the probationer is held in custody, he or she should receive a preliminary hearing; if not in custody, no preliminary hearing is required.

The second scenario, when a probationer is also charged with a crime based on the same conduct, requires a more nuanced analysis. In this instance, a court (or grand jury) has already made an initial ex parte determination that probable cause exists either by authorizing a warrant, reviewing a criminal complaint or indictment, or otherwise assessing evidence for a new crime. Under this scenario, unlike the violation-only situation, a neutral decision-maker has determined that probable cause exists for the newly charged crime—which is based on the same conduct as the violation charge. The concern in *Morrissey* that a minimal inquiry be conducted at or near the time of the alleged violation might arguably be satisfied by this ex parte determination, although the accused probationer is still detained without the immediate opportunity to challenge probable cause.²⁴⁵

Nevertheless, when the defendant is detained, significant constitutional problems can arise under the second scenario with the bundling of the probation charge and the new crime. If a probation revocation hearing happens quickly after the notice of violation, *DeLomba* could be consistent with *Morrissey* to the extent there is no concern of stale evidence because a court (or grand jury) has already made an initial ex parte determination—in *Morrissey* parlance, a “minimal inquiry”—that probable cause exists.²⁴⁶ This may be possible in theory, as Rhode Island permits the court to hold an alleged probation violator without bail for only ten business days, but in practice most probation revocation hearings, if they go forward at all, occur well after the alleged

245. See *Morrissey*, 408 U.S. at 485.

246. *Id.*

conduct.²⁴⁷ A cursory review of recent probation violation decisions bears this out. For example, in *Prout*, the alleged conduct occurred in June 2012 and the probation violation hearing happened in February 2013;²⁴⁸ in *State v. McKinnon-Conneally*, the arrest was in December 2011 and the probation violation hearing in February 2012;²⁴⁹ and, in *Barrientos*, the arrest occurred in January 2011 and the probation violation hearing went forward in June 2011.²⁵⁰ In *McCarthy*, where no new criminal charges were pending, the defendant was arrested on the probation violation in February 2005 and the hearing did not occur until June 2005.²⁵¹

As these cases illustrate, hearings often happen later than ten business days after the incident that gave rise to the notice of a violation. *Morrissey* found that a lapse of two months between the time of arrest for a parole violation and the final revocation is not unreasonable, but even for such a short gap, it still held that defendants are entitled to a preliminary *and* final revocation hearing.²⁵² This suggests that even short gaps between the time of the underlying conduct and the final revocation hearing should require a preliminary hearing, and that preliminary hearings should definitely be required when the gap is two months. Evidence was not fresh within the meaning of *Morrissey*, as seen in *Prout* when there was a seven-month gap between the arrest and the probation violation hearing.²⁵³ There are multitudes of reasons for delays—the defendant might want counsel or more time to marshal a defense, or perhaps there are plea negotiations. But whatever the reason, given the reality that many probation violation hearings do not happen quickly, the due process right to a preliminary hearing should not ride on the uncertainty of when a final revocation hearing will occur. When the probationer is detained, this uncertainty should militate towards holding a preliminary hearing even if the defendant is also charged with a crime based on the same conduct. This is because under

247. See R.I. GEN. LAWS § 12-19-9 (2006).

248. See *State v. Prout*, 116 A.3d 196, 198 (R.I. 2015).

249. See 101 A.3d 875, 877 (R.I. 2014).

250. See *State v. Barrientos*, 88 A.3d 1130, 1132 (R.I. 2014).

251. See *State v. McCarthy*, 945 A.2d 318, 320 (R.I. 2008).

252. See *Morrissey v. Brewer*, 408 U.S. 471, 488 (1972).

253. See *Prout*, 116 A.3d at 198.

Morrissey, due process requires a minimal inquiry “as promptly as convenient after arrest while information is fresh and sources are available” to allow a defendant to challenge the evidence against him.²⁵⁴ *Gagnon* echoes *Morrissey*’s rule, holding that the preliminary hearing should be held “at the time of . . . arrest and detention.”²⁵⁵

One of the benefits of a preliminary hearing is that it gives an accused the opportunity to challenge the State’s evidence without subjecting oneself to major consequences if the challenge fails. *Morrissey* and *Gagnon* envision a preliminary hearing to determine whether probable cause exists for the violation, in which the consequence of a finding for the State at the preliminary hearing is merely continued prosecution of the violation and perhaps continued detention.²⁵⁶ This mirrors a preliminary or probable cause hearing in a normal criminal setting where the defendant has a chance to challenge probable cause, with the worst consequence being continued prosecution. But, in Rhode Island’s probation violation system, there is no avenue for the defendant to challenge probable cause or test the evidence in any preliminary way. The probationer can only challenge the evidence at the final violation hearing, where the stakes are years in prison rather than simply continued prosecution. As such, the unitary hearing procedure for probation violations is another coercive measure that discourages a probationer from challenging an alleged violation.

A potential solution would be to release more alleged probation violators, thus negating the need for a preliminary hearing regardless of whether the probationer faces only a violation or also a new criminal charge. As noted above, there appear to be no substantive standards set forth by statute or case law that guide the bail decision in the probation violation context.

One tempting but ultimately flawed approach to develop bail standards for alleged probation violators would be to look to Rhode Island’s bail revocation rules for pre-trial defendants. Rhode Island courts often analogize between probation violation hearings and bail revocation hearings, and probation violation

254. *Morrissey*, 408 U.S. at 485.

255. *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973).

256. *See Gagnon*, 411 U.S. at 782; *Morrissey*, 408 U.S. at 485.

hearings are often combined with bail hearings or bail revocation hearings. Similar to the probation revocation statute that allows a defendant to be held for ten days,²⁵⁷ the Rhode Island Supreme Court has held that a bail revocation hearing should proceed within two weeks of the arrest, and that the same due process rights afforded at a probation violation hearing are also required at a bail revocation hearing.²⁵⁸ The burden of proof at a probation violation hearing is the same at a bail revocation hearing.²⁵⁹ The State may also rely on inadmissible evidence in both bail and probation revocation hearings.²⁶⁰

Probation violations and bail revocation have similarities, but the purposes of bail and probation are analytically distinct. The purpose of probation is to rehabilitate,²⁶¹ and the purpose of probation revocation is to punish the defendant for abusing the court's act of grace and grant of conditional liberty.²⁶² By contrast, the purpose of bail is not to rehabilitate or punish. Rather, "[t]he primary purpose of bail, be it of the pre-trial or the post-conviction variety, is to assure a defendant's appearance in court at the appointed time."²⁶³ The Rhode Island Supreme Court has said that the "bail system is designed to ensure the accused's presence at court and to keep the accused as much under the control of the court as if he were actually in the custody of a court officer."²⁶⁴ In addition, it is "constitutionally permissible to hold a defendant without bail in order to prevent danger to the community."²⁶⁵ The twin purposes of risk of flight and danger to the community mirror the Federal Bail Reform Act.²⁶⁶

While the purposes of probation revocation and bail are different, functionally Rhode Island law treats them the same. This is made clear from Rhode Island's bail guidelines, which

257. See R.I. GEN. LAWS § 12-19-9 (2006).

258. See *Mello v. Superior Court*, 370 A.2d 1262, 1266 (R.I. 1977).

259. See *id.*

260. *Bridges v. Superior Court*, 396 A.2d 97, 99 (R.I. 1978).

261. *Tillinghast v. Howard*, 287 A.2d 749, 752 (R.I. 1972); see *The Costs of Abusing Probationary Sentences*, *supra* note 83, at 757–58, 761, 762.

262. *State v. Govern*, 423 A.2d 1177, 1179 (R.I. 1981); *Tillinghast*, 287 A.2d at 751–52.

263. *State v. Abbott*, 322 A.2d 33, 35 (R.I. 1974).

264. *Bridges*, 396 A.2d at 101.

265. *Witt v. Moran*, 572 A.2d 261, 265 (R.I. 1990).

266. See 18 U.S.C. § 3142(e) (2012).

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state that the “[t]he purpose of bail is to assure that the defendant will appear in court as required and will keep the peace and be of good behavior.”²⁶⁷ Under Rhode Island law, keeping the peace and good behavior are conditions both of bail²⁶⁸ and probation.²⁶⁹

The current practice of conflating the standards for probation violations and bail revocation leads to troubling results. As a practical matter, Rhode Island law treats a probationer as subject to the threat of bail revocation at any time during the entire span of the probationary sentence. Probation is revoked for failing to keep the peace and maintain good behavior, and bail is revoked for failing to keep the peace and maintain good behavior. When a defendant is detained and denied bail for a probation charge at the initial court appearance pending the probation violation hearing, the decision not to grant bail is in essence a decision to revoke the defendant’s bail. This means the court appears to be finding that the defendant failed to keep the peace or exhibit good behavior before the probation revocation hearing has even begun, but without reviewing any evidence or other information to support such a finding.

Seen from this perspective, Rhode Island’s bail revocation procedures are not necessarily helpful to crafting standards that should govern bail for alleged probation violators. At the initial appearance on a probation violation (i.e., the presentment), for the purposes of bail, it seems more appropriate to ask whether the defendant is a risk of flight or danger to the community than to ask whether the person has kept the peace or maintained good behavior. This approach separates the probation violation finding from the bail decision. In practice, this is the standard that some courts seem to employ at presentments on probation violations when considering bail, but the inquiry is rarely made with any vigor. If taken seriously and treated on an individualized basis, asking whether a probationer is a risk of flight or danger to the community would make it more likely that a defendant will be granted bail pending a probation violation hearing. This, in turn, will relieve some of the tremendous pressure on a probationer to admit to a violation in the hope of avoiding additional prison time.

267. R.I. R. SUPER. CT. BAIL GUIDELINES § I.

268. *State v. McKinnon-Conneally*, 101 A.3d 875, 877 (R.I. 2014); *State v. Demers*, 525 A.2d 1308, 1309 (R.I. 1987).

269. *State v. Waite*, 813 A.2d 982, 985 (R.I. 2003).

Ironically, probationers in the state district court will often be released if they agree to admit to a probation violation and plead to a new charge based on the same conduct, but they will be detained as a risk of flight or danger to the community if they refuse to admit. This begs the question of how a defendant is a bona fide risk of flight or danger to the community when the court is willing to release the defendant if they agree to plead guilty.

V. THE “REASONABLY SATISFIED” STANDARD AT THE REVOCATION HEARING

If the defendant does not plead to the probation charge, the main event is the probation revocation hearing. The procedure for the hearing is not enumerated by statute or rule of criminal procedure. Section 12-19-9 of Rhode Island’s General Laws states simply that “[t]he court shall conduct a hearing 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.” Rule 32(f) of the Rhode Island Superior Court Rules of Criminal Procedure says in relevant part that at the “hearing . . . the defendant shall be afforded the opportunity to be present and apprised of the grounds on which such action is proposed.”²⁷⁰ *Morrissey* and *Gagnon* provide the minimum due process required at probation revocation hearings: (a) written notice of the claimed violations; (b) disclosure of evidence; (c) opportunity to be heard in person and present witnesses and documentary evidence; (d) a limited right to confront and cross-examine adverse witnesses; (e) a neutral and detached decision-maker; (f) a written statement of the evidence reasons for revoking probation; and (g) the right to counsel on a case-by-case basis.²⁷¹

Many legal commentators have discussed these requirements and the limited due process afforded at probation violation hearings.²⁷² Most notably, commentators have expounded on the coercive effects of bundling a probation violation with new

270. The state district court rules are the same. See R.I. GEN. LAWS § 12-19-14 (2006); R.I. DIST. CT. R. CRIM. P. 32(f).

271. See *Gagnon v. Scarpelli*, 411 U.S. 778, 781–82 (1973); *Morrissey v. Brewer*, 408 U.S. 471, 488–89 (1972).

272. See, e.g., Hladio & Taylor, *supra* note 17, at 172–74; Hong, *supra* note 17, at 233; Casey, *supra* note 17, at 183–85.

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criminal charges arising from the same conduct.²⁷³ This practice forces defendants to forgo a jury trial on the criminal charge because they face significant exposure to jail time from the probation violation that employs a lower burden of proof. There is no need to retread this frequently plowed ground.

This section will focus on a conundrum specific to Rhode Island: the meaning of the “reasonably satisfied” burden of proof. At a probation violation hearing, the burden of proof “is simply that of demonstrating that ‘reasonably satisfactory’ evidence supports the finding that a defendant has violated probation.”²⁷⁴ “The state is not required to prove, beyond a reasonable doubt, that a defendant has committed a crime. ‘The hearing justice can draw reasonable inferences from the evidence presented to determine whether the defendant violated the terms of his probation.’”²⁷⁵ The hearing justice is also charged with determining the credibility of the witnesses.²⁷⁶

Rhode Island courts have not been consistent in defining reasonably satisfied. In *State v. Rioux*, the superior court expressed confusion over the meaning of reasonably satisfied, stating that it is “an extremely low standard that does not take much to satisfy . . . [and], I can be reasonably satisfied by a hot dog on occasion.”²⁷⁷ The Rhode Island Supreme Court upheld the probation revocation, notwithstanding the superior court’s comment about the hot dog, “[b]ecause 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.”²⁷⁸

Rioux does not go into any detail about what “reasonably satisfied” means, but it does seem to say that the “reasonably

273. See, e.g., *The Costs of Abusing Probationary Sentences*, *supra* note 83, at 753–54.

274. *State v. Maloney*, 956 A.2d 499, 504 (R.I. 2008) (quoting *State v. Forbes*, 925 A.2d 929, 934 (R.I. 2007)).

275. *State Seamans*, 935 A.2d 618, 621–22 (R.I. 2007) (citations omitted) (quoting *State v. Piette*, 833 A.2d 1233, 1236 (R.I. 2003)).

276. *State v. Washington*, 42 A.3d 1265, 1271 (R.I. 2012).

277. *State v. Rioux*, 708 A.2d 895, 898 (R.I. 1998).

278. *Id.*

satisfied” standard is itself satisfied when the evidence supports a finding by a preponderance of the evidence. Three years earlier, in *State v. Sparks*,²⁷⁹ the Rhode Island Supreme Court pointed in a different direction. In *Sparks*, a probation violation case, the court quoted the State as arguing that “the ‘reasonably satisfied’ standard of a probation-revocation hearing allows an even more relaxed burden of proof than the preponderance-of-the-evidence standard required in a civil case.”²⁸⁰ After the quote, and without further analysis, *Sparks* affirmed the superior court’s probation violation finding.²⁸¹

The meaning of *Sparks* is unclear, but it can be read to mean that “reasonably satisfied” is something less than a preponderance. This view is further muddled by *Massey v. Mullen*, which explained that the standard of proof at a bail hearing is essentially the same as a probation violation hearing.²⁸² *Massey* held that in bail hearings the prosecution “must meet a higher standard of proof [than probable cause]. Specifically, the state must make out a case that demonstrates not only a factual probability of guilt but it must produce evidence that is legally sufficient to support a conviction.”²⁸³ This suggests that, analogizing to the probation violation context, the State must submit admissible evidence that, if believed, would satisfy the elements of the criminal charge and support a finding of guilt beyond a reasonable doubt.

The Rhode Island Superior Court has also made opaque comments on the meaning of reasonably satisfied. In *State v. Reis*, the superior court described reasonably satisfied as lower than probable cause (which itself is lower than a preponderance), reasoning that “[t]he same way the State does not need to prove a violation beyond a reasonable doubt, the State need not prove that there exists probable cause to determine a finding of violation.”²⁸⁴

The sum of these decisions equals uncertainty on the

279. 667 A.2d 1250 (R.I. 1995).

280. *Id.* at 1252.

281. *Id.*

282. *Massey v. Mullen*, 366 A.2d 1144, 1147 (R.I. 1976).

283. *Id.* at 1148–49.

284. No. P2-03-2726A, 2012 WL 3638892, at *14 (R.I. Super. Ct. Aug. 20, 2012); *see also* *State v. Ford*, No. P2-05-0083A, 2012 WL 3638916, at *6 (R.I. Super. Ct. Aug. 20, 2012).

quantum of proof necessary to prove a probation violation. This is troubling because the stakes could not be higher: defendants at violation hearings are often facing many years in prison from a previously-imposed suspended sentence. If probable cause (or less) is all that is needed to prove a probation violation, and a neutral decision-maker determines that probable cause exists to bring a new criminal charge based on the same conduct, then it is game over for any probationer also facing a new criminal charge. This is because the probable cause finding for the new crime would be sufficient to find that the defendant violated probation.

Rhode Island is not alone in the lack of a clear definition for “reasonably satisfied.” For probation violators in the federal system (recall that probation is relatively rare and for defendants who do not receive jail time at the original sentencing), the probation statute does not enumerate a burden of proof.²⁸⁵ To fill the void, the First Circuit employs a “reasonably-satisfied” standard²⁸⁶—the same as the Rhode Island burden of proof. But, just like Rhode Island, the First Circuit has not defined what it means. In the last First Circuit case to discuss it, *United States v. Vixamar*, the First Circuit declined to define the meaning of reasonable satisfaction for probation violations, hypothesizing that it could mean preponderance of the evidence or maybe something less.²⁸⁷ *Vixamar* explained it did not define the term because the evidence in that case surpassed the preponderance standard and there was no need to take up the issue.²⁸⁸

Unlike probation violations, the burden of proof for a supervised release violation in the federal system is explicitly defined by statute: the government must prove its case by a preponderance of the evidence.²⁸⁹ This is significant because Rhode Island’s probation system is often more similar to federal supervised release than federal probation. Many Rhode Island sentences include a period of incarceration, which in the federal system would result in a term of supervised release rather than

285. *United States v. Vixamar*, 679 F.3d 22, 26 n.4 (1st Cir. 2012) (“The probation-revocation statute . . . says nothing about the level of evidence required.”).

286. *Id.* at 29.

287. *Id.*

288. *Id.*

289. 18 U.S.C. § 3583(e)(3) (2012).

probation.

Returning to first principles, *Morrissey* makes clear that the burden of proof for a probation violation should be more than probable cause but is otherwise silent on an appropriate burden of proof. At the final revocation for a parole violation, *Morrissey* holds that the “hearing must be the basis for more than determining probable cause; it must lead to a final evaluation of any contested relevant facts and consideration of whether the facts as determined warrant revocation.”²⁹⁰ The Rhode Island Attorney General’s 1996 advisory opinion to the State Parole Board echoes and expands on this approach. The advisory opinion states that “the standard of proof applicable to parole revocation hearings is a preponderance of the evidence.”²⁹¹ Given the similarity between parole and probation revocation as framed by *Morrissey* and *Gagnon*, and taking into account the Attorney General’s advisory opinion, clarifying that preponderance of the evidence is the burden of proof required for “reasonable satisfaction” would remove uncertainty about the quantum of evidence required to prove a probation violation in Rhode Island.²⁹²

VI. SENTENCING ON THE VIOLATION

The last stage in the probation violation process is the sentencing on the violation. Rhode Island’s sentencing practices for violations raise concerns both procedurally and substantively. Section 12-19-9 of Rhode Island’s General Laws dictates that after a finding of a probation violation, “in open court and in the presence of the defendant, [the superior court] may remove the suspension and order the defendant committed on the sentence

290. *Morrissey v. Brewer*, 408 U.S. 471, 488 (1972).

291. Office of the Att’y Gen. of R.I., Unofficial Op. U96-05, 1996 WL 33164516, at *2 (Aug. 15, 1996).

292. Two days before the final draft of this Article went to press, the Presiding Justice of the Rhode Island Superior Court issued proposed amendments to the probation system. See Order Soliciting Comments on Proposed Amendments, *supra* note 70. As relevant here, the proposal would amend Rule 32(f) of Rhode Island Superior Court Rules of Criminal Procedure to read: “No revocation shall occur unless the State establishes by a fair preponderance of the evidence that the defendant breached a condition of his/her probation or deferred sentence or failed to keep the peace or remain on good behavior.” See *id.* at 1.

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previously imposed, or on a lesser sentence, or impose a sentence if one has not been previously imposed, or may continue the suspension of a sentence previously imposed, as to the court may seem just and proper.”²⁹³ The Rhode Island Supreme Court has interpreted this provision to provide the lower courts with “wide latitude” at sentencing on a probation violation.²⁹⁴

From a procedural perspective, under Rhode Island law courts have held there is no basis for delay or even allocution at the end of a probation revocation hearing before sentencing. Once a defendant is found in violation of probation, no statute or procedural rule “requires allocution or argument before a suspension of sentence is lifted and the sentence is ordered to be served.”²⁹⁵ Essentially, there is no right to a presentence report or any form of mitigation argument.²⁹⁶ The defendant is subjected to long periods of incarceration from a suspended sentence without any absolute right to advise the court of the defendant’s individual characteristics.

The rules are substantially different in federal court, where the defendant has a right of allocution and the ability to present evidence in mitigation at sentencing on supervised release and probation revocation.²⁹⁷ The violation and sentencing hearing is regularly referred to a federal magistrate judge for proposed findings of fact and a recommended disposition, which gives the defendant the ability to object and make focused arguments to the district judge who reviews *de novo* the magistrate judge’s report and recommendation.²⁹⁸ In the federal system, the district judge at the final revocation and sentencing hearing is also the same judge that sentenced the defendant on the underlying crime. This leads to continuity and familiarity with the defendant and the case when making a sentencing decision on a violation. By contrast, in the state system, the judge at the probation hearing is the judge that happens to be sitting on the calendar that day, and is infrequently the same judge that presided over the original

293. R.I. GEN. LAWS § 12-19-9 (2006). The rule for state district court is the same. *See id.* § 12-19-14.

294. *State v. Tucker*, 747 A.2d 451, 454 (R.I. 2000).

295. *State v. Nania*, 786 A.2d 1066, 1069 (R.I. 2001); *see also State v. Jones*, 969 A.2d 676, 682 (R.I. 2009).

296. *See Nania*, 786 A.2d at 1069 n.1.

297. FED. R. CRIM. P. 32.1(b)(2)(E).

298. *See R.I. DIST. CT. R. CRIM. P. 32.1.*

sentencing on the underlying crime. This means there is a good chance the judge will have very little information about the defendant's individual characteristics that might impact the sentencing decision.

Turning to substantive issues, the sheer length of the sentence imposed for a probation violation raises concerns. Recall from earlier in this Article that the original sentence on the underlying crime often maxes out most if not all the recommended prison term enumerated in Rhode Island's sentencing benchmarks, and the original sentence usually includes a suspended sentence that is much longer than the prison-time portion of the sentence.

Because the defendant remains on probation for long periods of time, typically after a shorter term of incarceration, the maxing out of the sentencing benchmarks at the original sentencing becomes a problem when a sentencing court must craft an appropriate sentence for a probation violation. While admittedly advisory, Rhode Island's sentencing benchmarks are applicable to sentencings for probation violations:

The benchmark sentencing ranges are also presumed to be appropriate in cases where the sentence has been suspended or deferred and where the defendant has been declared a violator of the conditions of his or her probation. In those situations, the sentencing judge should refer to the benchmark which is applicable to the original offense. Departures from the ranges should be made only when substantial and compelling circumstances exist. As in other instances, if the sentence is outside the benchmark range, the judge must give specific reasons for the departure on the record.²⁹⁹

This benchmark is not a model of clarity, but its most natural reading is that if a sentencing court has already imposed a jail term consistent with the benchmarks, it should not impose

299. R.I. R. SUPER. CT. SENTENCING BENCHMARKS ¶ 6, at 689–90. In contrast to the sentencing benchmarks, the United States Sentencing Guidelines have detailed policy statements to guide sentencing on revocation of probation or supervised release and a revocation table with ranges of imprisonment. *See generally* U.S. SENTENCING GUIDELINES MANUAL ch. 7 (U.S. SENTENCING COMM'N 2015).

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additional jail time for a probation violation unless “substantial and compelling circumstances exist.” This clearly is not the practice in Rhode Island, where probation violators make up an estimated 61% of the prison population at the ACI.³⁰⁰ Another more unnatural reading of the benchmarks, which may be closer to explaining the reality of sentencing in Rhode Island, is to use the original sentencing benchmark as the guideline for punishment for the probation violation. In other words, if a defendant is convicted of larceny from a person, the sentencing benchmark is 2.5 to 3.5 years.³⁰¹ If the defendant violates probation after release from prison for any reason, the unnatural reading of the sentencing benchmarks would guide the court to incarcerate the defendant for another 2.5 to 3.5 years, which is the original sentencing benchmark for the underlying crime.

In cases where the sentencing court has already imposed a jail term consistent with the benchmarks,³⁰² the original sentence usually includes a suspended sentence. In this scenario, applying the most natural reading of the sentencing benchmarks for probation violations, the sentencing court is in effect imposing an above-benchmark sentence when a suspended sentence is revoked and the defendant is re-incarcerated. In these cases, the proceeding has lost its legal moorings from the “act of grace” that justifies the minimal due process and reduced burden of proof for a probation violation. The defendant has already served the time in prison intended for the original crime, but the long suspended sentence subjects the defendant to another long prison term or to a series of shorter stints of incarceration.³⁰³

300. JUSTICE REINVESTMENT WORKING GROUP, *supra* note 48, at 13.

301. R.I. R. SUPER. CT. SENTENCING BENCHMARKS 16, at 694.

302. See MACFADYEN & HURST, *supra* note 65, § 32.2, at 302–03 (“[A]s a practical matter, the benchmarks have become a *minimum* range for sentences after trial for the enumerated crimes; and it is more usual to see sentences persistently in excess of the benchmark than it is to see them significantly lower than those recommended.” (emphasis added)).

303. Two days before the final draft of this Article went to press, the Presiding Justice of the Rhode Island Superior Court issued proposed amendments to the probation system. See *supra* note 70. As relevant here, the proposal would amend the sentencing benchmarks to provide examples of substantial and compelling circumstances that would justify departure from the benchmarks in probation violation proceedings, including whether the violation is technical in nature or constitutes or crime, and the defendant’s record and length of compliance while on probation.

The Rhode Island Supreme Court has said that sentencing on a probation violation is not punishment for a new crime. The probation violation system operates under the legal fiction that a defendant is violated for breaching probation conditions, not for committing a crime, even when a defendant is violated for conduct that is also the basis for the underlying crime.³⁰⁴ This reasoning is difficult to square with the sentencing court's ability to consider the "totality of the circumstances" at sentencing on a violation, which the Rhode Island Supreme Court has held can include the probation violation conduct, which may in turn constitute the circumstances of the new crime.³⁰⁵ It is hard to fathom that a long prison sentence based on a probation violation is not punishment for a new crime based on the same conduct, when the defendant has already been incarcerated for the old crime and the revocation of the suspended sentence from the old crime is much higher than what the defendant would receive if sentenced for the new crime.

To be fair, the issue of punishment for a probation violation and a new crime based on the same conduct gets complicated when the alleged probation violation goes to the core of the "act of grace" by which the court imposed less prison time than it could have at the original sentencing on the underlying crime. To return to *Pitts*, the case of the masturbator in the van near the school, the defendant had already served seven years in prison, a below-benchmarks sentence for first-degree child molestation.³⁰⁶ Ostensibly, the reduced sentence could be viewed as an act of grace. Later, after the defendant was released from prison and violated probation, the court sentenced the defendant to another five years of incarceration.³⁰⁷ The underlying conduct that formed the basis for the probation violation constituted (at most) the crime of disorderly conduct, a petty misdemeanor. If the defendant had not been on probation, he would have been subject to a maximum of six months in jail,³⁰⁸ not the five years he

304. See *State v. Forbes*, 925 A.2d 929, 934 (R.I. 2007).

305. See *State v. Wisheart*, 569 A.2d 434, 437 (R.I. 1990).

306. *State v. Pitts*, 960 A.2d 240, 242 (R.I. 2008); cf. R.I. R. SUPER. CT. SENTENCING BENCHMARKS ¶¶ 35–36 (calling for ranges from ten years to life in prison depending on the circumstances).

307. *Pitts*, 960 A.2d at 242.

308. R.I. GEN. LAWS § 11-45-1(c) (2006).

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received from his suspended sentence. To make matters more complicated, after the probation violation hearing, the *Pitts* defendant was later found guilty in a separate criminal proceeding on one count of disorderly conduct based on the same set of facts as the probation violation. He was sentenced to six months imprisonment for the new crime to be served consecutively to the five-year prison term from the probation violation proceeding.³⁰⁹

In Judge Torruella's words, this is the "tail wagging the dog": the *Pitts* defendant received a much longer sentence at the probation violation hearing than at the companion criminal proceeding.³¹⁰ Nevertheless, the combined term of incarceration that the *Pitts* defendant received for his original crime of conviction for first and second degree child molestation—the seven years at the initial sentencing followed by five more years for the probation violation, for a total of twelve years in prison—is consistent with the sentencing benchmarks for first-degree child molestation.³¹¹ In essence, the *Pitts* defendant's new criminal conduct was used to punish him harshly for breaching the court's "act of grace" at the original sentencing on the old crime, even though a harsh punishment was not available for the new crime standing alone.

The *Pitts* approach is similar to the underlying policies for sentencing on supervised release and probation violations in the federal system, although the five-year sentence the *Pitts* defendant received on the violation is much longer than the federal guidelines range. As chapter 7 of the United States Sentencing Commission's Guidelines Manual makes clear, the Commission debated two approaches to sanctioning supervised release and probation violations: either a "breach of trust" model, or treating the violation as if the revocation is used for sentencing a new crime.³¹² The Commission decided to go with the "breach of trust" approach, under which "the sentence imposed upon revocation would be intended to sanction the violator for failing to abide by the conditions of the court-ordered supervision, leaving the punishment for any new criminal conduct to the court

309. *Pitts*, 990 A.2d at 188.

310. *See* United States v. St. Hill, 768 F.3d 33, 40 (1st Cir. 2014).

311. R.I. R. SUPER. CT. SENTENCING BENCHMARKS ¶¶ 35–36.

312. U.S. SENTENCING GUIDELINES MANUAL § 7A(3)(b) (U.S. SENTENCING COMM'N 2015).

responsible for imposing the sentence for that offense.”³¹³ Among other reasons, the Commission explained that treating the revocation as a sentencing for new criminal conduct would essentially duplicate the actual sentence in the separate proceeding on the new criminal charge.³¹⁴

Because the federal system treats a supervised release or probation violation as a breach of trust, the federal sentencing guidelines³¹⁵ for length of incarceration on a violation are relatively short compared to the length of a sentence if the conduct was viewed as a new criminal charge. In the *Pitts* example, if the defendant was in the federal system, his disorderly conduct charge would probably be categorized as a Grade C violation of supervised release or probation.³¹⁶ The maximum recommended range of imprisonment for a Grade C violation is eight to fourteen months, although the guidelines suggest an upward departure may be warranted when the violation conduct is “associated with a high risk of new felonious conduct (e.g., a defendant, under supervision for conviction of criminal sexual abuse, violates the condition that the defendant not associate with children by loitering near a schoolyard).”³¹⁷ The *Pitts* defendant could qualify for an upward departure because his original crime consisted of child molestation and his probation violation consisted of masturbating near a school, which could be seen as high risk for new criminal conduct related to his original crime. Nevertheless, it is significant that the *Pitts* defendant’s sentence of five years in prison in the state system is roughly five times greater than the guidelines range for a supervised release or probation violation in the federal system.

Pitts is a good example of a complicated case involving parallel punishment for an old crime and a new crime in the probation violation context. *Pitts* shows that sometimes there are no easy answers—on the one hand, the *Pitts* defendant received

313. *Id.*

314. U.S. SENTENCING GUIDELINES MANUAL § 7B1.1(A)(3) (U.S. SENTENCING COMM’N 2015).

315. Technically, the sentencing recommendations in the federal system for supervised release and probation violations are “policy statements” and not guidelines, but usually they are colloquially referred to as sentencing guidelines. *See id.* § 7A(3)(a).

316. *Id.* § 7A(3)(b).

317. *See id.* § 7B1.4 cmt. 3 (emphasis omitted).

an act of grace at his initial sentencing and the remainder of his benchmarks sentence after he violated; but on the other hand, the new criminal conduct subjected him only to six months in prison as a standalone crime, and yet he received a prison term ten times longer on his violation sentence.

At bottom, the conundrum of enhanced sentencing for state probation violations echoes the dilemma highlighted by Judge Torruella and brings into stark relief the federal Sentencing Commission's decision to treat violations as a breach of trust rather than as a vehicle to punish defendants for new crimes. Post-*Booker*, federal sentencing courts have wide discretion to impose sentences up to the statutory maximum and often justify lengthier terms by relying on "relevant conduct" allegations not proven beyond a reasonable doubt. This is similar to the situation in Rhode Island, where the sentencing benchmarks are not mandatory and courts have ample latitude to impose part or all of a suspended sentence based on a probation violation that is proven with a low burden of proof. If probation violations were viewed primarily as a breach of the original sentencing court's trust, sometimes the result will be a long sentence like in *Pitts*, but in most instances the sentence on the probation violation would be relatively short. Under current sentencing practices in Rhode Island, however, defendants receive probation violation prison terms that are often more commensurate with punishment for new criminal conduct, without a laser-like focus on the breach of the court's trust from the sentencing on the original crime. Long suspended sentences coupled with equally long periods of probation provide the state courts with the ability to sentence probation violators to long prison sentences irrespective of the relationship between the probation violation and the breach of the court's trust. When this reality is combined with the low burden of proof for probation violations, the result is long jail terms, or a series of shorter jail terms for serial violators, which has triggered a cycle of mass incarceration in Rhode Island.

VII. CONCLUSION AND FINAL THOUGHTS ON PROBATION VIOLATION HEARINGS

In Rhode Island, probationers face an uphill battle from the very beginning at the original sentencing for the underlying crime all the way through to the very end at the sentencing on the

probation violation. The sum of these individual roadblocks is thousands of Swords of Damocles that hang over the thousands of Rhode Islanders who are currently on probation. The Sword hangs over these defendants' heads by a single horse-hair, often for many years.

This Article has endeavored to identify concerns with Rhode Island's probation violation system and compare state practices to the federal system. Each system has issues. As Judge Torruella's concurrence in *St. Hill* shows, many of the concerns about Rhode Island's probation system are present in the federal system.

Much ink has been spilled elsewhere on the coercive nature of probation hearings when the probation violation is coupled with a new criminal charge based on the same conduct.³¹⁸ Because of the dearth of procedural and substantive rights that attach in probation violation proceedings, the defendant will frequently plead to the new criminal charge and the probation violation to avoid jail time or receive a lesser sentence. Defendants often forfeit the constitutional right to a jury trial on the new criminal charge and forfeit their limited due process rights. There is no constitutional right to a jury trial at a probation violation hearing.³¹⁹

Prosecutors need leeway to charge crimes when probable cause exists. In the plea context, courts regularly hold that a plea bargain is not unconstitutionally coercive merely because a prosecutor threatens a greater sentence if a defendant reneges or rejects a plea offer.³²⁰ As long as the prosecutor has a legitimate basis to bring a new criminal charge based on the same conduct as the probation violation charge, the prosecutor's actions will not be considered unconstitutionally coercive in forcing a plea or a waiver of a jury trial.³²¹

318. See, e.g., Lara Montecalvo, Kara Maguire & Angela Yingling, *No Exit, No End: Probation in Rhode Island*, 21 ROGER WILLIAMS U. L. REV. 316 (2016); Peter F. Skwirz, *Not to be Countenanced: Pre-Bail Revocation Hearing Detention In Rhode Island District Court*, R.I. B.J. May/June 2014, at 7, 7; *The Costs of Abusing Probationary Sentences*, *supra* note 83, at 765.

319. *Minnesota v. Murphy*, 465 U.S. 420, 435 n.7 (1984); *United States v. Czajak*, 909 F.2d 20, 24 (1st Cir. 1990).

320. See *United States v. Jenkins*, 537 F.3d 1, 5 (1st Cir. 2008); see also *Powell v. Chandler*, No. 13-C-75, 2014 WL 2198475, at *6 (N.D. Ill. May 27, 2014), *aff'd sub nom.* *Powell v. Enloe*, 598 F. App'x 451, 453 (7th Cir. 2015).

321. See, e.g., *United States v. Steele*, No. 10-20037-01-JWL, 2015 WL

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Nevertheless, the current state of the Rhode Island probation system is problematic because probation defendants held in custody have no means to challenge a violation charge at a preliminary hearing. Equally problematic, it is not clear whether a prosecutor must have probable cause to make a charging decision on a probation violation, or even needs probable cause to prove a probation violation.³²²

Prosecutorial discretion reaches its practical limit when it forces a plea on a crime for which no probable cause exists. When probable cause does not exist, a prosecutor's "broad discretion to initiate and conduct criminal proceedings" ends.³²³ "A prosecutor's broad discretion to charge has only two limitations: (1) selective enforcement of the law based on the race or religion of the defendant, and (2) threats of charges which the prosecutor has no probable cause to believe are warranted."³²⁴ Under current Rhode Island law, as demonstrated by this Article, the lack of probable cause is a realistic possibility even when a probation violation is brought in good faith. This raises troubling questions about the coercive power of bringing a probation violation charge both when bundling a probation violation with a new criminal charge and when bringing a stand-alone probation violation. It also raises knotty issues on malicious prosecution. Such claims are typically actionable when a prosecution lacks probable cause and the criminal charge is dismissed, and are usually disposed of quickly because probable cause exists as a matter of law.³²⁵ If probable cause is not required to bring a probation violation charge, a key question in malicious prosecution cases will become whether the defendant can show clear proof of malice—a fact-

1530554, at *4 (D. Kan. Apr. 6, 2015), *appeal dismissed*, 616 Fed. App'x 395 (10th Cir. 2015).

322. *State v. Reis*, No. P2-03-2726A, 2012 WL 3638892, at *27 (R.I. Super. Ct. Aug. 20, 2012) ("The same way the State does not need to prove a violation beyond a reasonable doubt, the State need not prove that there exists probable cause to determine a finding of violation.").

323. *See United States v. Rodella*, 59 F. Supp. 3d 1331, 1350 (D.N.M. 2014).

324. *United States v. Shamsian*, 933 F.2d 1017 (9th Cir. 1991) (unpublished table decision).

325. *Hill v. R.I. State Emps.' Ret. Bd.*, 935 A.2d 608, 613 (R.I. 2007) ("Whether defendants in a malicious-prosecution action had probable cause to initiate a criminal action is a question of law to be determined by the court.").

based inquiry not designed for quick resolution.³²⁶

One way to recalibrate the scales is to add a few more horsehairs to the Sword of Damocles. The State could be required to show probable cause to charge a probation violation at a preliminary hearing. Equally important, alleged probation violators could be considered more closely for bail. Under the current system, alleged probation violators face inordinate pressure to plead to new crimes because they are immediately locked up pending the violation hearing. If the defendant was released on bail, this would lessen the pressure for a probation violation to proceed quickly and make it easier for the criminal charges to be resolved first.

In the federal system, when a probation or supervised release violation is based on new criminal conduct, the general practice is for the new criminal charges to be resolved before the revocation hearing.³²⁷ The Rhode Island Supreme Court could exercise in inherent authority to mandate a similar system. It has done so before. In *DeLomba*, the court exercised its administrative authority to require derivate use immunity for testimony at a probation violation hearing that precedes a criminal trial based on the same allegations.³²⁸ Taking this a step further to require the

326. See *Horton v. Portsmouth Police Dep't*, 22 A.3d 1115, 1121 (R.I. 2011).

327. A comparison between the state and federal system is not entirely apples-to-apples. In the state system, the bundling of the probation violation and new criminal charges both involve conduct governed by state law. In the federal system, supervised release violations are often based on pending state-law charges. In those cases, the federal supervised release violation proceeding is often continued until the state-law charges are resolved in state court. Under the United States Sentencing Guidelines, the prison sentence arising from the federal supervised release violation is to be served consecutively after the completion of the state court sentence for the new criminal charge. See *United States v. Reeks*, 441 F. Supp. 2d 123, 127 (D. Me. 2006) (citing U.S. SENTENCING GUIDELINES MANUAL § 7B1.3(f) (U.S. SENTENCING COMM'N 2015)). There are also federal cases in which the government decides to bring a new federal criminal charge *and* the defendant is subjected to a supervised release proceeding based on the same conduct. When this happens, the federal sentence on the new criminal charge is usually much longer than the federal sentence for the violation, so the potential for prison time from the violation proceeding is generally less important to the defendant in the federal system than the state system.

328. *State v. DeLomba*, 370 A.2d 1273, 1276 (R.I. 1977). For an interesting survey of case law on testimonial immunity when probation hearings precede criminal trials on the same conduct, see *State v. Flood*, 986

criminal trial before the probation violation hearing would eliminate many of the due process concerns that come with probation violation hearings, including the low burden of proof, limited right of cross-examination, lack of discovery, and non-existence of the jury trial. This is not a novel concept and has been suggested or discussed by many in the legal field, including the American Bar Association.³²⁹

Under existing Rhode Island law, requiring the criminal trial first would force the State to bring new charges only if it believes it can prove them beyond a reasonable doubt. Although it sounds radical, this is not much different from the intent of the General Assembly. Section 12-19-18 requires that a person in prison from a suspended sentence after a probation violation hearing must be released when the subsequent criminal trial for the same criminal conduct results in a not guilty finding or dismissal.³³⁰ The Rhode Island Superior Court has held that section 12-19-18 is unconstitutional as violative of the separation of powers,³³¹ and the issue is currently on appeal before the Supreme Court.³³² In any event, the teaching of section 12-19-18 illuminates a path forward. If the criminal trial occurred before the probation violation hearing, the State would have to decide if it could prove the allegations beyond a reasonable doubt. If not, the State would be left solely to charging a probation violation and the defendant would not face the crucible of admitting to a probation violation and new criminal charges, a decision that results in serious collateral consequences.³³³

Relatedly, sentencing practices both at the original sentencing on the underlying crime and at the probation revocation hearing should be reconsidered. For the original sentencing, courts should

A.2d 626 (N.H. 2009).

329. See, e.g., *The Costs of Abusing Probationary Sentences*, *supra* note 83, at 785 (discussing section 18-7.4(h) of the American Bar Association Standards for Criminal Justice Sentencing); Klein, *supra* note 198, at 2, 5.

330. R.I. GEN. LAWS § 12-19-18 (2006).

331. See, e.g., *State v. Reis*, No. P2-03-2726A, 2012 WL 3638892, at *14 (R.I. Super. Ct. Aug. 20, 2012).

332. *State v. Beaudoin*, No. SU-13-0254 (R.I. full arguments heard Jan. 20, 2016).

333. For example, a criminal defendant with two convictions generally cannot have either crime expunged from his record. See *State v. Badessa*, 869 A.2d 61, 64–65 (R.I. 2005) (citing R.I. GEN. LAWS § 12-1.3-1(3)). This can be a serious impediment to employment.

consider de-coupling the term of probation from the length of the suspended sentence. In most cases, there is no good reason for a defendant to spend a significant portion of his or her adult life on probation. Similarly, suspended sentences imposed at the original sentencing should be shorter; this would exhibit fidelity to the “act of grace” theory of sentencing, justify the reduced due process on the violation, and move the practical application of the probation violation system back towards the proposition that a violator is being sentenced for the old crime and not the new crime.

At the probation hearing, even if the violation allegation is based on a new crime, the prison sentence on the violation should be guided by the measure of grace the defendant received at the initial sentencing, and how the probation violation reflects an abuse of that grace. This essentially is the approach taken by the United States Sentencing Commission in chapter 7 of its Guidelines Manual.³³⁴ Applying this approach in Rhode Island courts would re-tether the violation sentencing to the limited due process afforded at violation hearings because the defendant would not be subject to punishment for the new crime, and it would clarify that the violation sentence is for the violation of probation, while the sentence for the new crime is to be imposed in the new case. As a practical matter, if there is no prison time left under Rhode Island’s sentencing benchmarks from the original term of incarceration, the court should have a compelling reason to impose more jail time on a probation violation, and should consider more creative sentencing options than incarceration. It is troubling when an allegation proven at a probation violation hearing, which is not proven beyond a reasonable doubt, results in double the amount of jail time compared to the conduct that formed the basis for the crime in the first place.³³⁵

In sum, by adding a few more horse-hairs to the Sword of Damocles, the Rhode Island probation system can still protect the public, while at the same time preserve the rights of criminal defendants and reduce mass incarceration.

334. U.S. SENTENCING GUIDELINES MANUAL § 7A(3)(B) (U.S. SENTENCING COMM’N 2015).

335. *See, e.g.*, *State v. McCarthy*, 945 A.2d 318, 326 (R.I. 2008) (sentencing defendant to three years in prison at original sentencing; received six years in prison for technical probation violation for failing to remain current with sex-offender counseling).

CODA

As the authors have noted in several footnotes throughout this Article, on March 16, 2016, two days before the final draft went to press, the Presiding Justice of the Rhode Island Superior Court submitted to the Rhode Island Supreme Court proposed amendments to the Superior Court Rules of Criminal Procedure and the Superior Court Sentencing Benchmarks that directly relate to the probation violation system.³³⁶ At press time, the proposed amendments were in a public comment period scheduled to end on April 12, 2016.³³⁷

The proposal consists of five major amendments to the current system. First, the burden of proof for a probation revocation would be clarified to require “a fair preponderance of the evidence.”³³⁸ Next, the rules would be amended to allow for termination of an existing probationary sentence after three years of good behavior.³³⁹ Third, the proposal would amend the sentencing benchmarks to de-couple the length of the probationary period from the length of the suspended sentence, and to stress that probation conditions should advance the purposes of probation and not impose a greater burden than necessary to achieve that purpose.³⁴⁰ Fourth, a new subsection of the sentencing benchmarks would provide additional examples of substantial and compelling circumstances that might justify upward sentencing departures for probation violators.³⁴¹ Finally, the proposal adds a new sentencing benchmark that states a term of probation should not exceed three years for felony offenses, although most state felonies are specifically excluded from this limitation.³⁴²

The fate of the proposed amendments remains unclear at press time, but they are generally consistent with the theme of adding a few more horse-hairs to the Sword of Damocles. The authors observe, however, that the proposal does not eliminate the

336. *See generally* Order Soliciting Comments on Proposed Amendments, *supra* note 70.

337. *Id.*

338. *Id.* at 1.

339. *Id.* at 1–2.

340. *Id.* at 3.

341. *Id.* at 3–4.

342. *Id.* at 4.

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implied probation conditions of keeping the peace and remaining on good behavior, or otherwise clarify what these terms mean.